



RE-THINKING THE BARS

ACCESS AND ADMINISTRATION OF JUSTICE
FOR WOMEN WHO COMMIT PETTY OFFENCES

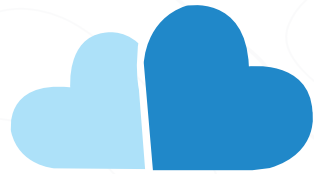


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REPORT OF A STUDY
IN KENYA JULY 2022



Clean Start

RE-THINKING THE BARS

**A Research Report on access and administration of justice
for women who commit petty offences**

Nairobi, July 2022



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Copy Editing:	Pragma Editorial Services
Layout:	Jackson Magare - Blue Fox Media



ACKNOWLEDGEMENTS

This report and the research behind it would not have been possible without the support of Ford Foundation East Africa. The Foundation's commitment to supporting organizations working to address inequality around the globe greatly enables Clean Start Kenya to advocate for the rights of women negatively impacted by the criminal justice system in Kenya. We also thank different institutions and individuals who offered support, insight, and expertise that significantly assisted the research. Legal Resource Foundation for providing paralegals who helped collect data inside the women's prisons. Commissioner emeritus Jedidah Waruhiu for participating in the conceptualization of the study, Samuel Kamau and Peace Ituku for their contributions to the study's design, and Jami H. Solli for facilitating literature that enriched the study. Similarly, we would like to extend our sincere gratitude to the Kenya Prisons Service for affording the research team an enabling environment to collect data through its Legal, Human Rights, Research & Statistics Unit.

We are also immensely grateful to all the research participants, who volunteered their time, knowledge, and experiences that ultimately helped to answer the research questions. The research partner is especially indebted to all the incarcerated and formerly incarcerated women for their willingness to participate in the research during the height of the COVID-19 pandemic. Clean Start Kenya is equally appreciative of all key informants for speaking to the study's objectives and sharing their knowledge and insights into the Kenyan criminal justice system. Furthermore, we would like to thank all participants involved in the validation process of this report for their constructive and active contribution at the validation forum. Last but not least, we thank Ms Renee Ngamau, Ms Kathambi Kinoti, and Dr Sarah Kinyanjui for their comments and insights that significantly strengthened this report.

We appreciate the technical and financial support received from the Kenyan Section of the International Commission of Jurists (ICJ - Kenya) vide a grant from the Open Society for Eastern Africa.

PREAMBLE

Prison is not a system indigenous to many cultures in Kenya. It was introduced as a method of punishment by a colonial system and entrenched and structured as a mechanism for the enforcement of colonial laws, colonial interests and the subjugation of a population against an invading force. It is therefore a pity that, over 50 years after independence, we continue to see in the statute books, laws which are essentially not only pre-independent but which serve to discriminate and to penalize based on poverty. The laws on loitering with intent, and laws relating to vagrancy may be on their way out in the Penal Code, thanks to the great and very focused work of the Honorable the Chief Justice Madam Martha Koome and the National Council on the Administration of Justice; however, the county legislators are reintroducing them in their local by laws, undermining the efforts to decriminalize poverty. Operationalization of by-laws on “loitering” coupled with judicial practices of denying bail to persons with no fixed address, inadvertently result in the undue profiling and targeting of poorer persons in our society. Our legislative bodies, and our judiciary hold the key to stop the discrimination, full stop.

This study could not come at a timelier period. With the advent of the COVID-19 pandemic, the very commendable action by the Government to decongest prisons proved that the very high numbers of persons held in prison could effectively be reduced without any correspondent increase in crime rates. It is not the first time that this, and earlier governments have decongested our prisons. In 2012, and again in 2016, the government sought to reduce the numbers of incarcerated persons by 6700 and 7000 respectively. However, as the pandemic subsided, we have begun to witness an increase on the number of pretrial detainees, many for petty, non-violent misdemeanours. As at March 2022, Kenyan prisons were housing just under 53,000 inmates. Approximately 22,630 of these [42.7%] were in pretrial detention.

What is often lost when looking at the numbers, is the effect on people. When single mothers with no family support are imprisoned, even for one night, their children

are exposed to insecurity, uncertainty, gangs, drugs, and worse. The reports of sexual violence against minors upon the arrest of their mothers, the effect of women returning home to find their houses locked, their belongings stolen, their children missing, all for a “crime” of loitering” should be a wake up call to the injustice meted when the law becomes blind to the consequences of its application upon an increasingly impoverished population struggling to recover from a depressed economy and the effects of the COVID-19 pandemic.

Our prisons are designed to hold 30,000 inmates. We hold almost 80% more persons than capacity. In these circumstances, rehabilitation and social reintegration, two of the key missions of our Kenya Prisons Service, are very difficult to achieve. It is trite saying that the officers of the Kenya Prisons Service work in very overcrowded conditions, to deliver any rehabilitation. These are some of the silent heroes and heroines in a very difficult circumstance. Taking action to reconceptualize the criminal justice system will allow these professionals to truly deliver on their mandate.

It is the hope that this report will serve as an invitation for all the parties within the criminal justice system to re-imagine a just and fair system where poverty and the intersectionality of being female, single, poor, abused, uneducated, does not predispose one to discrimination by the law. Justice must not only be blind, but must be seen, in practice to be both blind and fair.

Renee Ngamau
Director
CleanStart Kenya

Over the years, the criminalisation and punishment of petty offenders in Kenya have provided a basis for gross violation of the human rights of poor and vulnerable populations, especially those in cities and major urban centers of Kenya. Unfortunately, this has continued to be the case even after the promulgation of Kenya's robustly progressive and rights-based Constitution 2010. Hundreds of thousands of mainly poor, vulnerable, and minority groups, such as hawkers, touts, commercial sex workers, and street urchins, face punishment, extortion, deprivation, and violence meted out mainly by law enforcement agencies.

In research findings contained in this publication titled, "Laws, Policies, and Practices affecting populations at the National level and in Kisumu and Mombasa Counties," Kenyan women working in the informal sector bear the greatest brunt of the enforcement of petty offences. The enforcement of petty offences has continued to be characterised by arbitrary and unlawful arrests targeting the poor and marginalised groups. The enforcement of the laws has contributed to the high number of pre-trial detainees overburdening the already overcrowded prisons. These have had negative consequences for detainees and an adverse socio-economic impact on their families.

Towards this end, this Publication provides an in-depth analysis of the legal and procedural challenges women petty offenders face within the criminal justice system. The lived experiences, insights, and perspectives of women petty offenders, legal practitioners, and human rights activists portray the need for urgent legislative, policy, and procedural reforms towards promoting the respect for human rights within the criminal justice system further to decriminalising petty offenses. This clarion call finds expression in several international and regional instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and The African Commission on Human and Peoples Rights Principles on the Decriminalisation of Petty Offences in Africa. Additionally, the Constitution of Kenya obligates the Kenyan government to promote the realisation of individuals' substantive and due process rights and further enact legislation that facilitate the full realisation of its obligations outlined in the various international instruments that the Country has ratified.

ICJ Kenya lauds Clean Start Solutions for the commitment, tenacity, and determination with which they continue to advance criminal justice reforms in Kenya and one which is depicted in the conceptualisation and development of this research publication. The findings and recommendations herein will tremendously guide and shape the discourse on criminal justice reforms in Kenya and contribute to the need for a gender-based approach to reforms. This publication will significantly benefit all actors within the criminal justice sector in understanding and effectively responding to the needs of women petty offenders.

Finally, this publication is an invaluable resource for the campaign for the decriminalisation and reclassification of petty offences in Kenya and beyond.

Indeed, Poverty is Not a Crime!

Elsy. C. Sainna

The Executive Director

The Kenyan Section of the International Commission of Jurists (ICJ -Kenya)

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EXECUTIVE SUMMARY

Too often, in many countries, the criminal justice system is perceived to create significant obstacles to women's access to justice despite the United Nations (UN) and regional legal instruments recognizing women as a vulnerable group. For instance, the UN requires the Member States explicitly to take practical steps to ensure that the law respects women's human rights and works toward eliminating any form of discrimination, including within the criminal justice system. This study contributes to the acceleration of actions and policies in Kenya to increase women's access to justice and nurture a responsive justice system that advances women's equal rights, opportunity, and participation.

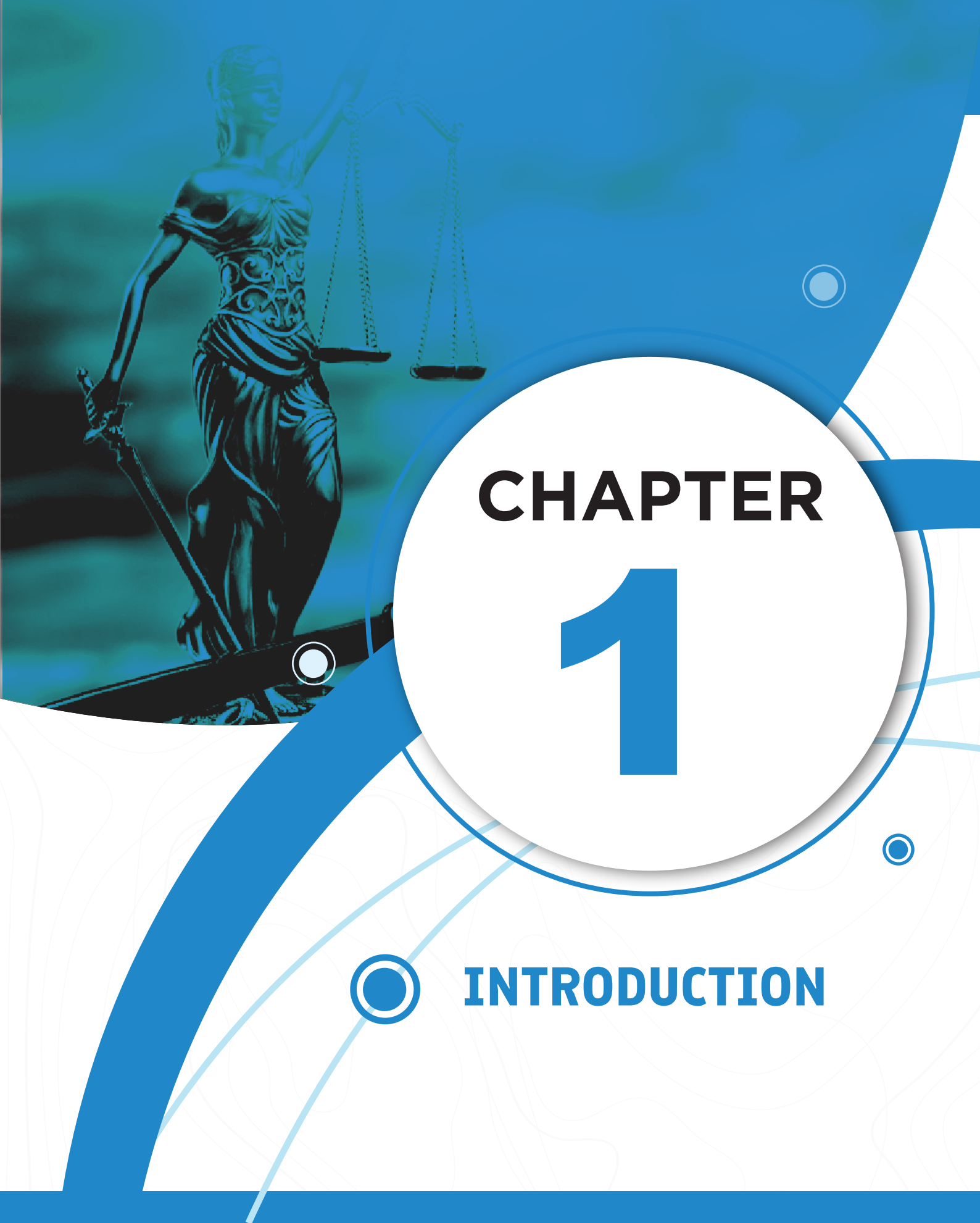
Essentially, the study sought to address the common perception that the needs of women who commit petty offences require little attention from the Kenyan criminal justice system compared to those of women who commit serious offences. Evidence presented in this study suggests that a large majority of convicted female prisoners in Kenya are women who had committed petty offences. These women are victims of excessive detention, where their human rights are often violated. Furthermore, judicial authorities prefer custodial sentences for women who commit petty offences to alternative dispute resolution (ADR) mechanisms such as Community Service Orders (CSOs) and probation orders. Since women's rights are human rights, women in conflict with the law have special status and protection within the UN human rights systems and regional legal instruments. The guidelines on the sentencing of women offenders are set out in instruments such as United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules), and United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

The objectives of the study were to identify the legal standards and procedures applied in the arrest and pre-trial detention of women who commit petty offences and to establish the cross-cutting issues that law enforcement and judicial authorities should consider when administering justice to women who commit petty offences in Kenya. Moreover, the study sought to assess the implementation of the available guidelines on arrest, detention, and sentencing for women who commit petty offences in Kenya and determine the alternative dispute resolution mechanisms that should be applied when administering justice for these women. Empirical evidence was obtained from a survey of incarcerated and formerly incarcerated women sampled from eighteen women's prisons in Kenya and the Coalition of Formerly Incarcerated Women (COFIW-Africa).

Additional data was collected from the lived experience group of formerly incarcerated women and key informant interviews with professionals working in the Kenyan criminal justice system. Document analysis of regional and international legal instruments was then deployed to triangulate results gathered from the survey, lived experience group, and key informant interviews.

In the main, the report finds that low-income women, who are also the sole breadwinners of their households, are more likely to commit petty offences. However, the partial compliance with the guidelines on the conditions of arrest in reference to the types of offences committed by these women is a major contributing factor to the increasing number of petty offenders congesting Kenyan prisons. Crucially, the results confirmed that the Kenyan criminal justice system could not fully guarantee the rights of women who commit petty offences due to gender dimensions, which influence the decisions taken by law enforcement during arrest, police bond, and pre-trial detention. These decisions often lead to the violation of women's rights. Furthermore, the results showed that economically marginalized women experience the worst of divergent law procedures because they are less likely to engage the Kenyan criminal justice system due to the high monetary costs involved in the access and administration of justice. It was clear from the results that Domestic law (the Constitution) and the guidelines contained in regional and international legal instruments on procedural guarantees and the rights of arrested persons were either not strictly observed or were applied selectively within the Kenyan justice system.

It was also evident that while the Kenyan justice system had done relatively well to improve the conditions of pre-trial detention and ultimately reduce the length of pre-trial detention, a custodial sentence was still the most preferred form of punishment for petty offences in the Kenyan criminal justice system. It also emerged that the interpretation of the law is varied among legal practitioners, law enforcers, and judicial officers on the legal standards and procedures that should be followed in the administration of justice for women who commit petty offences. Yet, there are explicit provisions in domestic and international law recommending non-custodial sentences for persons who commit petty offences. Nonetheless, the study concluded that the Kenyan government has the capacity to finance an alternative justice system and ensure its implementation.



CHAPTER

1

INTRODUCTION

1.1 INTRODUCTION TO THE REPORT

In September 2012, the Declaration of the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels emphasized the right of equal access to justice for all, including members of vulnerable groups. It reaffirmed the importance of awareness-raising concerning legal rights and, in this regard, committed to taking all necessary steps to ensure the provision of fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all including legal aid.¹ Moreover, the High-level Meeting acknowledged the significant role that informal justice mechanisms play in dispute resolution within the framework of international human rights law and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.² Further to this, Heads of State and Government and heads of delegation at the High-level Meeting recognized the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law and commit to using the law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system. They also recommitted to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice.³

The United Nation's commitment demonstrates that increasing access to justice, especially for women, strengthens the rule of law in a State and empowers members of vulnerable groups to know and exercise their fundamental human rights. Since the rule of law is still perceived to often rule women out, it is crucial to shift attention towards accelerating actions and policies to increase women's access to justice and nurture a responsive justice system that advances women's equal rights, opportunity, and participation.⁴ There is also a common perception that the needs of women who commit petty offences do not deserve special attention by the criminal justice system compared to women who are convicted of serious offences.

¹ United Nations, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, November 30, 2012, (Para.14), 3 https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf

² Above, Para. 15, No. 3

³ Above, Para. 16, No. 3

⁴ UN Women, Strengthening Women's Access to Justice, 2012, <https://www.unwomen.org/en/news/in-focus/strengthening-womens-access-to-justice>



However, the evidence presented in this study proves that a large majority of convicted female prisoners in Kenya are women who had committed petty offences. These women are victims of excessive detention, where their human rights are indeed violated.

These dynamics make the present study, especially timely because it can help to close the justice gap by bringing the Kenyan criminal justice system closer to women who commit petty offences.

In the current environment of the criminal justice system in Kenya, petty offences are known as misdemeanours or lesser offences punishable by a fine or a jail term not exceeding two years, or a fine, or both.⁵ Consequently, all petty offences are heard and determined by Magistrates' Courts. Some examples of petty offences in Kenya include littering, idling, being drunk and disorderly, hawking, causing a disturbance or nuisance, and loitering with intent to commit prostitution, among others.⁶ Existing data reveals that women are likely to be arrested and charged with the petty offences listed above. Law enforcement officers, empowered by the State to arrest and prosecute any person found to have committed an offence, often violate the human rights of women in conflict with the law. Arbitrary arrests and excessive detention of persons contribute to overcrowding in prisons and detention facilities. As a result, the fundamental human rights of female detainees, most of whom are petty offenders, are violated through punishment, discrimination, and sexual abuse.⁷

Thus, the aim of this study is to advocate for the implementation of non-custodial sentencing for women who commit petty offences. Implementation of non-custodial sentencing is key to solving the overcrowding problem, which contributes to poor prison conditions around the world.

The extent to which Governments are able to make justice accessible to women who commit petty offences and safeguard their rights is key to an effective justice system that does not leave vulnerable groups behind on the path to equal rights, opportunity, and participation for all, as envisaged by the UN. In light of the above, it is essential to mention that there is a relative dearth of research specifically concerned with opportunities in access and administration of justice for women who commit petty offences. This is particularly true in the Kenyan context. Therefore, the present study is especially timely because it can help close the justice gap by bringing the Kenyan criminal justice system closer to women who commit petty offences. The study can also contribute to understanding how women come into conflict with the law and ultimately get caught up in the justice system due to circumstances noticeably different from those of men, hence finding themselves at a distinct disadvantage. Thus, this study aims to advocate for the implementation of non-custodial sentencing for women who commit petty offences. Implementation of non-custodial sentencing is key to solving the overcrowding problem, which contributes to poor prison conditions around the world. The aim of the study informs the specific objectives presented in the following sub-section.

⁵ See Section 36 of the Penal Code (Rev.2012): <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf>

⁶ For a broader context of petty offences in Kenya, including their origin, see: Kenya National Commission on Human Rights (KNHCR), Decriminalization and Reclassification of Petty Offences in Kenya, June 18, 2018, <https://www.knchr.org/Portals/0/PETTY%20OFFENCES%20-%20FINAL%20FINAL.pdf>

⁷ For more information on the violation of fundamental human rights for women in conflict with the law see: Penal Reform International (PRI), Briefing: Access to Justice – Discrimination of women in criminal justice systems, (2012), 7.

1.1.1 Objectives of the study

The objectives of the study were as follows.

- i. To identify the legal standards and procedures that law enforcement officers apply in the arrest and pre-trial detention of women who commit petty offences in Kenya.
- ii. To establish the cross-cutting issues, law enforcement and judicial officers should consider when administering justice to women who commit petty offences in Kenya.
- iii. To assess the implementation of the available guidelines on arrest, detention, and sentencing of women who commit petty offences in Kenya.
- iv. To determine the alternative dispute resolution mechanisms that should be applied when administering justice for women who commit petty offences in Kenya.

1.1.2 Definitions

- i. **Bar** – in this study, “bar” refers to the act of confining individuals convicted of a minor or petty offence. Therefore, the phrase “rethinking the bars” calls for implementing non-custodial sentencing for women who commit petty offences in Kenya.⁸
- ii. **Access to justice** – in this study, refers to the ability of women who commit petty offences to make full use of the existing legal processes, formally or informally, to protect their rights per the law, in all the stages of the justice chain including arrest, police custody, pre-trial detention, sentencing hearing, and alternative dispute resolution mechanisms.⁹
- iii. **Administration of justice** – in this study, refers to the management and organization of the Kenyan criminal justice system based on legal process and fairness. In other words, it is how women who commit petty offences are treated by law enforcement officers, the court, and the prison systems.¹⁰

⁸ For more information about the incarceration of women, see: Jo Deakin and Jon Spencer, “Women Behind Bars: Explanations and Implications”, *The Howard Journal* 42 No.2 (May 2003): 123-136.

⁹ For a textbook definition see: Gomez Lima, “Access to Justice: Promoting the Legal System as a Human Right, in: *Peace Justice and Strong Institutions*”, in *Encyclopaedia of the UN Sustainable Development Goals*, ed. Walter Filho (New York: Springer International Publishing, 2019), 1–10.

¹⁰ For original definition see: LawCentral, “Administration of Justice,” Alberta Resources, April 24, 2020, <https://www.lawcentralalberta.ca/en/administration-justice>.



- iv. Women in conflict with the law** – the study uses the term “women in conflict with the law” and “women who commit petty offences” interchangeably only in the context of access and administration of justice. Therefore, the phrase “in conflict with the law” implies that women are victims of the justice system due to the challenges they encounter in accessing justice, originating from poor policies and facilities or lack thereof and weak institutional mechanisms. Additionally, women in conflict with the law also experience more subtle forms of discriminatory treatment, often due to the perceptions and attitudes of criminal justice officers.¹¹
- v. Petty offences** – in this study, refer to misdemeanours or minor offences punishable by a fine or a jail term not exceeding two years, or a fine, or both.¹²
- vi. Criminal justice system** – in this study refers to the network of government and private agencies given the power to manage arrested, accused, and convicted persons. The main partners in the Kenyan criminal justice include the police (conduct investigations and arrests); the judiciary (undertake judicial procedure); the probation and aftercare service (provide advisory reports); and the prison service (reformation, rehabilitation and reintegration).¹³
- vii. Arrest** – the study uses the term to refer to taking a person into lawful custody due to a warrant, crime, or statute.¹⁴
- viii. Pre-trial detention** – is the term used in this study to refer to the act of depriving an accused person of their liberty following judicial or other legal processes but not yet definitively sentenced.¹⁵

¹¹ For more details on the challenges women encounter in the process of accessing justice, see: United Nations Office on Drugs and Crime (UNODC), “Gender-based discrimination and women in conflict with the law”, UNODC, February 27, 2019, <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-9/key-issues/1--gender-based-discrimination-and-women-in-conflict-with-the-law.html#:~:text=Women%20in%20conflict%20with%20the%20law%20not%20only%20encounter%20formal,attitudes%20of%20criminal%20justice%20officers>.

¹² See: International Commission of Jurists (ICJ), “Crime and Punishment: The Case of Petty Offences in Kenya”, ICJ, January 24, 2018, <https://icj-kenya.org/news/crime-and-punishment-the-case-of-petty-offences-in-kenya/>.

¹³ See original definition: Stan Crowder and Brent Turvey, “Ethics in the Criminal Justice Professions”, in *Ethical Justice*, eds. Stan Crowder and Brent Turvey (Cambridge: Academic Press, 2013), 1-19.

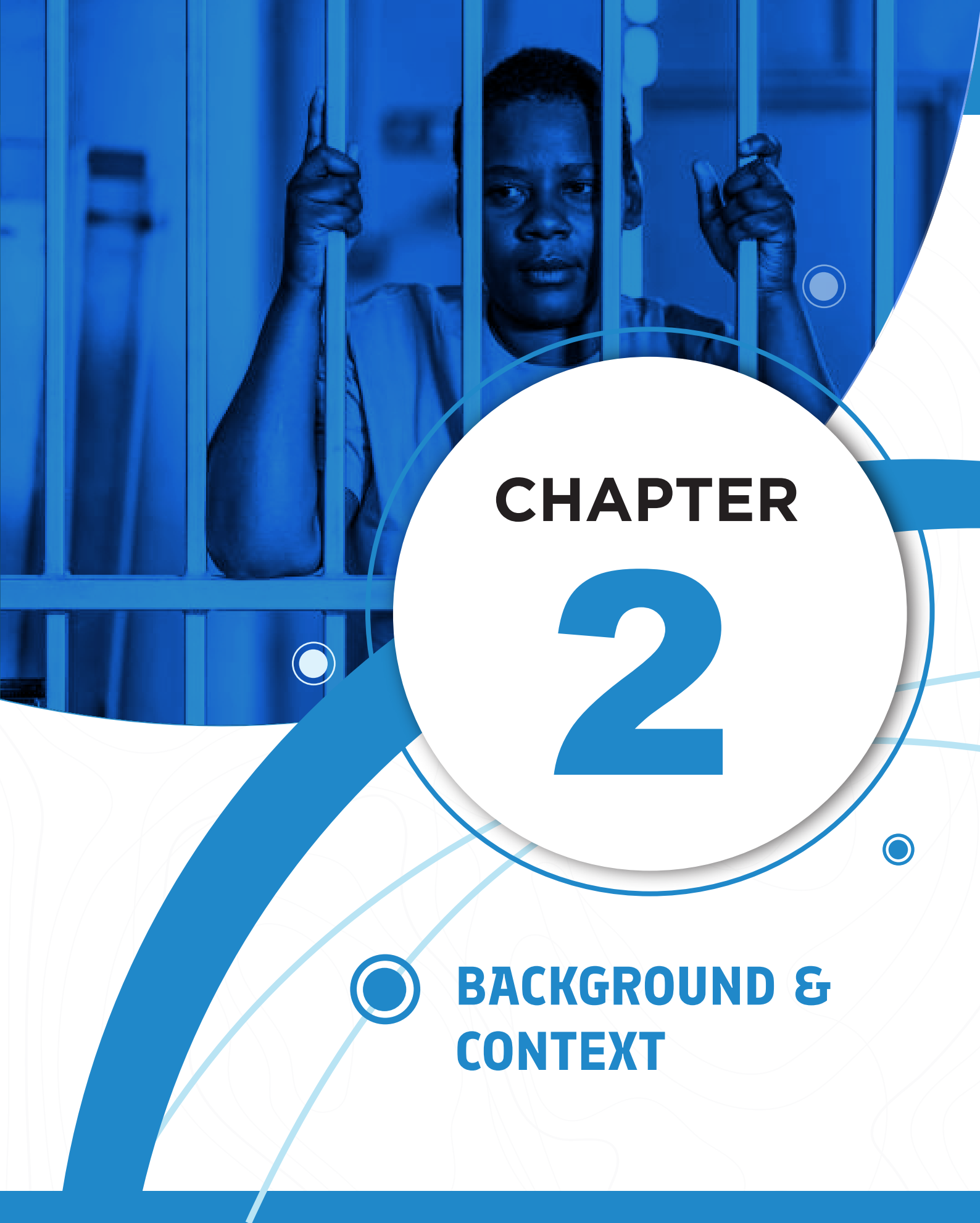
¹⁴ Halil Akbas, “Power of Arrest: Definition, Legal Justification, and Authority”, (New York: Springer, 2019).

¹⁵ Catherine Heard and Helen Fair, “Pre-trial Detention: Its Use and Misuse – Evidence From Ten Countries”, (London: Institute for Crime & Justice Policy Research, ICPR, 2019), v.

Bail – in the context of this study, refers to a legal mechanism used to facilitate the release of an accused person from detention pending the conclusion of their case if certain conditions are met. A common bail condition is the payment of a sum as security with the court, which is forfeited if the accused person then absconds. This sum of money is itself called “bail”. For example, “the court set bail at Ksh. 100,000”.¹⁶

The following chapter provides the background and context of what is already known about access and administration of justice for women in conflict with the law. The subsequent chapters describe the methods, results and discussion, and recommendations and conclusions concerning the research questions of this study.

¹⁶ Heard and Fair, “Pre-trial Detention: Its Use and Misuse – Evidence From Ten Countries”, (2019), v.



CHAPTER

2

BACKGROUND & CONTEXT

2.1 INTRODUCTION

The objectives outlined in the previous chapter have laid the groundwork for a substantive consideration of the relationship between the criminal justice system and women in conflict with the law. This relationship is pivotal to the study of access and administration of justice for women who commit petty offences. Yet, at the same time, the concepts of access and administration of justice offer a discursive context of the court infrastructure in Kenya as it pertains to judicial decisions and practices of the law. This chapter discusses legal scholarship with the intention of situating the study within existing discourses that draw on the current state of the criminal justice system in Kenya. It combines primary sources such as legislation and court cases with reference to handbooks and recent journal articles. The first part of the chapter presents a normative framework for the study. The second part addresses women's access to justice in Kenya, both in terms of the petty offences women commit and the cross-cutting issues determining how they access justice. The third part then examines the guidelines on the conditions of arrest, pre-trial detention, and sentencing of women who commit petty offences and, specifically, how an alternative justice system can supplement the current infrastructure of the courts in Kenya. The conclusion briefly emphasizes the need for a systematic and rigorous enquiry process to answer specific research questions.

2.2 Normative framework for the study

The research questions posed in this study are normative rather than explanatory or descriptive. In that sense, the research questions evaluate the legal procedures and instruments that facilitate access and administration of justice while advocating alternative dispute resolution mechanisms. In such a context, it would be critical to stress that this study uses a normative framework, specifically needed to provide standards for evaluation. Contrastingly, a general theoretical framework often supports various research questions and the conceptual basis.¹⁷ Literature further suggests that theoretical frameworks are not often addressed in the context of legal scholarship except in methodological discussions. As such, legal research is driven by current developments in doctrinal debate or legal practice, which implies an existing problem in the current legal system, hence the justification for conducting research. It is therefore plausible to argue, as do legal scholars, that “the (implicit)

¹⁷ For a detailed explanation see: Sanne Taekema, “Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice”, *Law and Method* 10 No.31 (February 2018): 1-17.



theoretical framework for legal scholarship is the current legal system itself.¹⁸ Thus, the normative questions asked in this research include the following.

- i. What factors should determine how police officers, prosecutors, and judicial officers treat women in conflict with the law and how they access justice?
- ii. What cross-cutting issues should be considered when administering justice to women who commit petty offences in Kenya?
- iii. What guidelines should be adhered to in the arrest, detention, and sentencing of women who commit petty offences in Kenya?
- iv. What alternative dispute resolution mechanisms should be applied when administering justice for women who commit petty offences?

To answer the above normative questions, a framework is needed to provide a set of standards or values that can support judicial decisions. For instance, in criminal procedure, Articles 49 and 50 of the Kenyan Constitution guarantee the rights of arrested persons and a fair hearing, respectively. Similarly, principles of fair trial and the right to a fair trial are stipulated in regional and international legal instruments. Together, these sets of standards or guidelines provide a normative framework for the researchers to evaluate how women who commit petty offences access justice in the broader context of female criminality. Consequently, the present study is inherently normative because it is informed by the Kenyan legal system as well as the regional and international legal instruments as standards.

2.3 Women's access to justice in Kenya

This section addresses how women access justice in terms of the petty offences they commit and the cross-cutting issues that precipitate such offences. Literature suggests that women account for the rising numbers in the prison population across the world.¹⁹ In Kenya, for instance, female offenders made up to 18% of the prison population annually, with a steady increase of up to 7,255 between 2004 and 2012.²⁰ However, according to recent statistics, the number of convicted female

¹⁸ Pauline Westerman, "Open or Autonomous? The Debate of Legal Methodology as a Reflection on the Debate of Law", in *Methodologies of Legal Research: What kind of method for what kind of Discipline?* Ed. Van M. Hoecke (Oxford and Portland: Hart Publishing, 2011), 87-90.

¹⁹ United Nations Office on Drugs (UNODC), *Gender-responsive non-custodial measures 2020*, March 5, 2020, https://www.unodc.org/documents/justice-and-prison-reform/20_01528_Gender_Toolkit_complete.pdf.

²⁰ National Council on Administration of Justice (NCAJ), Legal Resource Foundation Trust (LRFT), and Resource Oriented Development Initiatives (RODI), *Criminal Justice System in Kenya: An Audit*:

prisoners in Kenya has been decreasing steadily from 12,348 in 2015 to 3,699 in 2020, thus accounting for 13% of the total prison population.²¹ This decrease may have been brought on by a confluence of factors including but not limited to the “Justice for All” project, which aimed at decongesting the prison facilities and accelerating the sentencing hearing process.²² As at March 2022, the total prison population (including pre-trial detainees) was 52,979. Pre-trial detainees accounted for 22,622 (43%) of the total prison population while female prisoners were 2,701 (5%).²³ Still, data shows that studies undertaken on incarcerated women in African countries are limited, giving credence to this study.²⁴ In terms of the offences that most women commit in Kenya, available results indicate that out of the 8,004 convicted women incarcerated in Kenya in 2017, a significant majority (5,145 or 63%) were charged with alcohol-related offences. These results are further supported by another survey, which showed that out of the 77,347 convicted male and female prisoners in Kenya as of 2020, 22,122 had been convicted of alcohol-related offences.²⁵ Equally important are the 2018 results, which revealed that a large majority (72%) of convicted female prisoners in Kenya were sentenced to prison terms of between one month and two years. Overall, the above results point to the conclusion that a significant majority of convicted female prisoners in Kenya are women who had committed petty offences.²⁶ Additionally, some women in Kenya have been arrested and charged with other petty offences such as loitering with intent to commit prostitution, child neglect, hawking, littering, and obtaining money by false pretences, among others.²⁷

Furthermore, women’s access to justice is significantly inhibited by other forms of intersectional or cross-cutting issues such as gender, poverty, income level, nationality, and disability, just to name a few.²⁸ Essentially, a justification for studies to be more attentive to female criminality is reinforced by the fact that women constitute a vulnerable group in prisons due to their gender.²⁹

understanding pre-trial detention 2016, http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf

²¹ Faria, Julia. “Number of convicted prisoners in Kenya from 2015 to 2020, by gender.” Statista.com. <https://www.statista.com/statistics/1241825/number-of-convicted-prisoners-in-kenya-by-gender/> (accessed February 8, 2022).

²² See Cece Siago. State could release petty offenders after case reviews: ODPP, (Nation Media Group 2020), <https://nation.africa/kenya/news/Government-could-release-petty-offenders-after-case-reviews/1056-4318350-fkjftoz/index.html>

²³ See World Prison Brief data: <https://www.prisonstudies.org/country/kenya>.

²⁴ Samantha Jeffries, Chontit Chuenurabh, Prarthana Raob, and Min Jee, “Women’s pathways to prison in Kenya: Violence, poverty, familial caretaking and barriers to justice”, *Women’s Studies International Forum* 73, No. 3 (February 2019): 50-61.

²⁵ KNBS Economic Survey, 2020.

²⁶ For a detailed analyses, see the Kenya National Bureau of Statistics (KNBS), Economic Survey, 2018, April 25, 2018, <https://www.knbs.or.ke/download/economic-survey-2018/>. KNBS also published a similar survey in 2017, which has been cited above.

²⁷ NCAJ, LRFT, and RODI, *Criminal Justice System in Kenya: An Audit: understanding pre-trial detention*, (2016), 52.

²⁸ Section 5.3.2 presents data and discussion related to some of these cross-cutting issues.

²⁹ Tomris Atabay, *Handbook on Women and Imprisonment* (New York: United Nations, 2014), https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf



As such, gender directly affects how women access justice and the difficulties associated with the same process. While this study focused on the impact of the criminal justice system on women who commit petty offences in Kenya, data reveals that there are similar characteristics in terms of how women who are generally in conflict with the law attempt to access justice all over the world.

First, women in many countries find it difficult to access justice on an equal basis with men mainly due to traditional gender biases and cultural norms, which promote the culture of silence among females. Secondly, it is evident that women are often victimized sexually or physically when they come into contact with the criminal justice system, and they are forced to suffer in silence to reduce the chances of re-victimization, incarceration, or stigma. The third characteristic is related to the fact that in most communities, women are caregivers and/or breadwinners. When these women are incarcerated, their children suffer, while the isolation from loved ones causes such women to experience mental health challenges.³⁰

▶ The state only provides the minimal legal aid to accused persons charged with murder at the High Court of Kenya or child sexual offenders who are unable to secure legal representation. Therefore, women who commit petty offences and cannot afford legal representation, have no access to legal aid.

Poverty is another cross-cutting issue that constrains women from accessing justice in Kenya. Data suggests that the majority of women who commit petty offences are illiterate or semi-illiterate with low social status.³¹ Low literacy skills show that these women are from poor backgrounds, which increases their vulnerability and likelihood of committing petty offences such as hawking, selling illicit brew, and loitering with intent to commit prostitution to survive. If a large majority of these women are poor, it means that they would not have the economic means to access legal services, pay fines, or afford bail or bond when they are in police custody or detention. Low literacy skills also make it more difficult for the women to be aware of their legal rights. Additionally, women from other nationalities tend to be vulnerable when they attempt to access justice in Kenya. First, they have little or no knowledge of the Kenyan criminal justice system, thus making them less aware of their legal and/or human rights.³² Language barrier also limits how they access legal services. At the same time, the lack of social networks makes it difficult for them to seek the necessary support system as they navigate the complex justice system.³³ Section 5.3.2 presents data and discussion related to other cross-cutting issues, including disability.

³⁰ For a detailed explanation of the characteristics of victimization of women discussed in this context, see Atabay, *Handbook on Women and Imprisonment*, 7-10.

³¹ NCAJ, LRFT, and RODI, *Criminal Justice System in Kenya: An Audit: understanding pre-trial detention*, (2016), 52

³² For a more information see: Atabay, *Handbook on Women and Imprisonment*, 7-9.

³³ For a more information see: Atabay, *Handbook on Women and Imprisonment*, 9.

Another major issue regarding women's access to justice in Kenya relates to trial length. As the legal maxim goes, "justice delayed is justice denied".³⁴ Article 159(2) (b) of the Kenyan Constitution states explicitly that justice shall not be delayed.³⁵ In other words, the courts and tribunals are expected to administer justice to all, irrespective of status and without undue regard to procedural technicalities. Existing literature offers several factors that prolong the trial of accused persons, especially in this context, women who commit petty offences. Chief among these factors is access to legal aid services. A significant majority of accused persons, especially petty offenders, who cannot afford legal representation, have no access to legal aid. The State only provides the minimal legal aid available to accused persons charged with murder at the High Court of Kenya or child sexual offenders who are unable to secure legal representation.³⁶

Therefore, women who commit petty offences and cannot afford legal representation have no access to legal aid. The Civil Procedure Act provides for an application of pauper briefs and pro bono services for persons who cannot afford legal services.³⁷ However, these applications have an initial cost and depend on the availability of advocates and their pending pro bono work. Still, pro bono services are only offered in capital cases and cases of children in conflict with the law. Nonetheless, the recent enactment of the Legal Aid Act, 2016, establishes a legal and institutional framework to promote access to justice by "providing affordable, accessible, sustainable, credible, and accountable legal aid services to poor or needy persons in Kenya, in accordance with the Constitution".³⁸ Under this framework, poor or needy women who commit petty offences should have access to legal aid services. It should be emphasized, though, that legal aid in Kenya is still inadequate and cannot cater for most petty offenders who need it. This brings to focus the rights of arrested and accused persons in terms of how they access justice.

2.4 GUIDELINES ON THE CONDITIONS OF ARREST, PRE-TRIAL DETENTION, AND SENTENCING

The constitution of Kenya and international human rights law recognize the power of the State to arrest any person for purposes of maintaining law and order. However, the arrested person has the right to be informed promptly, in the language that

³⁴ Refer to: Lillian Goldman Law Library, *The Magna Carta*, clause 40, (Yale: Yale Law School, 2008) https://www.occourts.org/directory/education/Magna_Carta_English_Translation.pdf Accessed 11/03/22

³⁵ The Constitution of Kenya, 2010

³⁶ Patricia Mbote and Migai Akech, "Kenya: Justice Sector and the Rule of Law", *International Environmental Law Research Centre*, (March 2011): 159.

³⁷ See The Constitution of Kenya, The Civil Procedure Act (Cap. 21), (2010), Orders 33 and 44.

³⁸ For more details, see: Kenya Gazette Supplement, Acts 2016, *The Legal Aid Act* No.6 of 2016 (Nairobi: 2016): 101-102.



they can understand, of the reason for the arrest, to remain silent, to communicate with an advocate, and to be brought before a court as soon as reasonably possible, but no later than twenty-four hours after the arrest.³⁹ Even though the arrest of any person is permissible by law, it amounts to deprivation of liberty, a human rights issue. This section briefly discusses the human rights implications related to the process of arrest, pre-trial detention, and sentencing, and the guidelines to be followed to prevent and respond to human rights violations during arrest and detention.

The Criminal Procedure Code (CPC) prescribes the arrest of any person with or without a warrant in accordance with the law.⁴⁰ This means that petty offenders can also be arrested with or without a warrant. The arrest can be made by a police officer or a private person, with a search being conducted immediately. In this case, however, the law states that “whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency”.⁴¹ Evidence shows that in many instances in Kenya, law enforcement officers abuse the authority given to them by the State. These abuses entail excessive force in making arrests, sexual assault, and illegal confiscation of property, among others, which are not only violations of human rights but also barriers to accessing justice in Kenya.⁴² There are several regional and international legal instruments that secure the rights of arrested persons. The present study for example, drew on a number of regional instruments, including the Luanda Guidelines on Conditions of Arrest, Police Custody, and Pre-trial Detention.⁴³ These guidelines guide law and policy-makers and law enforcement officers on best practices during arrest, police custody, and pre-trial detention. The study was also informed by Principles on the Decriminalization of Petty Offences in Africa in terms of Articles 2, 3, 5, and 6 of the African Charter.⁴⁴ Section 3.2.4 lists other instruments discussed at length throughout the results and discussion section.

There are also provisions in the CPC regarding the procedures that should be followed when an arrested person has been taken into police custody. For instance, if the person has been taken into custody without a warrant for an offence other

³⁹ See the Constitution of Kenya, *Rights of arrested persons*, Article 49(1), (2010), <https://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/215-49-rights-of-arrested-persons> Accessed 22/11/2021.

⁴⁰ CPC (Cap 75), Part 1: *Preliminary*, (National Council for Law Reporting, 2015): 17.

⁴¹ Above, No.22.

⁴² For more information see: Human Rights Watch, Kenya: *Police Brutality During Curfew*, (April 2020). <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew> Accessed 23/01/2022.

⁴³ African Commission for Human and Peoples’ Rights (ACHPP), *Luanda Guidelines on Conditions of Arrest, Police Custody, and Pre-trial Detention*, (Banjul: ACHPP, 2017)

⁴⁴ The African Commission on Human and Peoples’ Rights, (Banjul: ACHPP, 2017).

than murder, treason, robbery with violence and attempted robbery with violence, the officer in charge of the police station to which the person has been brought may bring that person before an appropriate subordinate court within twenty-four hours of custody. The officer can also inquire into the case and release the person on his executing a bond, with or without sureties, if the offence does not appear to be of a serious nature.⁴⁵ Therefore, the law prescribes that women who have committed petty offences can be released on a police bond without needing detention. Even if there are reasonable grounds to detain the offender beyond the twenty-four hours, the police officer must apply in writing to the court for an extension. An affidavit sworn by the police officer should be attached to the application.⁴⁶ Moreover, Article 49(1) (h) of the Constitution of Kenya gives an arrested person the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.⁴⁷ Further to the provisions in Article 49(2) of the Constitution of Kenya, “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”.⁴⁸ The law, therefore, prescribes the payment of fines for persons who have committed petty offences.

Human rights abuse also occurs during pre-trial detention, where the arrested person’s right to liberty is legally curtailed. Pre-trial detention can be defined as “detaining of an accused person in a criminal case before the trial has taken place, either because of a failure to post bail or due to denial of release under a pre-trial detention statute”.⁴⁹ Pre-trial detainees are vulnerable to the detaining authorities, who may adopt dehumanizing strategies like torture to obtain information or force a confession from them.⁵⁰ The Luanda Guidelines speak to the conditions required for pre-trial detainees held in custody. The first condition is accommodation, where female detainees are placed in separate wards from their male counterparts. The same applies to detainees who are old, lactating, pregnant or suffering from mental illness. Secondly, pre-trial detainees should be provided with a good diet or request to have their food procured at their own expense from the outside.⁵¹ It is the responsibility of the National Police Service and the Kenya Prison Service to ensure that the gender-specific health and other needs of female detainees are met, in which case, only female officers are allowed to attend to

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⁴⁵ Criminal Procedure Code (Cap 75), *Part 1: Preliminary*, (2015), 25.

⁴⁶ Above, subsection 2, No.25.

⁴⁷ The Constitution of Kenya, *Rights of arrested persons, Article 49(1)*, (2010).

⁴⁸ Above, No.34.

⁴⁹ NCAJ, LRFT, and RODI, *Criminal Justice System in Kenya: An Audit: understanding pre-trial detention*, (2016), 54

⁵⁰ Above, No. 61.

⁵¹ Above, No. 53.



The incarceration of women, regardless of the sentence length, raises the question of who is left to care for their children.

The present study in Section 5.5, provides a detailed analysis of the sentencing hearing process and an alternative justice system to minimize the negative impact of incarceration on women, their families & communities.

such detainees. Other pre-trial conditions include the detainees being allowed to wear their own clothing, offered the opportunity to work if need be, and access to healthcare by their own doctor, at their own expense.⁵² The pre-trial and prison conditions in Kenya are characterized by assault, sexual abuse, torture, poor diet and healthcare, lack of a support system, and limited legal services. Hence, conditions of pre-trial detention in Kenya fall short of internationally acceptable standards.⁵³ Section 4.4 of this study specifically discusses several international instruments that set out human rights standards on pre-trial detention. Specifically, it discusses several international instruments that set out human rights standards on pre-trial detention. Meanwhile, there is a gender-neutral gap in the law of Kenya that makes sentencing and supervision of sentences problematic. Legal scholars have argued that “gender-neutral non-custodial programmes can impose disproportionate hardships on women”, making it difficult for them to successfully access justice and serve their terms.⁵⁴ To address this discriminatory tendency, the Kenyan judiciary established a task force to develop the Sentencing Policy Guidelines, 2016 (SPGs) to specifically respond to the challenges of sentencing in the administration of justice. Among the critical issues highlighted in the SPGs include “disproportionate and unjustified disparities in respect to sentences imposed to offenders and an undue preference of custodial sentences”.⁵⁵ This preference is despite numerous non-custodial measures, which in this case, are more suitable for petty offences. For instance, the incarceration of women, regardless of the sentence length, raises the question of who is left to care for their children. It cannot, therefore, be gainsaid that the separation of women from their children as a result of incarceration is a harrowing ordeal for those concerned and may cause irreversible long-term effects on the mothers and their children.⁵⁶

The international community has also acknowledged that women and girls are negatively impacted by the criminal justice system, which does not adequately address the specific needs of incarcerated women. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), for example, guides policymakers, legislators, sentencing authorities, and prison staff to reduce the incarceration of women and to meet their specific needs while in prison.⁵⁷ Similarly, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)

⁵² P Penal Reform International (PRI), “Pre-trial detention”, (June 2015), 6, <https://cdn.penalreform.org/wp-content/uploads/2016/01/factsheet-1-pre-trial-2nd-ed-v5.pdf>

⁵³ NCAJ, LRFT, and RODI, Criminal Justice System in Kenya: An Audit: understanding pre-trial detention, (2016), 61

⁵⁴ Penal Reform International (PRI), *Community Service and Probation for Women: A Study in Kenya Towards Gender-sensitive alternatives to imprisonment* (London: PRI, 2016), https://cdn.penalreform.org/wp-content/uploads/2016/12/PRI-Kenya-report-summary-briefing_WEB_rev.pdf

⁵⁵ The Judiciary, Sentencing Policy Guidelines, (Nairobi: The Judiciary, 2016), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf

⁵⁶ For a detailed explanation of the impact of incarceration on women, see Atabay, *Handbook on Women and Imprisonment*, 17-20.

⁵⁷ United Nations Office on Drugs and Crime (UNODC), *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)*, March 16, 2011, https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

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In the Kenyan context, there are non-custodial measures put in place as alternatives to imprisonment. They include Fines, Probation Orders and Community Service Orders (CSOs).⁵⁹ The present study in Section 5.5 provides a detailed analysis of the sentencing hearing process and an alternative justice system to minimize the negative impact of incarceration on women, their families and communities.

2.5 CONCLUSION

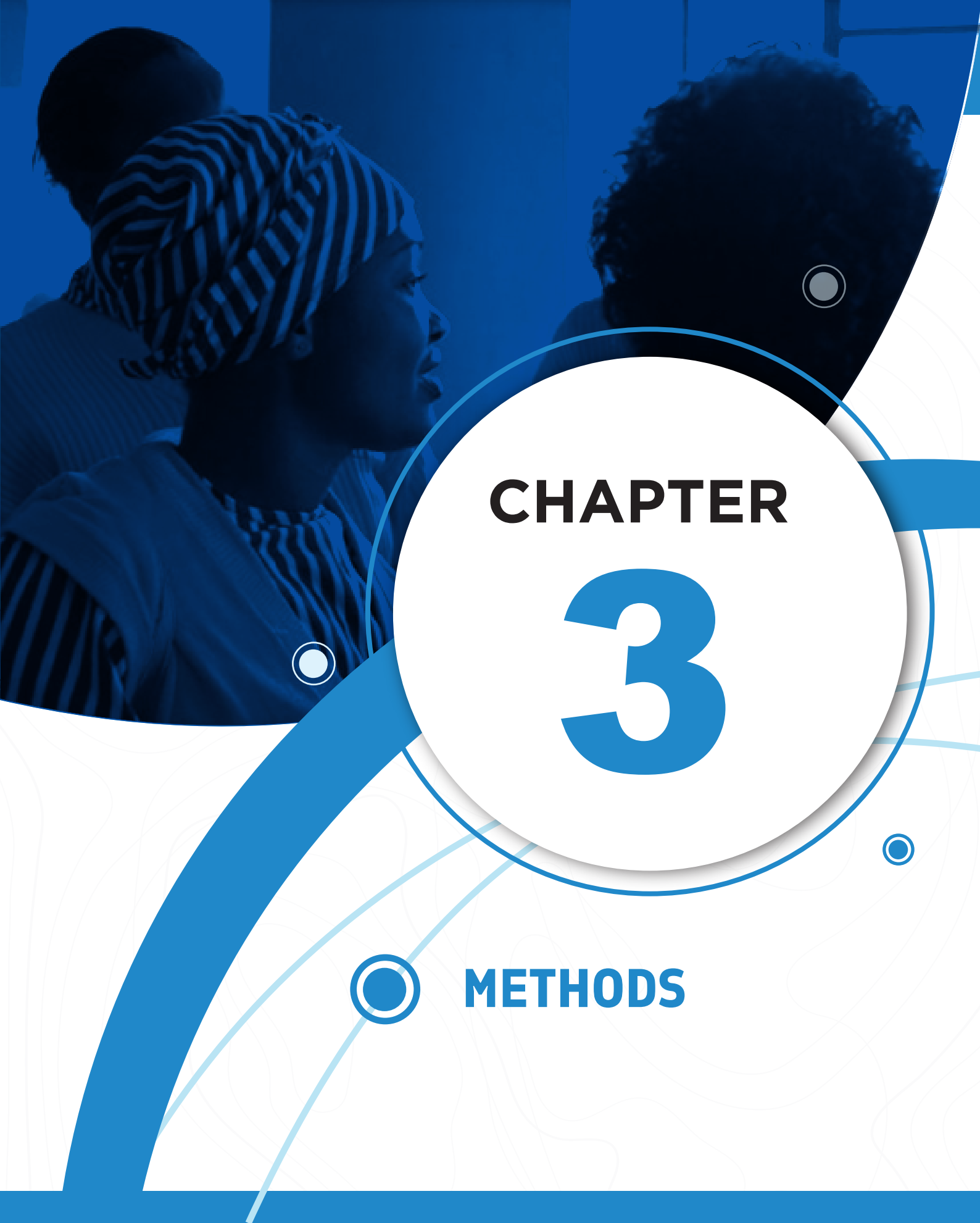
This chapter has provided context to the opportunities in access and administration of justice for women who commit petty offences, as discussed throughout the present study. First, a brief survey of literature has revealed that the concepts of access and administration of justice are discursive in the context of the court infrastructure in Kenya, influencing the judicial decisions concerning women in conflict with the law. In that sense, there was a need to develop a normative framework that could enable the research questions to evaluate the legal standards and procedures relative to the access and administration of justice for women who commit petty offences. While data suggests that women account for the rising numbers in the prison population worldwide, there is a shortage of studies undertaken on female criminality within the African context. In Kenya, for instance, there is little to no evidence of studies that have specifically focused on how women who commit petty offences access justice. Indeed, the case of petty offences in Kenya has been problematized through policy briefs and research outputs. Still, none of them has focused on the needs of women who commit petty offences.⁶⁰ Another area that has been understudied in Kenya but receives special attention in this research is the significance of cross-cutting issues such as gender, income level, and nationality, to name a few. These cross-cutting issues directly influence the types of petty offences women commit and how they go about accessing justice.

Furthermore, guidelines on the conditions of arrest, pre-trial detention, and sentencing are rarely discussed in relation to women who commit petty offences. This study presents data and analyses on these guidelines in exhaustive detail, thus providing insights that illuminate legal scholarship in the area of female criminality. Lastly, in the context of women who commit petty offences in Kenya, the present study is the first to employ a research design that triangulates survey results with the lived experience group, key informant interviews, and document analysis of regional and international legal instruments discussed in detail in the next chapter.

⁵⁸ United Nations, Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), December 14, 1990, <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf>

⁶⁰ Penal Reform International (PRI), Community Service and Probation for Women: A Study in Kenya Towards Gender-sensitive alternatives to imprisonment (2016), 7.

⁶⁰ See for example, Kenya National Commission on Human Rights (KNCHR), *Decriminalization and reclassification of Petty Offences in Kenya, June 18, 2018*, <https://www.knchr.org/Portals/0/PETTY%20OFFENCES%20-%20FINAL%20FINAL.pdf>



CHAPTER

3

METHODS

3.1 INTRODUCTION

This research was problematized to expose the gaps in the Kenyan criminal justice system pertaining to women who commit petty offences with a view to highlighting the opportunities that exist in access and administration of justice. This conceptualization, therefore, informed the selection of the triangulation design, which enables the researcher “to obtain different but complementary data on the same topic” to best understand the research problem.⁶¹ Overall, the study was anchored in the following subject areas.

- » The need to build a strong case to advocate, inform and influence reforms, laws and policy change to facilitate access and administration of justice for women in conflict with the law.
- » Access to accurate data that can speak authentically to the issues that women who are in conflict with the law face as they seek justice.
- » Building a strong advocacy strategy that will spur constituents to hold the government to account and uphold the citizen’s human rights and dignity.
- » Compel the office of public prosecutions to do proper investigations at the point of arrest.

The above overlapping subject areas called for the convergence of different methods to answer the research questions. The intent of using the triangulation design was to bring together quantitative and qualitative methodologies to complement data. For instance, the strength of the quantitative method (survey) deployed in this study is in the utilization of a fairly large sample size of incarcerated and formerly incarcerated women selected from ten different counties in Kenya hence allowing generalization of results. While immensely useful, the survey could not effectively capture the experiences and attitudes of the respondents, the majority of whom were petty offenders, towards the complex process of accessing justice in Kenya. Therefore, qualitative methods were deployed to complement quantitative data by providing depth and perspective to statistics. The triangulation design was used to validate and expand quantitative results with qualitative data. Quantitative and qualitative data were collected concurrently. What follows is a discussion of the data collection instruments used in the study.

⁶¹ John Creswell and Vicki Clark, *Designing and Conducting Mixed Methods Research* (3rd ed.), (Thousand Oaks, California: Sage Publications, 2017), 62.



3.2 Data collection instruments

Quantitative and qualitative data were collected concurrently using the following instruments.

- » A survey
- » The lived experience group
- » Key informant interviews (KIIs)
- » Document analysis

3.2.1 Survey

The research team adopted a survey consisting of a predefined group of incarcerated and formerly incarcerated women. The incarcerated women were sampled from eighteen women’s prisons in Kenya, while the formerly incarcerated women were drawn from the Coalition of Formerly Incarcerated Women (COFIW-Africa), which has an estimated active membership of two hundred women from across Kenya.⁶² The survey population of incarcerated women was drawn from ten counties in Kenya, namely Nairobi, Machakos, Muranga, Nyeri, Narok, Nakuru, Embu, Kiambu, Migori, and Mombasa. As of 2020, when the quantitative data was collected, the total population of sentenced female prisoners in Kenya was 3,700 (13%) out of a possible prison population of 29,306, which represented the population accessible for sampling in the study.⁶³ Based on the figure of 3,700, the sample size of incarcerated women was 385, as shown in the calculation below, using the Andrew Fisher’s formula and working with a 95% confidence level, a standard deviation of 0.5, and a confidence interval (margin of error) of ± 5%.

Sample Size: $(Z\text{-score})^2 \times \text{StdDev} \times (1\text{-StdDev})$	$((1.96)^2 \times .5(.5)) / (.05)^2$
$(\text{confidence interval})^2$	
Where; n= desired sample size (if target population is >10,000	$(3.8416 \times .25) / .0025$
Z= the standard normal deviation at required confidence level (1.96)	$.9604 / .0025$
Therefore;	$.9604 / .0025$
(sample within a randomized controlled trial)	$n= 385$

On the other hand, 200 formerly incarcerated women were available for sampling. The appropriate sample size, in this case, was 132, also based on Andrew Fisher’s formula. As a result, the desired sample size for incarcerated and formerly

⁶² COFIW- Africa is an initiative of Clean Start Kenya aimed at providing a safe space that allows formerly incarcerated women to build their self-drive, resilience, and self-esteem, while advocating for the protection of human rights for incarcerated women in Kenya and the region. Clean Start hopes to grow the membership of COFIW to 600 by 2023 in five Kenyan counties. More information available at: <https://cleanstartkenya.org/impact/>. Accessed: 11/02/2022.

⁶³ Faria, *Number of convicted prisoners in Kenya 2015-2020, by gender*, (2021)

incarcerated women was 517, with a confidence level of 95% and a 5% margin of error. However, due to the COVID-19 control and prevention protocols at the time of data collection, it was impossible to access the entire desired sample size. Therefore, the final sample size of incarcerated and formerly incarcerated women was 190 based on convenience sampling. A pre-test of the instrument was conducted a day to data collection, with the aim of testing the instrument's coherence, validity and feasibility of application, language consistency (English to Kiswahili and vice versa), duration, and interviewer skills. The actual data collection was undertaken using KOBO Toolbox, a free toolkit for collecting and managing data in challenging environments and is the most widely-used tool in humanitarian emergencies.⁶⁴ All the research assistants underwent training on using KOBO as a data collection tool and the manual data collection procedures applicable to unique cases in the prison environment. Data was collected in English and Kiswahili.

3.2.2 The lived experience group

To establish the effectiveness of guidelines on the conditions of arrest, pre-trial detention and sentencing policy for women who commit petty offences in Kenya, this study sought to capture the lived experiences of formerly incarcerated women sampled from COFIW-Africa. The lived experience is a methodological approach in phenomenological research, which “contains structures of consciousness about the lifeworld of a person”.⁶⁵ In that sense, the approach helps explain a person's experience of a topic or issue or opinion of the experience. For example, in the context of this study, the participant in the lived experience group is asked to respond to the question, “What is it like to be arrested, to be detained and to be sentenced for committing a petty offence?”

Therefore, the goal of the researcher, in this case, was to create meaningful structures of lived experiences from the concrete description of the Kenyan criminal justice system process as it happened to the formerly incarcerated women rather than a reflection of the same. Consequently, a lived experience makes a distinctive impression that gives it lasting importance.⁶⁶ This distinctive impression contains an interpretation of significance for the participant.

⁶⁴ For more details see: <https://www.humanitarianresponse.info/en/applications/kobotoolbox>

⁶⁵ Jacqueline Jones, *The Contested Terrain of Focus Groups, Lived Experience, and Qualitative Research Traditions* (Washington: AWHONN, 2015), 565.

⁶⁶ Julie Frechette et al., *Capturing Lived Experience: Methodological Considerations for Interpretive Phenomenological Inquiry* (Alberta: Sage Publications, 2020), 3



A purposive sampling technique was used to select the lived experience group from two hundred members of COFIW-Africa. This technique allowed the selection of participants with rich knowledge of the Kenyan criminal justice system processes pertaining to their lived experience. The sampled formerly incarcerated women were asked to describe their lived experience based on a chronological sequence of events from arrest, police custody or detention, and sentencing. After that, they were asked to construct meaning from these scattered events. The sample size in the lived experience approach is smaller, with (n= 10) being commonly used. This is because the richness of data collected is more meaningful than the actual size of the sample.⁶⁷ Therefore, a small sample size is not seen as a limitation in the lived experience approach since the primary goal is to illuminate the participants' depth of experience in context rather than seeking to achieve generalizability. The study, therefore, targeted at least (n= 10) formerly incarcerated women, but due to the challenges posed by the COVID-19 pandemic, only (n= 7) of them participated.

Data in the lived experience group was collected from a second-person perspective through interpretive phenomenological interviews to elicit a participant's narrative in light of what was meaningful for them, which is an essential component of lived experience.⁶⁸ Moreover, the triangulation design allowed the use of multiple collection methods to complement and inform the lived experience approach through a back-and-forth movement, as is common in phenomenological research.⁶⁹ The researchers were keen to listen to the lived experience participants' underlying beliefs of the Kenyan criminal justice system, assumptions on arrest, and interpretations of detention and sentencing hearing processes. Ultimately, the data generated from the lived experience approach was directed at improving the understandings of law enforcement, judicial officers, and policymakers regarding opportunities in access and administration of justice for women who commit petty offences in Kenya.

3.2.3 Key informant interviews

Since the survey respondents and lived experience group were less able to provide the legal perspective of access and administration of justice, it was necessary

⁶⁷ Frechette et al., *Capturing Lived Experience: Methodological Considerations for Interpretive Phenomenological Inquiry*, 6.

⁶⁸ Frechette et al., *Capturing Lived Experience: Methodological Considerations for Interpretive Phenomenological Inquiry*, 7.

⁶⁹ For more details see: Linda Finley, "Debating Phenomenological Research Methods", *Phenomenology & Practice* 3 No. 1 (December 2009): 6-25.

for the study to rely on key informants who could provide information about the participants' experiences of the Kenyan criminal justice system. The key informants were also able to correct, expand or refine data from the survey respondents, lived experience group, and document analysis. Furthermore, key informant interviews are appropriate for policy-focused research such as the current study.⁷⁰ The study initially targeted (n= 15) purposively selected key informants, but three of them were unavailable due to time constraints. In the end, the researchers conducted in-depth interviews with (n= 12) key informants who work for or have knowledge of the criminal justice system in Kenya. Twelve key informants were deemed sufficient because of the study's triangulation design, which enabled the combination of survey, lived experience group, and document analysis data collection instruments. The key informants selected for this study included lawyers, magistrates, human rights defenders, police officers, and senior prosecution counsel. Interviews were conducted and recorded based on the key informants' preferences, including face-to-face and via the video conferencing application, Zoom and with strict adherence to COVID-19 control and prevention protocols.

3.2.4 Document analysis

In this study, document analysis as a qualitative data collection tool was deployed as a component of the larger triangulation research design.⁷¹ The tool was used to triangulate results gathered from the survey, lived experience group, and key informant interviews. The researchers used domestic law, regional and international legal instruments, as well as national government policy documents to corroborate or refute, elucidate, or expand on findings across the other data sources, thus helping to guard against bias. The computer-based and Internet-transmitted instruments and policy documents were selected, examined, and interpreted to elicit meaning, gain understanding, and develop empirical knowledge of opportunities in access and administration of justice for women who commit petty offences.⁷²

The examined and interpreted legal instruments and policy documents yielded excerpts and quotations that were organized into major themes, categories, and case examples.⁷³

⁷⁰ Michelle Lokot, "Whose Voices? Whose Knowledge? A Feminist Analysis of the Value of Key Informant Interviews", *International Journal of Qualitative Methods* 20 No. 1 (February 2021): 1-8.

⁷¹ Document analysis is often used in combination with other qualitative research methods as a means of triangulation as explained in this source: Glenn Bowen, "Document Analysis as a Qualitative Research Method", *Qualitative Research Journal*, 9, No. 2 (August 2009): 28.

⁷² For a detailed explanation see: Bowen, "Document Analysis as a *Qualitative Research Method*", *Qualitative Research Journal*, 28.

⁷³ The major themes are listed in Section 5.1 while the excerpts and quotes are included throughout the results and discussion section.



The researchers conducted a preliminary search of the potential domestic, regional and international legal instruments and national policy documents. The search involved the identification of keywords such as *access to justice, criminal law, legal instruments, and protection of human rights for women in conflict with the law*, among others. The researchers selected document sources that yielded the greatest quantity and quality of relevant results related to the research question. After that, the researchers conducted a simple cursory review of the legal instruments and policy documents returned to see patterns and determine the quantity and quality of relevant results in relation to petty offences.⁷⁴

The process described above helped to identify the most suitable and rich sources to use for sampling. Considering the elaborate process of selecting available legal instruments and policy documents related to the research question, the researchers clearly defined inclusionary and exclusionary criteria to ensure the authenticity and representativeness of document sampling. The inclusionary criteria entailed determining the age of regional and international legal instruments to seek the most current representation of access and administration of justice, even though older documents were also considered. An exclusionary criterion was used to narrow search results and enable the researchers to limit redundant representations in the sample.⁷⁵ Examples of the documents selected and the data analyzed are given in table 1. The legal instruments and policy documents were analyzed together with data from the survey, lived experience group, and key informant interviews, so that themes would emerge across all four sets of data.

⁷⁴ For further reading see: Judith M. Gross, “Document Analysis,” in *The Sage Encyclopedia of Educational Research, Measurement, and Evaluation*, ed. Bruce B. Frey (Thousand Oaks: Sage Publications, 2018), 546.

⁷⁵ For further reading see: Gross, “Document Analysis”, 547

Table 1: A sampling of documents and data analyzed

DOCUMENTS SELECTED	DATA ANALYZED
Penal Code (Rev. 2012)	Types of offences committed
Criminal Procedure Bench Book (2018)	Guidance on statutes, judicial authorities, and policy directions that are relevant in different stages of criminal proceedings
The Constitution of Kenya (2010)	Rights and fundamental freedoms (Articles 48,49,50,51)
Bail and Bond Policy Guidelines (2015)	Guidance on the application of laws that provide for bail and bond by police and judicial officers
Alternative Justice Systems Baseline Policy (2020)	Alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms
Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa Toolkit (2017)	The treatment of persons subject to arrest, police custody and pre-trial detention
Principles on the Decriminalization of Petty Offences in Africa – the ‘African Commission’ (2017)	Adoption of strategies by Governments to address prison overcrowding by declassifying and decriminalizing petty offences
African (Banjul) Charter On Human And Peoples' Rights (1981)	Adherence to the principles of human and peoples’ rights and freedoms” as written in the extended report
Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (1999)	Principles and rules to strengthen and supplement the provisions relating to a fair trial in Africa and to reflect international standards
International Covenant on Civil and Political Rights (1966)	Administrative, judicial, and legislative measures taken by Governments to protect the rights enshrined in the treaty and to provide an effective remedy
United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2015)	Prison management with a view to ensure the secure, safe and humane custody of prisoners
United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2010)	Sentencing guidelines for policymakers, legislators, sentencing authorities and prison staff to reduce the imprisonment of women and to meet the specific needs of women in case of imprisonment
United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990)	Basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment



3.3 DATA MANAGEMENT AND ANALYSIS PLAN

All the data collected during the study were kept in a secure and locked place only accessible to authorized members of the research team. The data collected was coded with unique identifiers where only the study investigators would interpret the codes. The data collection tool, KOBO Toolbox, was used to analyse and identify emerging themes. The research team individually and collectively identified key themes, especially when undertaking data cleaning. Qualitative data was analyzed thematically, which involved reading transcripts from the lived experience group and key informant interviews and identifying patterns in meaning across the data to derive themes on access and administration of justice for women who commit petty offences. The thematic analysis also involved an active process of reflexivity, where the researcher's subjective experience played a central role in generating new insights and concepts derived from data. Ultimately, the researchers chose vivid quotes from the data to help back up the discussion.

3.4 ETHICAL CONSIDERATIONS AND APPROVALS

This study required two approvals to proceed. The first approval was from Strathmore Ethics & Scientific Review Committee (SESRC).⁷⁶ Ethical approval was granted on condition that the research team shares the results upon completion of the report. The second approval was from the National Commission for Science, Technology, and Innovation (NACOSTI), which was granted upon approval from SESRC. Since the study involved a vulnerable group consisting of incarcerated and formerly incarcerated women, the research team ensured careful ethical considerations to minimize the potential to cause harm to the participants. To account for this vulnerability, the research team consulted with paralegals through a partnership with Legal Resources Foundation (LRF), who provided many recommendations about how to gain access to the incarcerated women and to engage them in a respectful and considerate manner.

Additionally, participant information sheets and informed consent forms were administered throughout the research process to ensure that the respondents were willing to participate in the study. Another ethical consideration was ensuring the anonymity and confidentiality of the participants.

⁷⁶ Reference number SU-IERC1107/21

Careful transcribing provided safeguards against misrepresenting the participants' quotes or inadvertently identifying the respondents. The presentation of research findings from the lived experience group and key informants in a thematic format, rather than using individual narratives, for example, was another confidentiality safeguard. This approach also served to anonymize the participants and to ensure that any information shared did not reflect a specific individual but spoke broadly to issues of access and administration of justice.

3.5 CONCLUSION

Literature suggests that multi-method research, as described by the present study's triangulation design, is perhaps the most effective way to understand the relationship between law and society, despite the risks of time and cost involved.⁷⁶ Combining quantitative and qualitative methods in this context was aimed at producing generally more reliable data while considering that no particular method is privileged over another. Overall, the methodology enabled the researchers to acquire a deeper understanding of the dynamic relationship between the Kenyan criminal justice system and women who commit petty offences.

⁷⁶ See for example, Khadijah Mohamed, "Combining Methods in Legal Research", *The Social Sciences* 11 No. 21 (May 2016): 5191-5198.



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CHAPTER

4



RESULTS & DISCUSSIONS

4.1 INTRODUCTION

The primary objective of this study was to assess the opportunities in access and administration of justice for women who commit petty offences in Kenya. The study was designed to draw on existing literature and research that address the divergences in access to justice and human rights protection within the Kenyan criminal justice system. Salient human rights issues emerging from existing literature and research were then tested against a sample of incarcerated and formerly incarcerated women in Kenya. In the following sections, all the quantitative and qualitative results from the survey, document analysis, lived experience group, and key informant interviews outlined in Section 3.2 are presented and discussed in detail.

The researchers collected and analyzed data separately for each research instrument to produce four sets of findings. The researchers then combined these quantitative and qualitative findings through triangulation to gain a more complete picture of opportunities in access and administration of justice for women who commit petty offences in Kenya. First, there was a need to benchmark the quantitative responses from incarcerated and formerly incarcerated women (n= 190) with more current findings generated from the analysis of international legal instruments and policy documents outlined in Section 3.2.4. After that, it was possible to dig in further through the lived experience approach involving formerly incarcerated women (n= 7) who have successfully been reintegrated back into society through Clean Start Kenya.⁷⁸ Ultimately, the lived experience approach brought out the lived experiences of formerly incarcerated women and thus strengthened the quantitative findings. Finally, findings from the survey, international legal instruments and/or policy documents, and lived experience provided critical fodder for developing specific research questions for key informant interviews with legal professionals, agency representatives, human rights defenders, law enforcers, and judicial officers (n= 12). These informants, with their particular knowledge and understanding of the Kenyan criminal justice system and international legal instruments or policy documents, provided insight into the challenges and opportunities in access and administration of justice for women who commit petty offences in Kenya.

⁷⁸ Clean Start Kenya is non-profit organization that upholds, maintains and reinforces dignity of women and children impacted by the criminal justice system in Kenya. For more information, visit <https://cleanstartkenya.org/>.



Drawing on the study’s normative framework, the researchers began by generating sufficient thematic categories related to issues of access and administration of justice from existing literature, international legal instruments, and policy documents. The thematic categories identified were *Guidelines on conditions of arrest*, *Decisions on pre-trial detention*, and *Sentencing guidelines*. Additionally, the researchers applied deductive codes that reflect each thematic category as summarized in table 2. The thematic categories and deductive codes were closely aligned in the quantitative and qualitative data strands. Since this study was not exploratory or data-driven, the researchers did not privilege the inductive codes, although they were attentive to them. The section that follows presents the study’s demographics.

Table 2: Summary of thematic categories and deductive codes

THEMATIC CATEGORIES	DEDUCTIVE CODES
Guidelines on conditions of arrest	<ul style="list-style-type: none">• Types of offences• Cross-cutting issues• Procedural guarantees and the rights of arrested persons
Decisions on pre-trial detention	<ul style="list-style-type: none">• Length of detention• Conditions of detention
Sentencing guidelines	<ul style="list-style-type: none">• The sentencing hearing• Determination of the Sentence (custodial versus non-custodial sentence)• Alternative sentencing

4.2 DEMOGRAPHICS

This section analyzes the various demographic characteristics of the respondents, including incarcerated and formerly incarcerated women, lived experience group, and key informants. Supporting figures and tables are provided together with existing prison data, where necessary.

4.2.1 Demographic characteristics of incarcerated and formerly incarcerated women

The 190 respondents who participated in the study comprised 98 (51%) incarcerated and 92 (49%) formerly incarcerated women drawn from ten counties in Kenya (see Section 3.2.1). The number of convicted prisoners in Kenya as of 2020 stood at 29,306. Of this figure, men constituted a significant majority (25,600) while approximately 3,700 sentenced prisoners were females. In the same year, Kenya had a prison population of around 86,000 convicted and unconvicted persons.⁷⁹

It is submitted that while males were more likely to be arrested and convicted for various offences, the number of females convicted of petty and livelihood-related offences was still relatively high considering that they are caregivers and in some instances, more likely to be the sole breadwinners. Table 3 summarizes the demographic characteristics of the respondents who participated in the study. A slight majority of respondents (43%) were aged between 31-40 years, followed by 31% of those aged between 20 to 30 years. Most of the women interviewed were within the child-rearing age and are thus likely to have dependents. A significant majority of the women sampled (41%) and (40%) were convicted in their prime ages of 20-30 years and 31-40 years, respectively. Regarding marital status, 40% of those sampled were single, while 36% were married. The rest were either separated or widowed. It is clear that a sizeable majority of the respondents were the sole breadwinners in their households and willing to take risks in their quest for survival, hence being in conflict with the law. As for their education levels, 110 (58%) respondents had primary school qualifications, while only 13 (7%), representing the minority, had a college education. In this case, the sample's composition was acceptable because it included representatives from the three major education levels. Still, these findings reveal that the respondents' education level had implications for their socio-economic status, with the majority (58%) more likely engaging in petty offences to eke a living. A lower education level (primary school) also points to limited knowledge of their human rights and access to justice. Considering the income levels of the respondents, only three (2%) earned Ksh. 100,000 and above, while a sizeable majority, 140 (74%) earned less than Ksh. 10,000.

⁷⁹ Faria, *Number of convicted prisoners in Kenya 2015-2020, by gender*, (2021).



It is clear that a sizeable majority of the respondents were the sole breadwinners in their households and willing to take risks in their quest for survival, hence being in conflict with the law. These findings infer that women who are low-income earners and happen to be the sole breadwinners as the respondents confirmed, are more vulnerable to petty offences.

The rest, representing around 23% earned between Ksh. 10,000 and 50,000. The majority of those sampled said their sources of income included farming, small businesses, house-helpers, shopkeepers, and waiters. These findings infer that women who are low-income earners and the sole breadwinners, as the respondents confirmed, are more vulnerable to petty offences.

Regarding living arrangements, the majority of the respondents, 128 (68%) live or lived in rented houses, while 50 (26%) owned a house. Seven (4%) were housed by either friends or other family members. Most of the respondents live or lived in mud, timber or brick-walled houses with iron sheet roofs. Few had or have rented apartments or single/double roomed houses made of brick walls and iron sheet roofs. Based on these findings, it can be concluded that housing was an issue of concern among most respondents, who struggled to meet their rental house

obligations. This, then, forced the women to engage in income-generating activities that exposed them to petty offences such as hawking, selling illicit brew, and loitering with intent to commit prostitution, among others. Furthermore, formerly incarcerated women, who did not have a home or could not even afford to rent a house, resorted to living with relatives or friends, thus exposing them to stigma and increasing their chances of recidivism.

Table 3: Demographic characteristics of incarcerated and formerly incarcerated women

DEMOGRAPHIC DISTRIBUTION	FREQUENCY (N=190)	VALID PERCENTAGE (100%)
AGE		
20-30	58	31.4
31-40	81	43.4
41-50	28	15.3
51-60	19	10.6
61-70	3	2.3
71-80	0	0.0
Total	189	100
MARITAL STATUS		
Single	76	40.6
Married	68	36.4
Separated	28	15.5
Widowed	15	8.5
Total	187	100
EDUCATION LEVEL		
Primary school	110	58.2
Secondary school	64	34.6
College	13	7.3
Undisclosed	2	1.9
Total	189	100
INCOME LEVEL		
Ksh. 100,000 - Above	3	2.4
Ksh. 40,000 – 49,999	3	2.4
Ksh. 30,000 – 39,999	3	2.4
Ksh. 20,000 – 29,999	7	4.3
Ksh. 10,000 – 19,999	28	15.3
Less than 10,000	140	74.2
Total	184	100
LIVING ARRANGEMENT		
I rent my house	128	68.2
I own my house	50	26.4
Housed by another person	7	4.8
Undisclosed	4	2.6
Total	189	100



4.2.2 Demographic characteristics of the lived experience group

Seven formerly incarcerated women who had successfully been reintegrated into the community participated in the study. These women were beneficiaries of Clean Start Kenya's interventions aimed at preventing recidivism and related risk factors. Table 4 shows the demographic characteristics of those sampled. Five (71%) of the participants were 40 years or older, while only two (29%) were between 30 and 39 years of age. It is worth noting that the average age of the sampled participants was approximately 42 years. This confirms that the reintegration process was consistent with the ages of the participants.

Table 4: Demographic characteristics of lived experience group

DEMOGRAPHIC DISTRIBUTION	VALUE	FREQUENCY (N= 7)	VALID PERCENTAGE (100%)
Age			
	40 years or older	5	71.4
	30-39 years old	2	28.6
Marital status			
	single	1	14.2
	married	2	28.9
	Divorced	1	14.2
	Widowed	3	42.7
Education level			
	Bachelor's degree	1	14.2
	Diploma	1	14.2
	Secondary school	5	71.6
Source of income			
	Employed	3	42.9
	Small business	4	57.1

Regarding marital status, only two (29%) were married. Those who were either single or divorced were evenly split at 14% each, while a slight majority (43%) were widowed. Overall, the findings suggest that a significant majority of those sampled were the sole breadwinners of their households. When asked about their education level, five (71%) of the respondents representing a sizeable majority, said they had secondary school qualifications. In comparison, the remaining two respondents (14% each) had post-secondary school qualifications. It is reasonable to conclude that the majority of the respondents who had secondary school qualifications or below were more likely to pursue income-generating activities that might put them in conflict with the law. Lastly, all the respondents had a particular source of income after incarceration in large part due to Clean Start's interventions. Three of the respondents were employed by Clean Start, while the rest (four) were running small businesses such as selling second-hand clothes and shoes, dressmaking, grocery shop, and making detergents. The fact that all the respondents had stable sources of income before incarceration made their reintegration into the community easier

4.2.3 Demographic characteristics of key informants

Twelve key informants were interviewed for this study based on the demographics that represent minimum requirements. The researchers also sought to interview two judges, who were willing to participate in the study but were unavailable during the data collection phase. The twelve key informants were represented in the sample as follows. Two police officers (male and female), two human rights defenders (male and female) with one identifying himself as a paralegal, four lawyers (one male and three females), one female criminal justice reform activist, one male senior prosecution counsel, one male chief magistrate, and one female magistrate. The ages of the key informants varied, with three of those who responded falling between the 41 and 50 years bracket, while two others were between 31 and 35 years of age. Seven key informants did not disclose their age brackets. The gender composition of the key informants was 42% (five) male and 58% (seven) female. In terms of their education level, seven (58%) of the 12 participants had attained a Bachelor's degree at the time of the interview, with six among them having a Postgraduate Diploma and/or Master's degree. Five (42%) informants did not disclose their education levels.

The total years of work experience in the Kenyan criminal justice system varied among the 12 informants. Of those sampled, three informants had over 15 years of experience, two had between four and six years, while the rest (seven) did not



disclose their years of work experience for unknown reasons. The above demographic information suggests that all the participants sampled were representative of the Kenyan criminal justice system and were knowledgeable and experienced enough to provide the richest and most complex information relevant to opportunities in access and administration of justice for women who commit petty offences in Kenya. The subsequent section reports on the findings from quantitative and qualitative databases obtained through a survey, analyzing regional and international legal instruments, lived experience group of formerly incarcerated women, and key informant interviews. The quantitative and qualitative findings are also discussed integratively based on the study's specific objectives and in keeping with the mixed-methods design

4.3 GUIDELINES ON THE CONDITIONS OF ARREST

The study sought to establish the effectiveness of guidelines on the conditions of arrest for women who commit petty offences in Kenya with specific reference to the types of offences committed, cross-cutting issues that contribute to women being in conflict with the law, and procedural guarantees and the rights of arrested persons.

4.3.1 Types of offences committed

The survey findings revealed that the incarcerated and formerly incarcerated women had been arrested for committing capital and petty offences. The petty offences committed by those sampled included shoplifting, operating unlicensed businesses, flouting COVID-19 rules, hawking, loitering, selling illicit brew, child neglect, and failing to pay a debt. Other more serious offences, which are beyond the scope of this study, included conducting or undergoing female circumcision, murder, assault, child trafficking, handling or possessing stolen property, obtaining by false pretence, fraud, and drug trafficking. Nine (75%) of the study's key informants confirmed all the petty offences identified by the survey respondents. Some of the petty offences that women commit regularly as highlighted by the key informants, include loitering with the intention to cause nuisance through prostitution (Magistrate, female), truancy from school among young girls (Lawyer 1, female), creating disturbance (Human rights defender 1, male), and possession with intent to sell illicit brew (Chief magistrate, male). One key informant observed that most women who earn a living from hawking were particularly vulnerable to some offences such as "loitering with the intention to

cause a nuisance through prostitution”. This key informant discredits the legal mechanism used to criminalize certain activities such as loitering, as captured in the quote below..

“Interestingly, when female sex workers are arrested, they are charged with other offences such as hawking. On the other hand, female hawkers are sometimes arrested and charged with loitering with the intention of benefiting from prostitution. To both sets of women offenders, it is never clear what loitering really means.”

(Criminal justice reform activist, female).

Another key informant quoted below attempts to situate petty offences within the criminal justice system framework, emphasizing that under the new constitution, petty offences are based on a judicial decision since there is no exact definition of a petty offence per the laws of Kenya. This means that petty offences are implied rather than defined in the constitution.

“In case a petty offence has been committed, you could consult article 49 (the rights of an arrested person), where it has been stated that an offence that has been committed by a person is punishable for a period of 6 months or less or an equivalent of Ksh. 10,000. This is only a petty offence by implication because, in our criminal law, we only have two categories of crime: felonies or misdemeanours (ICJ Lawyer, female).”

(ICJ Lawyer, female).

In line with the above assertions, another key informant calls for the decriminalization of loitering as a petty offence in the quote that follows.

“Loitering is also classified as a petty offence, but that is a misdemeanour, which is rarely charged nowadays unless it is accompanied by another offence. Unfortunately, we still have old petty offences that should no longer be in the statute books. Such petty offences should be decriminalized (Senior prosecution counsel, male).”

(Senior prosecution counsel, male).



The key informant who had earlier argued that petty offences are implied rather than defined in the constitution strongly agrees with the Senior prosecution counsel as quoted below.

“How do you prove that someone is loitering? Such offences should be decriminalized. They should no longer be considered offences in our statutes. Similarly, offences such as nuisance, which carry imprisonment terms, should be reclassified to a minor offence that will attract a fine as opposed to imprisonment.”

Lawyer, female).

The above arguments support the efforts of The Kenya National Commission on Human Rights (KNCHR) and civil society organizations in advocating for the decriminalization and reclassification of petty offences in Kenya.⁸⁰ The lived experience group members, all of whom were formerly incarcerated, gave different accounts of the types of offences they committed. Participant 1 and Participant 3 were arrested and charged with obtaining money through false pretences, Participant 2 for bribery and theft, Participant 4 for drug trafficking, and Participant 5 for grievous harm. Participant 6 was charged with breaking and stealing, while Participant 7 was charged with impersonation. However, Participant 3, Participant 6, and Participant 7 felt that they were arrested and charged with the wrong offences, hence denied justice. For instance, Participant 3 explained that she owed her business partner Ksh. 300,000 after a deal went wrong and had managed to repay him Ksh. 200,000, but she was still arrested and charged with obtaining money through false pretences. In the end, Participant 3 felt she did not access justice as quoted below.

“It was a total of 300,000 and I had paid him 200,000. So, I had a balance of 100 thousand which I was supposed to repay him. The 100,000 debt or balance is what I was arrested for, and not failure to repay the full amount of 300,000. However, in my charge sheet, the police wrote obtaining money by false pretenses. That was my charge but it was a debt because I had paid him part of that money (Participant 3).”

(Participant 3).

⁸⁰ KNHCR, *Decriminalization And Reclassification Of Petty Offences*, (2018).

On account of the charges levelled against Participant 3 above, Section 313 of the Penal Code provides as follows:

“ Any person who by any false pretense, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years. ”

In this case, there is a divergence of legal procedure because, in reality, Participant 3 had already agreed with her business partner (creditor) on repayment of the outstanding debt. Therefore, the creditor should have instituted a civil process to recover the debt. The conduct of Participant 3 under the circumstances described above does not suggest any intention on her part to obtain money through false pretenses. In referring to the above case, there are regional and international legal instruments that protect a number of human rights. For example, Article 7(2) of the African (Banjul) Charter On Human And Peoples’ Rights, 1986 states that:

“ No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender. ⁸¹ ”

Other relevant legal instruments governing the protection of human rights in access and administration of justice as discussed in this section, include:-

- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,
- Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, and;
- International Covenant on Civil and Political Rights (ICCPR).

⁸¹ The Kenyan Constitution also has this protection. See Art. 50 (2) (n)



In conclusion, the findings of this study show that partial compliance to the guidelines on the conditions of arrest in reference to the types of offences committed is a major contributing factor to the increasing number of petty offenders congesting Kenyan prisons. These findings corroborate the findings of a 2017 report by the National Council on the Administration of Justice (NCAJ), which found that more than 75% of prisoners in Kenya are aged between 18 and 35, with a majority of them being petty offenders.⁸² Of even greater significance, Principle 5 of the African Charter on the Decriminalization of Petty Offences in Africa requires States to ensure that “the adoption and implementation of all laws, including laws that create petty offences, respect, protect and promote the rights of all persons to equality before the law.”⁸³

4.3.2 Cross-cutting issues in access and administration of justice for women who commit petty offences

To gain a deeper understanding of the types of petty offences that women get arrested for, it is crucial to approach the guidelines on the conditions of arrest from a broader framework. The results and discussion in this section concern cross-cutting issues or topics considered essential in terms of how they influence and/or cut across most or all aspects of arrest. The discussion of cross-cutting issues also serves as an entry point to identify emerging concerns that are often overlooked in the study of a given criminal justice system. The cross-cutting issues discussed in the following paragraphs include gender, income level, poverty, disability, and nationality.

4.3.2.1 Gender

The key informants were asked to shed light on the gender dimensions that influence access to justice for women who commit petty offences. Regarding the types of offences committed, Lawyer 1 argued that most of the petty offences are differentiated by gender, which plays a role in the commission of the offence and how the society perceives women who are in conflict with the law compared to their male counterparts. Lawyer 1 gave an example of how the (Kenyan) criminal justice system affects men and women differently.

⁸² National Council On the Administration of Justice (NCAJ), *Criminal Justice System in Kenya: An Audit*, (Nairobi: NCAJ, 2017).

⁸³ The African Commission on Human and Peoples’ Rights, Principles on the Decriminalization of Petty Offences in Africa, (Banjul: ACHPP, 2017: 12).

“The police may have different attitudes towards women compared to men. We have had so many cases of a girl or a young woman being arrested and raped in the cells or being made to clean the police station and so on. Additionally, gender plays a role for instance in sex work and the selling of illicit brew, which mostly involve women. It is very rare to see a man selling illicit brew. There are different expectations of men and women even within the criminal justice system. The police, judges or magistrates are also products of the society so they may have that hidden bias though justice is supposed to be neutral.”

(Lawyer 1, female).

Lawyer 2 concurs with Lawyer 1, emphasizing the vulnerability of women to their male counterparts.

“Most of my clients are women, who are victims of male chauvinism. Therefore, gender plays a big role because some police officers ask women who are in conflict with the law for sexual favors. When these women reject their advances, the police officers intimidate and arrest them (Lawyer 2, male).”

(Lawyer 2, male).

Judging from the above responses, it is clear that the decisions taken by law enforcement are influenced by the gender dimensions, which inhibit access to justice for women who commit petty offences. Furthermore, Principle 6 of the African Charter on the Decriminalization of Petty offences in Africa states: Laws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination on the basis that they target, or have a disproportionate impact on, the poor, vulnerable persons, key populations or on the basis of gender.⁸⁴

4.3.2.2 Income level

It cannot be gainsaid that income level shapes the way in which women come into conflict with the law in the context of the Kenyan criminal justice system, as two key informants confirmed below. The first key informant affirms that low income level increases the risk of committing a petty offence.

⁸⁴ The African Commission on Human and Peoples’ Rights, *Principles on the Decriminalization of Petty Offences in Africa*, (2017) 12.



“The issue of some women committing petty offences actually revolves around income level. If you have no income, you have to look for an income-generating activity and perhaps find yourself in conflict with the law (Chief magistrate, male).”

(Chief magistrate, male).

The second key informant insists that faced with the risk of coming into conflict with the law, most women who are low-income earners will still engage in illegal economic activities to provide for their families, especially if they are the sole breadwinners.

“Many women engage in petty offences while seeking an income to provide for their families. Most often than not, these women do not consider such income generating activities as illegal. This, then, amounts to poverty and ignorance.”

(FIDA Advocate, female).

The above findings suggest that economically marginalized women bear the brunt of divergent law procedures within the criminal justice system in Kenya.

4.3.2.3 Poverty

Poverty does not independently inhibit access and administration of justice for women who commit petty offences. It interacts with other issues such as gender and income level that lead to the same effect as discussed in the preceding paragraphs. The key informants who responded to the question of how poverty influences access to justice for women who commit petty offences acknowledged that the poor experience more severe consequences due to coming into conflict with the law. As quoted below, one of the key informants described his experiences with poor women facing legal problems.

“Poverty is a challenge because most of the women who commit petty offences cannot afford legal fees. As a lawyer, I have to represent these women pro-bono or link them up with organizations that could help.”

(Lawyer 2, male).

While access to justice is also a matter of concern for high-income individuals, poor people may be exposed to a greater risk of encountering barriers to access and administration of justice, as another key informant explains:

“The high-income woman will rarely find her way to the criminal justice system; if she does, she will have a lawyer. For me, the greatest impediment is poverty because it makes some women resort to survival offences. Also, consider the fact that some women have a challenge even travelling to court due to lack of fare. That means accessing justice will be almost impossible for women living in poverty.”

(Magistrate, female).

Both of these viewpoints above recognize that poor women often experience conditions which lead to petty offences, but they (poor women) lack the means to avoid or resolve them. This insufficient access to justice and related legal difficulties indicate that poor women who are in conflict with the law will likely suffer in silence and surrender to fate. Taken together, these findings imply that poor people are less likely to engage the criminal justice system due to the high monetary costs involved in the access and administration of justice.

4.3.2.4 Disability

There have been efforts under international human rights law (a series of binding and non-binding regional and international legal instruments) to guarantee access to justice for persons with disabilities. For example, Article 13 of the International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020 (rooted in the Convention on the Rights of Persons with Disabilities) advises States to:



“Ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

Additionally, the convention expects States to take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity. Despite such efforts, persons with disability in Kenya and the rest of Africa still experience significant barriers in terms of access to justice. A key informant exposes some of these barriers as follows.

“The system does not have much accommodation for people with disabilities. During my practice, I did not see any special arrangements for persons with disabilities. Therefore, at the onset, the arrested person must raise issues of disability rather than wait for the justice system to find out. Still, the justice system is already intimidating and one may not even want to raise any such issues, especially for women. Women particularly find it difficult to speak up for themselves and so, there is a gap when it comes to accessing justice for persons with disabilities. However, I do believe that the judiciary is making an effort to ensure that people with disabilities are catered for although there is room for improvement.”

(Lawyer 1, female).

Another key informant asserts that issues of disability are not easily identified when it comes to petty offences because of the manner in which they are dispensed with.

“If the arrested person is intellectually disabled, the law provides that he or she undergoes an assessment. However, in petty offences, those issues are not easily picked up and the process is usually fast because many petty offenders lack legal representation. The judiciary also provides for sign language interpreters and language translators in case one cannot understand the language used in court.”

(Senior prosecution counsel, male).

Lastly, another key informant maintains that the Kenyan criminal justice system has to do more to ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and to fully comply with regional and international legal instruments.

“I have met a woman in my courtroom who was in a wheelchair. I had to move closer to her because she could not access certain areas within the courtroom. Our criminal justice system is not that friendly to people with disabilities. I know we have provisions for sign language interpretation in the courtroom, but there are still many challenges in that regard.”

(Magistrate, female).

These findings confirm that the Kenyan criminal justice system cannot fully guarantee the right of persons with disabilities to effective access to justice at all phases of the justice chain, including at the point of arrest and initial investigations.

4.3.2.5 Nationality

The cross-cutting issue of nationality is also firmly rooted in international human rights law. For example, Article 2(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) states:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”



In the context of access and administration of justice, the ICCPR provides that migrants and immigrants shall be entitled to a fair and public hearing by a competent, independent and impartial court, without discrimination. ICCPR further protects the migrants' right to adequate legal information in a language that they understand, including financial and legal assistance, when needed. There is sufficient evidence to suggest that the Kenyan criminal justice system has specific complex procedures that deter migrants and immigrants from accessing justice. Consequently, the fundamental human rights codified in the ICCPR are not realized, as one of the key informants explains in the following quote.

“ Many African migrants or immigrants in Kenya have a disadvantage when it comes to the criminal justice system. First, because of the language barrier and secondly, inability to access bond. Therefore, you find many refugee women, especially from neighbouring African countries who come into conflict with the law cannot be released on bond because they do not have ties in Kenya. That means they are kept in remand for a long time . ”

(Lawyer 1, female).

Another key informant describes the barriers that migrants and immigrants who commit petty offences encounter in accessing justice within the context of the Kenyan criminal justice system, as captured below.

“ Petty offenders with non-permanent residence have no access to cash bail or bond, which is a violation of their rights. Secondly, women from other nationalities do not have access to legal services, hence, they experience a long trial process and nobody follows up on their cases. They are remanded for a long time without knowing what will happen next . ”

(Human rights defender 1, male).

Based on the above results, it bears to note that far more needs to be done to facilitate the meaningful application of the right to a fair trial within the Kenyan criminal justice system for migrants and immigrants while ensuring that such persons are granted the right to standing and recognition before the law. To conclude this section, it is important to submit that the findings call attention to the integration and mainstreaming of cross-cutting issues throughout all stages of access and administration of justice in Kenya. For example, the integration of gender, income level, poverty, disability, and nationality raises essential questions about inequalities being reproduced in the Kenyan criminal justice system that inhibit fair, impartial, and non-arbitrary treatment for women who commit petty offences. Substantially, Principle 2 of the Luanda Guidelines affords special protection in relation to women, children, persons with disabilities and non-nationals.⁸⁵ Additionally, Principle 7 of the African Charter on the Decriminalization of Petty Offences in Africa confirms that petty offences not only “undermine the dignity of persons on the basis of their status”, but also “reinforce discriminatory attitudes against marginalized persons”.⁸⁶

4.3.3 Procedural guarantees and the rights of arrested persons

This section provides an analysis of participants’ responses on their knowledge, experiences, and insights about the type of procedural guarantees that exist in the laws of Kenya with specific reference to the arrest process and notification of the rights of persons under arrest and in police custody or detention. It also presents findings on decision-making on bail or bond and access to legal services for arrested persons, including those in police custody. In the context of this study, procedural guarantees refer to legal measures established by law to ensure proper access and administration of justice. The rights of arrested persons relate to the procedural safeguards designed to ensure that individuals receive a fair trial and are protected from being unlawfully deprived of their human rights and freedoms.⁸⁷

The procedural guarantees and rights of arrested persons derive from a number of regional and international instruments. The regional treaties containing the principles and guidelines governing these guarantees and rights include

⁸⁵ African Commission for Human and People’s Rights- ACHPR, *Luanda Guidelines: Trainer Manual*, (2017),

⁸⁶ The African Commission on Human and Peoples’ Rights, *Principles on the Decriminalization of Petty Offences in Africa*, (2017) 12.

⁸⁷ International Committee of the Red Cross- ICRC, *Study on customary international humanitarian law*, (New York: Cambridge University Press, 2009): 306-308.



the Luanda Guidelines on the conditions of arrest, police custody, and pre-trial detention in Africa, 2014, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 1999, and the African (Banjul) Charter on Human and People’s Rights, 1981. The guarantees and rights of the person under arrest or custody are also expressed in the International Covenant on Civil and Political Rights, 1966. The Kenyan Constitution also defines the rights of arrested persons. Article 49 states explicitly that the arrested person has the right to be informed promptly, in a language that the person understands, of the reason for the arrest, the right to remain silent, and the consequences of not remaining silent. It further states that the arrested person has the right to communicate with an advocate and other persons whose assistance is necessary.⁸⁸

Additionally, the Criminal Procedure Bench Book, 2018, which serves as a quick reference for judges and magistrates presiding over criminal proceedings, can also be used by prosecutors, defence counsel, probation officers, and police officers, among other players in the Kenyan criminal justice system to ensure that the rights of arrested persons are respected.⁸⁹ Equally important, Chapter 15 of the National Police Service Standing Orders prescribes arrest and detention rules as well as the rights of prisoners and accused persons in the manner provided under the provisions of section 29 of the Criminal Procedure Code. These rules are also a reflection of the Luanda guidelines. For example, Section 22 of the Service Standing Orders provides for handling a female detainee, which stipulates under Section 22(1) (d) (v) that “the door of the cells meant for holding female detainees shall be secured by two locks and each of the two police officers on duty shall retain possession to one lock only”.⁹⁰ The pages that follow present results and discussion on the arrest process, notification of rights for persons under arrest, decision-making on bail or bond, and access to legal services for arrested persons and those in police custody.

4.3.3.1 The arrest process

The survey respondents (incarcerated and formerly incarcerated women) were asked to describe their arrest process. A significant majority of the respondents said they were arrested mostly by police officers, and on fewer occasions, by the local chief, and were at their workplaces at the time of the arrest. Still, others were at home with their families or away, running errands.

⁸⁸ Constitution of Kenya, Rights of Arrested Persons (Article 49), (2010).

⁸⁹ The Judiciary, Criminal Procedure Bench Book, (Nairobi: The Judiciary, 2018).

⁹⁰ National Police Service, Service Standing Orders, (Nairobi: Government Printer, 2017): 206-210.

Some respondents mentioned that they were ordered to report to the police station, where they were then arrested. Few respondents said that they were arrested right after a court hearing. Those who indicated that they were arrested at their workplaces (the majority) described the process as involving a mass arrest (msako) on the road or in the streets.

The lived experience participants were also asked to describe their arrest process. Five (71%) of the respondents were at their workplaces when they got arrested, while two (29%) were at home. The participants described the arrest process as “intimidating”, “coercive”, and “confusing”. One of the participants who got arrested at her workplace described her experience of the arrest process as follows.

“The journey for the arrest was not as easy, it was a little bit frightening because these two policemen came to my work place and forced me to accompany them to the police station and then arrested me. I was taken to Kiambu police station.”

(Participant 3).

Another participant who got arrested at home and was the sole breadwinner of her household also shared her experiences.

“That evening, as I was having supper with my children in my house, my accuser showed up in the company of two policemen and told me I was under arrest for stealing from her. They took me to Ruiru Police station. I was arrested on Friday and had to spend the weekend in the police cells”

(Participant 6).

One of the participants underwent an elaborate process of arrest involving her accusers, her area chief, and the police as captured below.

“ So, there are some women who came to my shop and told me that they wanted me to pay back their money because the lady whom I had guaranteed a loan could not be found. We went to the Chief, who proclaimed my innocence and suggested an amicable agreement for repayment. My accusers refused and so, we went to the police station. The police officer concurred with the chief but the women insisted that I should be taken into custody. I was to be remanded until the culprit could be found.”

(Participant 1).

Still, another participant retells the anxious moments she experienced during her arrest process, thereby exposing the gaps that exist in the Kenyan criminal justice system.

“ Plain-clothed police officers showed up at my workplace without my knowledge. They inquired about the company’s processes of booking, ordering, payment, and delivery of roofing iron sheets. After explaining the processes to them, they asked me if I knew about a client who has been on the waiting list. I became anxious and after further interrogation, they said that I was under arrest for impersonating Royal Mabati company. There was no warrant of arrest. They just wanted me to refund the money or give them the roofing iron sheets. Since I didn’t have both, I was ushered into a private vehicle. I requested to at least be allowed to call a representative from Royal Mabati Company but they never gave me time to seek help. I left my belonging at the office, my bag and everything. I only called the caretaker to lock the door. They handcuffed me and took me to Kiserian police station.”

(Participant 7).

Based on the experiences of Participant 7 above, it is worth noting that relevant passages in the Luanda Guidelines: guarantees and rights during arrest (Sections 3 and 4) provide that officials conducting an arrest be identifiable to the person under arrest by showing the unit to which they belong and an official identity card, which visibly displays their name, rank and identity number. The vehicle used to make the arrest must also have visible number plates. Moreover, the arrested person has the following rights as stipulated by the Luanda Guidelines;-

- the right to be informed of the reasons for their arrest and any charges against them,
- the right to silence and freedom from self-incrimination, and,
- the right to contact and access a family member or another person of their choice, and if relevant, consular authorities or embassy.

Furthermore, Article 9(1) of the International Covenant on Civil and Political Rights proclaims that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.⁹¹ In the case of Participant 7, and with specific reference to the Luanda Guidelines and ICCPR, the strict observance of procedural guarantees and the rights of arrested persons did not take place.⁹² Regarding the arrest process, all the key informants interviewed agree that the officials conducting an arrest must strictly observe procedural guarantees and the rights of arrested persons. “There is a need to sensitize the arresting police officers and the Officer commanding police station (OCS) about following the due process of arrest” (Human rights defender 1, male) and “give illiterate and poor women a voice because they cannot self-represent even for a petty offence” (Magistrate 2, female). Another key informant (ICJ Lawyer, female) emphasizes the importance of protecting vulnerable groups during the arrest process as outlined in the constitution and other legal instruments.

“The rights of an arrested person in article 49 are never taken into consideration when the arrest is being made. This is especially true for women, who are bundled in vehicles together with men. For some women, in order to avoid arrest, they carry children on their backs as a tactic since a City inspectorate officer cannot arrest a woman together with the child. Still, such guidelines are ignored because there is usually harassment at the point of arrest.”

(ICJ Lawyer, female).

Responding to the question of how police officers conduct the process of arrest in Kenya, another key informant provides important insights as follows.

“There are offences where a warrant of arrest or search of one’s premises is unnecessary. However, for most cases, a warrant is required even though the arrested persons are ignorant of this requirement. Secondly, male officers are not allowed to search a woman or handcuff her. There should always be a female officer present to deal with arrested women and their cases. There are three types of arrest: by a police officer, members of the public or by the Chief.”

(Police officer 1, female).

⁹¹ United Nations, *International Covenant on Civil and Political Rights*- ICCPR, (New York: UN, 1966).

⁹² The Kenyan Constitution and Criminal Procedure Code also contain these guarantees.

The above response, in reference to Participant 7 for example being handcuffed, confirms that the constitution and the principles and/or guidelines contained in regional and legal instruments on procedural guarantees and the rights of arrested persons are not strictly observed in the Kenyan criminal justice system.

4.3.3.2 Notification of the rights of persons under arrest and custodial investigations

A significant majority (66%) of the survey respondents who were part of a mass arrest (for petty offences) were notified about the reasons for arrest or being held in police custody or detention, while 32% were not notified. Of those sampled, 2% said they were notified later after arrest. Figure 1 summarizes the results.

Were you informed of the reasons for your arrest or detention?

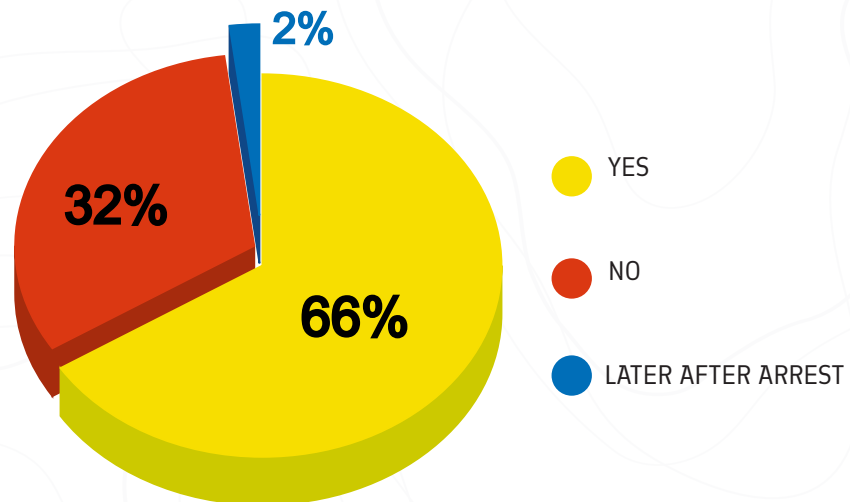


Figure 1: Reasons for arrest or detention

The above results confirm that officials conducting an arrest were aware of the guidelines on notifying the arrested persons about reasons for arrest and police custody or detention and made attempts to notify them. Regarding the notification of the rights of arrested persons, a large majority (87%) indicated that the police officers failed to notify them of their rights during arrest or detention. Only 13% were notified of their rights as figure 2 depicts.

Were you informed of the reasons for your arrest or detention?

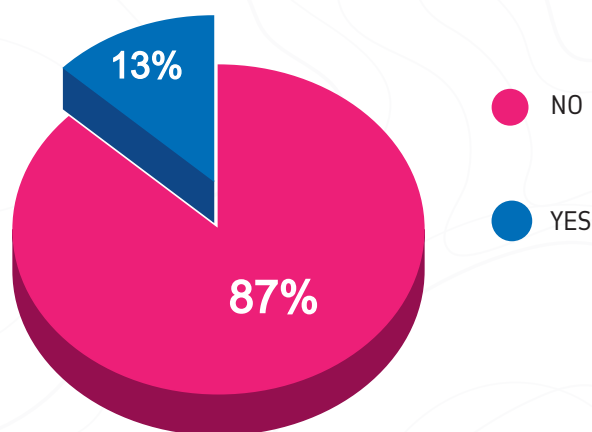


Figure 2: Notification of the rights of arrested persons during arrest or detention

The results suggest a clear violation of the rights of arrested persons, which are protected by the Kenyan Constitution (Article 49) and a number of regional and international legal instruments. That notwithstanding, it does beg the question of why the arrested persons do not know their rights in the first place. The above results are similar to the lived experience group, where six (86%) participants said they were not notified of their rights during arrest, in police custody, or detention. Only one participant said she was somehow aware of her rights during arrest and had an idea of how the criminal justice system worked. One of the participants sums up the views of those who neither knew nor were notified of their rights during arrest.

“ No. I did not know my rights. Now after my release is when I started to find out what does the law say about somebody who owes debt and under my charge, ‘obtaining money with false pretense,’ what does that mean? What is that offense? And actually what term does it carry and what are my options depending on the crime that I had committed.”

(Participant 3).



Another participant explained how her experience of detention affected the knowledge of her rights.

“ I did not understand my rights because we were mixed up in remand with capital offenders and suspects accused of theft. Also, there was ‘blanket Punishment’ where when one prisoner commits an offense, and the wardens are not sure about who committed it, you are all punished. That happened more often. ”

(Participant 6).

From the above explanation, it is easy to conclude that the rights of Participant 6 were violated because Article 49 (1) (d) of the Kenyan Constitution states that an arrested person has the right to be held separately from persons who are serving a sentence. Furthermore, Section 4(a) of Luanda Guidelines guarantees an arrested person the right to be free from torture and other cruel, inhuman and degrading treatment and punishment.⁹³ As for the notification of the rights of arrested persons at the pre-trial stage, a majority (57%) of the survey respondents were notified of the court procedures and their rights by lawyers, magistrates, judges, prosecutors, court clerks and paralegals. However, as shown in figure 3, a sizeable number (43%) of the respondents were neither notified of their rights nor pre-trial procedures. This implies that a good number of respondents may not have had access to legal assistance, and therefore, their chances of accessing justice going forward were diminished. Their rights had essentially been violated by the time they were presented at the pre-trial and sentence hearing stages.

⁹³ African Commission for Human and People’s Rights, *Luanda Guidelines: Trainer Manual*, (2017), 30.

Were you informed of court procedures before or pre-trial?

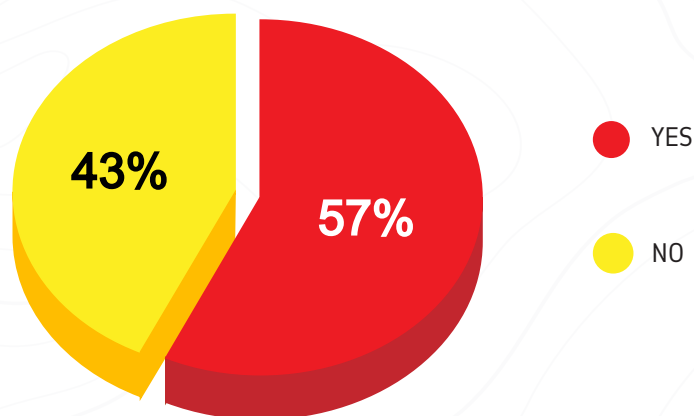


Figure 3: Notification of the rights of arrested persons at the pre-trial stage

The key informants largely agreed with the survey respondents and lived experience participants on the failure of the criminal justice system in protecting their rights and ensuring the procedural guarantees are observed. Still, the key informants sought to explain why women who commit petty offences do not know their rights. Lawyer 1 (female) explained that the Kenyan police hardly ever notify the arrested persons of their rights, who are also clueless about the criminal justice system. Lawyer 1 further notes that some arrested persons who seem to know their rights are recidivists, while others seek legal advice from fellow remandees or detainees. Lastly, Lawyer 1 argues that women who commit petty offences tend to have a lower education level and, therefore, are unable to make sense of the legalese used in the constitution and the criminal procedure code, among other legal documents. As such, Lawyer 1 calls for simplifying the rules to ensure that women who commit petty offences can access justice and know their rights. Human rights defender 1 (male) concurs with the views of Lawyer 1 while emphasizing that women who commit petty offences try to resolve their legal challenges at the police station through bribery and make no attempt to know their rights. Again, according to Human rights defender 1, magistrates do not provide translation services for arrested persons who do not understand English, hence violating their (arrested persons) rights and procedural guarantees. ICJ Lawyer echoes the views of Lawyer 1 and Human rights defender 1 and insists on the rights of arrested persons in police custody being often violated with little regard to domestic and international law.

Lawyer 1 further notes that some arrested persons who seem to know their rights are recidivists, while others seek legal advice from fellow remandees or detainees.



“ These individuals do not know their rights, which are constantly violated. An arrested person could easily stay in the police cells for about a week since they do not know that they are to be taken to any court near them to take plea within 24 hours from the time of arrest. That is a huge violation of one’s right to a fair trial. ”

(ICJ Lawyer, female).

For Police officer 2 (male), access to justice for women who commit petty offences in Kenya is especially difficult because they do not know their rights as provided by the law and confirms that most of the women he deals with as a police officer are either illiterate or semi-illiterate. These women are always afraid to seek clarifications or ask questions about procedural guarantees and their rights as arrested persons. Police officer 2 offers evidence of this particular challenge as captured below.

“ There is a woman who was arrested for selling illicit brew but in her defence; she said that she had children to feed. It means she did not understand why she was being arrested in the first place ”

(Police officer 2, male).

In the end, Police officer 1 (female) attempts to absolve law enforcement from any significant responsibility when it comes to strictly observing procedural guarantees and the rights of arrested persons, as evidenced by the quote below.

“ As the police, we are guided by the regulations in our service’s standing order. The police work under many laws, and most of the time, we work with other stakeholders. We are also mandated to work on any case under the Penal code, or that is against an act of parliament. The municipal also has the power to reinforce laws enacted by the municipal council, like hawking, but they can also call upon the police to help them. ”

(Police officer 1, female).

The results in this section reveal that the procedural guarantees in the Kenyan criminal justice system are not designed to ensure that arrested and/or accused persons brought to trial are protected from the unlawful or arbitrary violation of their rights and freedoms as stipulated in Articles 48 and 49 of the Constitution. Evidence also suggests that the justice system in Kenya selectively applies the principles and guidelines set out in regional and international instruments, which enable the arrested and/or accused persons to exercise their rights.

4.3.3.3 Safeguards and rights during police custody

The results and discussion in this section draw on safeguards and rights expressed under Section 7 of the Luanda Guidelines, which deals with decision-making on police bail or bond and access to legal services.⁹⁴ The guidelines specifically address the rights of all persons arrested and detained to ensure that they (persons) promptly access a judicial authority to review, renew and appeal decisions to deny police bail or bond. The Luanda Guidelines also prescribe the maximum duration of police custody, which should not be more than 48 hours, prior to the obligation to bring the arrested person before a judge. It is also worth noting here that Article 49 (1) (f) of the Kenyan constitution prescribes 24 hours for the arrested person to be brought before a court. Regarding access to legal services, Section 7 of the Luanda Guidelines guarantees the provision of legal services to arrested and/or accused persons in police custody, courtesy of lawyers, paralegals, and legal clinics. Furthermore, the State should guarantee access to quality legal services and, in particular, ensure that sufficient lawyers are trained and available to the arrested persons or suspects. What follows is the presentation and discussion of results on police bail or bond and access to legal services.

(i) Bail and bond decision-making

First, it is worth noting that police officers often detain persons who have committed such petty offences as loitering, creating a disturbance, being drunk and disorderly, and possessing illicit brew contrary to Article 49(2) of the Constitution.⁹⁵ From the survey results, a significant majority of the respondents (53%) stated that they were offered a police bail or bond. In comparison, a relatively large proportion (43%) did not receive a similar offer, as shown in figure 4.

Still, a majority of the respondents who were offered bail or bond could not afford it, hence remained in police custody. Those who could afford it got help from family and friends. The results underscore the fact that (low) income level and poverty are key barriers to accessing justice, especially for women who commit petty offences.

⁹⁴ African Commission for Human and People's Rights, *Luanda Guidelines: Trainer Manual*, (2017), 32.

⁹⁵ See National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, (Nairobi: NCAJ, 2015): 11

Were you offered a police bail or bond?

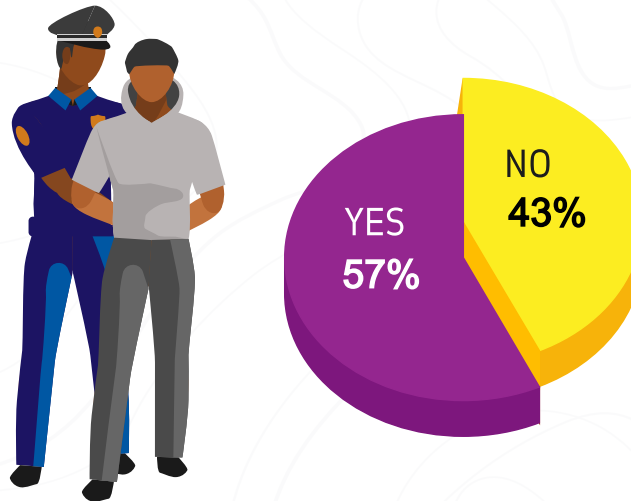


Figure 4: Provision of a police bail or bond

A large majority (85%) of participants in the lived experience group indicated that bail and bond decision-making was left to the courts because they were supposedly arrested for serious offences. These 85% of participants were eventually granted bail by the courts. However, Participant 7 (representing 15% of those sampled) said she was denied a police bail or bond because her accuser was a police officer. Participant 7 was not produced in court within the stipulated 24 hours and remained in police custody for a week (7-days) before she was released without any charges being preferred against her. In this case, police officers denied Participant 7 bail as a form of punishment. The rights of Participant 7 were clearly violated in consideration of the Luanda Guidelines, which prescribe time limits of no more than 48 hours as the maximum of police custody and Article 49 (1) (f) of the Kenyan Constitution providing a 24-hour limit for the arrested person to be brought before a court for the charges to be preferred against him or her. It is also important to consider the Bail and Bond Policy Guidelines 2015, drawn from Luanda Guidelines and international legal instruments such as the International Covenant on Civil and Political Rights 1966 and United Nations Basic Principles for Treatment of Prisoners, 1990, among others.⁹⁶ For instance, the General Principles stipulated in Part 3 of the Bail and Bond Policy Guidelines prescribe the following:

⁹⁶ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, (Nairobi: NCAJ, 2015): 11-24.

“ At the Police Station, a suspect may be released on cash bail, with or without sureties, or personal (free) bond or recognizance. The Police Force Standing Orders require the officer in charge of a police station to release any person arrested on a minor charge on the security of cash bail, as a general rule, unless the officer has good grounds for believing that the arrested person will not attend court when required to do so. ”

In light of the above guidelines, the police officers did not inform Participant 7 of any decision to put her in custody or the date she would appear in court. Further, the police officers did not inform Participant 7 of the reasons for the denial of bail or bond as stipulated in the Bail and Bond Policy Guidelines. The fact that Participant 7 was eventually not charged for any offence suggests that the police officers either ignored or did not have an electronic register for accounting for all arrested persons. It is upon the prosecutor (not the police) to review the complaints and the offence committed then decide to charge or not. The key informants interviewed corroborate the above results in terms of bail and bond decision-making. Still, as one of the key informants argues below, bail may be set at an exorbitant rate such that the arrested person is unable to afford.

“ The judiciary has adopted some bail and bond policy guidelines for petty offences, such that the arrested person should not remain in police custody and bail should not be exorbitant. We recently saw a case in Thika where a woman was fined a huge amount of money for apparently littering. In this case, the justice system is unnecessarily keeping women in custody who should not be in custody simply because they cannot afford bail or a fine. ”

(Lawyer 1, female).

Lastly, it would be necessary to submit that during the bail and bond decision-making process, police officers should consider other cross-cutting issues (see Section 4.3.2), especially in relation to petty offences.

(ii) Access to legal services

It was in the interest of the study to establish through the survey whether respondents had legal representation in their efforts to access justice. According to the results summarized in figure 5, a large majority of the respondents (81%) did not have any form of legal representation and were not aware of their rights in that regard. Only 19% of the respondents had legal representation. Most of the respondents said that they could not afford legal representation because they could not afford the fees associated with such services. The majority of the respondents (19%) who had legal representation benefited from pro-bono legal services and lawyers hired on their behalf by human rights organizations. Others who obtained legal services from private lawyers stated that they had incurred costs ranging between Ksh.3,000 and Ksh. 200,000 depending on the magnitude of the case. For one respondent, the cost entailed opening the file at Ksh 30,000, then 5,000 for each court appearance. To cover these legal fees, the accused persons used their savings, sold their assets or received support from their friends and family. However, their efforts still resulted in debts.

Did you have legal representation?



Figure 5: Legal representation

As for the lived experience group, four participants (57%) had no access to legal services whatsoever, even though some were aware of the right to legal representation. Participant 7, who could not access legal representation, narrates her experiences, which expose the violations that occur in police custody, as captured in the following quote.

“ *I remember requesting the police officer to let me speak to a lawyer and she said “hizo ni vitu za majuu” (Those are foreign concepts). I was thrown in the cells having talked to nobody even my family or the Royal Mabati boss. It was just me and the officers. I knew I had a right to representation.* **”**

Participant 7

Participant 3 said she had a lawyer, only by name, because he was always unavailable, while Participant 4 had a lawyer thanks to her friends, who covered all the legal fees. Participant 5 had insufficient legal services from an unqualified lawyer as she explains below;

“ *The trial process was long due to the fact that I had the wrong lawyer. Mine was a civil lawyer instead of a criminal lawyer. The civil lawyer took me round in circles but eventually never made any submissions in court. Later, I was given a student lawyer, and my case was done.* **”**

Participant 3

The key informants sought to explain why most women who commit petty offences (especially for the first time) are unable to access legal services. Of those sampled, four (57%) hinted that it could be because of ignorance, as one of the key informants explains below.

“ *Most women who commit petty offences in Kenya lack knowledge on court processes and what their rights are. Therefore, they are victims of the criminal justice system because they are unable to represent themselves.* **”**

(FIDA Advocate, female).



Furthermore, those women who have access to legal representation depend on pro bono services offered by lawyers (Lawyer 1, female) as well as paralegal officers, prison officers trained on human rights issues, and their fellow detainees who are mostly recidivists (Human rights defender 1, male). There is also the question of women who commit petty offences receiving custodial sentences because they cannot access legal services. One of the key informants plays a significant role in ensuring that such women access justice to avoid incarceration as evidenced by the following quote.

“As a paralegal officer through our organization, I offer them legal knowledge so that they can represent themselves. In cases where they seem stuck, I direct them to the Family Group Conferencing, where family, friends, and key supporters of the victim and offender decide the resolution of a criminal incident. I also advise the accused persons on how to apply other mechanisms like diversions and legal fees.”

(Human rights defender 1, male).

According to another key informant quoted below, women who commit petty offences tend to plead guilty unnecessarily because of ignorance or inability to pay legal fees.

“Women who have committed petty offences tend to self-represent. They only appear in court to plead guilty and then are fined. Those who are unable to pay the fine are sentenced. The default sentence for a petty offence is one year. Therefore, these women mostly plead guilty, and I think it is because somebody advises them to do so to avoid a full trial.”

(Magistrate, female).

In light of the above results, Section 8(a) of the Luanda Guidelines proclaims that States should establish a legal aid service framework through which legal services for persons in police custody and pre-trial detention are guaranteed.⁹⁷

⁹⁷ African Commission for Human and People's Rights, *Luanda Guidelines: Trainer Manual*, (2017), 32.

One of the key informants confirms that Kenya is in the process of complying with the guidelines set out in regional and international legal instruments to ensure that quality legal services can be accessed by detainees under conditions that guarantee their rights.

“ *The government is trying to come up with the National Legal Aid Service but it has not yet kicked off. So legal representation is not widely available. It is only available for a capital offence but not for petty offences, which most women are charged with.* ”

(Lawyer 1, female).

The decision by the Kenyan government to provide legal representation for a capital offence but not for petty offences is inconsistent with Principle 3(23) of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, which states:⁹⁸

“ *It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.* ”

Similarly, Section G(c), of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 1999, specifically requires States and professional associations of lawyers to promote programmes to inform the public about their rights and duties under the law and the vital role of lawyers in protecting their fundamental rights and freedoms. This awareness will benefit women who commit petty offences and end up pleading guilty because they cannot access legal services. Moreover, Section H(g) calls for recognising the role that para legals could play in providing legal assistance and for the State to establish the legal framework to enable them to provide basic legal assistance.⁹⁹

⁹⁸ UNODC, *Legal aid for persons suspected of or charged with a criminal offence*, (Vienna: United Nations, 2013),

⁹⁹ African Commission on Human & Peoples' Rights (1999). *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, (Banjul: ACHPR, 1999): 7-8



In referring to the earlier views of Human rights defender 1 (male), para legals have an important role in the provision of legal services to persons who are in conflict with the law. Therefore, they (para legals) should be granted similar rights and facilities afforded to lawyers to enable them carry out their functions effectively.

4.4 DECISIONS ON PRE-TRIAL DETENTION

This section reveals findings and discussion on the rights and safeguards of accused persons with a view to minimizing prolonged pre-trial detention for women who commit petty offences. The opportunity of the criminal justice in Kenya to impose pre-trial detention is granted in Article 51 of the Constitution, where it is stipulated that:

“ A person who is detained, held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned. ”

The above provision ensures that pre-trial detention is carried out according to the law, without discrimination, and within a reasonable time. Pre-trial detention can be imposed at several stages where:¹⁰⁰

- a decision to proceed with the case has been taken, and further investigations are underway,
- the court process is ongoing,
- the convicted person has not yet been sentenced, and;
- a provisional sentence has been passed, but the definitive sentence is subject to an appeal process.

The stages above will be useful in interpreting and discussing results in this section. To understand the significance of results on the rights and safeguards in pre-trial detention for women who commit petty offences, it is necessary to rely on existing data on pre-trial detention in Kenya.

¹⁰⁰ See Heard and Fair, Pre-trial Detention and Its Overuse, (2019), (v).

A 2018 Audit by the Office of the Director of Public Prosecutions (ODPP) showed that 52% of people in Kenyan prisons were in pre-trial detention, and only 48% had been sentenced.¹⁰¹

The majority of these pre-trial detainees were young, came from poor families, and had little or no education. A good number of them had been charged with petty offences such as creating a disturbance, loitering, brewing illicit liquor, touting, minor traffic offences, simple thefts such as shoplifting, being drunk and disorderly, and trespass. The average stay in pre-trial detention was one year, while some detainees had been waiting up to eight years without a hearing. More importantly, the report further revealed that 90% of pre-trial detainees were granted bail but could not afford it, with bail amounts ranging from Ksh. 500 to Ksh. 10 million. Lastly, the report indicated that a significant majority of the pre-trial detainees had their cases mentioned in court on numerous occasions, but no determinations were made due to the unavailability of complainants or witnesses. In doing so, the defendants were taken back to detention to await new court dates. These results are also validated by Section 6 of the Bail and Bond Policy Guidelines on Inter-Agency Coordination, Oversight of Places of Detention, and Public Awareness,¹⁰² which seeks to reinforce the right to a speedy trial of a detainee as stipulated by the Criminal Procedure Code (CPC) under Section 205 on adjournment.¹⁰³

The preceding paragraphs have laid the groundwork for the presentation of results and discussion on the length and conditions of pre-trial detention for women who commit petty offences.

4.4.1 Length of pre-trial detention

Evidence in the foregoing section suggests that safeguards on the length of pre-trial detention are not extended to accused persons in most cases, including petty offences. According to Section 6 of the Bail and Bond Policy Guidelines, 2015, petty offences are among the cases that are usually adjourned for periods of three to four months, while serious cases like murder take an average of four years to conclude.¹⁰⁴

¹⁰¹ The findings of the Audit Report were published in the *Nation* newspaper in September 2018 and updated in February 2021.

See link: <https://nation.africa/kenya/newsplex/remandees/2718262-4759170-12q39tl/index.html>. Accessed: 5/02/2022

¹⁰² National Council on the Administration of Justice, *Bail and Bond Policy Guidelines*, (2015): 31-34.

¹⁰³ National Council for Law Reporting, *Criminal Procedure Code*, (2012), 74.

¹⁰⁴ See page Pp.31-32 of the *Bail and Bond Policy Guidelines*.



However, the CPC seeks to protect the right to a speedy trial (for and including petty offences) of an accused person who has been detained in prison by stipulating that a court shall not adjourn the hearing of his or her case for more than fifteen days.¹⁰⁵ Detaining such a person for lengthy periods without conviction of any offence undermines the principle of the presumption of innocence, thereby contravening the relevant international human rights instruments.

The survey respondents were asked to indicate the length of time they had spent in pre-trial detention, between one day and twelve months as shown in table 5. Of those sampled, 176 responded to the question. A slight majority (43%) spent between three and seven days, followed closely by 41% of those who spent a maximum of two days. Only one respondent spent more than six months in pre-trial detention. It bears to note that at least 163 (86%) out of a possible (n=190) respondents who were sampled spent a maximum of fifteen days in pre-trial detention as stipulated in the Criminal Procedure Code, Rev.2012 (205). These results suggest that a large majority of pre-trial detainees sampled for the study had committed petty offences as explained in the previous paragraph under Section 6 of the Bail and Bond Policy Guidelines.

Table 5: Length of time in pre-trial detention

Period in custody	Frequency (n=190)	Percentage 100
1 – 2 days	73	41
3 - 7days	75	43
8 - 14 days	15	9
15 - 30 days	5	3
1 - 3 months	7	4
6 - 12 months	1	1
Total	176	100

Concerning the lived experience group (n=7), two participants were in pre-trial detention for six months, two others spent a maximum of fourteen days, while only one participant spent three months.

¹⁰⁵ See Section 205 of the *Criminal Procedure Code*, p.75

Of the two remaining participants, one was not detained while the other did not respond to the question asked. Participant 2, Participant 4, Participant 5, and Participant 6 were released from pre-trial detention after paying a cash bail or bond of not more than Ksh. 100,000. However, Participant 3 narrated her experience of a prolonged pre-trial detention as captured in the following quote.

“I was detained in Lang’ata Women’s Prison for six months (since my permanent residence is in Nairobi). So I used to attend Kiambu court, which was actually not right, because I should have been taken to Kibra court (in Lang’ata, Nairobi). The only reason I was taken to Kiambu court is because my complainant was coming from Kiambu. I wasn’t aware at that time. Otherwise, I could have raised the issue with the magistrate during the (off/court) process. So, I was going back and forth. One week I was detained in a Kiambu cell, and the next one, in Lang’ata Women’s Prison. It seemed like a punishment because I believe they could not detain me in one place for whatever reason. So, for six months, I was attending the court process, and for six months, my complainant never showed up. For six months, there was no hearing.”

(Participant 3).

For the above reasons, Participant 7 was not treated humanely, in accordance with the relevant international human rights instruments, including the African Commission on Human and Peoples’ Rights’ Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 1999 (7a,12), which requires the State to ensure that all persons under any form of detention are treated in a humane manner and with respect for their inherent dignity. Section 10(g,36) of the Luanda Guidelines, 2017, on the other hand, states:

“Pre-trial detainees should be held in detention facilities as close to their home or community as possible, taking account any caretaking or other responsibilities.”



Furthermore, Principle 3 (i) of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013 ensures that persons detained, arrested, suspected or accused of, or charged with a criminal offence are advised of their rights, which was not the case for Participant 7.

In light of the foregoing results, the key informants exposed the gaps that exist in the Kenyan criminal justice system in reference to pre-trial detention. Police officer 2 (male) revealed that there were no legal provisions guiding the pre-trial detention of individuals who commit petty offences in Kenya. This deficiency opens the door to the violation of the rights of accused persons in pre-trial detention. For her part, Police officer 1 defended her colleagues in the police force, arguing that their work ends as soon as they release the accused person on police bail or bond or arraign him/her in court in the shortest time possible. If there are any delays at all, it is for lack of resources and personnel, especially female officers, to deal with women who are in conflict with the law. Police officer 1 lays the blame for prolonged pre-trial detention squarely on the court's slow processes. Senior prosecution counsel strongly agrees with Police officer 1, emphasizing that the courts detain the accused person after he/she has taken a plea or pending a plea. Therefore, magistrates and judges are the ones who ensure that the pre-trial detention process meets certain criteria. ICJ Lawyer (female) discussed the issue of overcrowding in detention facilities, especially in Nairobi, which results in male and female offenders being detained together regardless of the offences committed. As such, the rights of accused persons in pre-trial detention are constantly violated.

It should be remembered that Article 49 (1) (e) of the Kenyan Constitution states that an arrested person has the right to be held separately from persons serving a sentence. Section 25(a) of the Luanda Guidelines also advocates for the reduction of overcrowding in pre-trial detention facilities, including through the use of a variety of alternatives to detention, consistent with international law and standards. Overall, results suggest that there is a relatively high adherence to the guidelines on the length of pre-trial detention as contained in domestic and international instrument. However, there are also significant cases where the rights of accused persons in pre-trial detention were violated.

4.4.2 Conditions of pre-trial detention

Since pre-trial detention involves the deprivation of a person's liberty during investigations and/or before he or she is convicted, there is a potential infringement of the individual's rights.

United Nations standards prescribe that (pre-trial) detention should be a measure of last resort to limit its overuse, in accordance with regional and international treaties.¹⁰⁶ For example, the Luanda Guidelines stipulate alternative measures to pre-trial detention under Section 25(a), which do not require resort to judicial proceedings. These standards are also detailed under Article 9(1) of the ICCPR treaty, which states in part that “no one shall be subjected to arbitrary arrest or detention”.¹⁰⁷ This instrument suggests that the State cannot deprive an individual of their liberty without proper due process of law. Additionally, Rule 3 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), 2015, proclaims that imprisonment and other measures (pre-trial detention) that result in isolating persons from the outside world are harrowing because they take from these persons “the right of self-determination by depriving them of their liberty”.¹⁰⁸ Due to that fact, the prison system should not (except as incidental) aggravate the suffering of pre-trial detainees. Consequently, governments have an obligation to limit pre-trial detention to exceptional cases and ensure a minimum period to complete investigations.

Evidence suggests that accused persons in pre-trial detention are particularly vulnerable to violence and abuse from prison staff and police officers, who may torture them to gain a statement or confession.¹⁰⁹ The unnecessary use of pre-trial detention also causes overcrowding, which puts pressure on prison conditions, further exacerbating rights violations, thus leading to a breach of regional and international standards. Moreover, pre-trial detention has a socio-economic impact on the detainees, who may be at a greater risk of reoffending.

The results and discussion in this section draw on all applicable international law and standards, which speak to conditions of pre-trial detention or prison and the rights of detainees, provision of adequate standards of accommodation, nutrition, hygiene, clothing, bedding, physical and mental health care, promotion of family support, religious observance, and educational facilities to name a few.¹¹⁰ Also necessary is the provision of special needs for vulnerable persons, in accordance with regional and international instruments. The study sought to determine whether conditions of pre-trial detention or prison were observed as presented and discussed in the following subsections, starting with the survey results.

¹⁰⁶ See Heard and Fair, *Pre-trial Detention and Its Overuse*, (2019), 9.

¹⁰⁷ International Covenant on Civil and Political Rights ICCPR), (1966), 6

¹⁰⁸ UNODC, *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, (New York: UN, 2015), 70/175, annex.

¹⁰⁹ Refer to Penal Reform International’s (PRI), The Issue: <https://www.penalreform.org/issues/pre-trial-justice/issue/>. Accessed 07/02/2022.

¹¹⁰ See Part VI of the *Luanda Guidelines*, (2017), 37.

4.4.2.1 Hygiene

When asked if they were satisfied with the hygiene standards in pre-trial detention, a large majority of the respondents indicated that they were generally satisfied, as summarized in figure 6. Of those sampled, 98% said they had access to regularly cleaned toilet facilities, 99% had access to bathing water, and 96% received sanitary towels. However, a few respondents said that toilet facilities were insufficient (one toilet per ward) compared to the number of detainees. In some instances, the detainees were forced to share a bucket as a substitute for insufficient toilets.

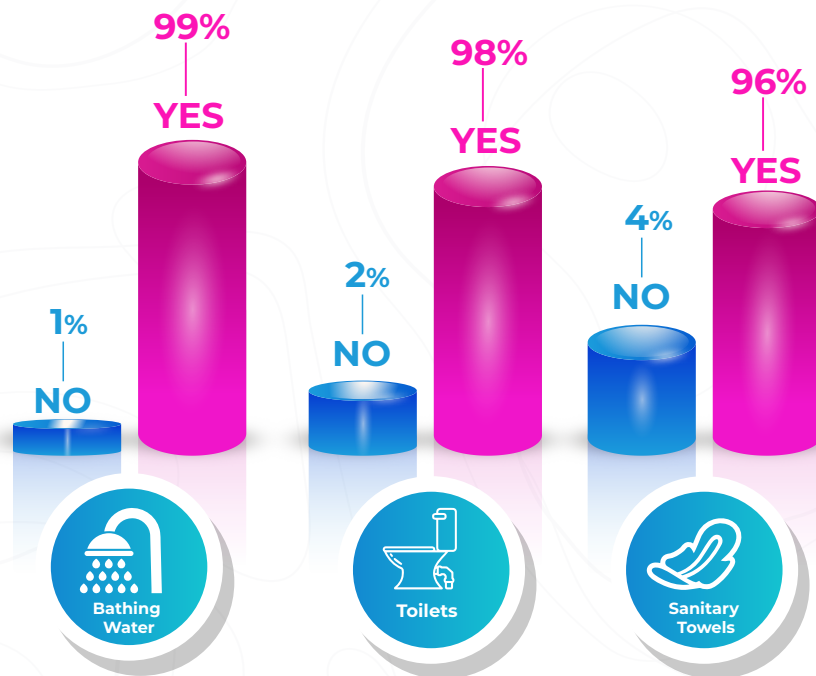


Figure 6: Hygiene

4.4.2.2 Access to health services

As noted in Section 4.4.2, pre-trial detention exposes the arrested or accused persons to potential risks, among them, poor health. First, the respondents were asked if they had developed any illnesses during their pre-trial detention. The results are shown in figure 7. A minority (24%) of the respondents revealed that

they or their children had experienced health challenges while in detention. In contrast, a significant majority (76%) had not developed any illness. Some of the illnesses developed in detention include swelling of feet, ulcers, pneumonia, high fever, diarrhoea, flu, urinary tract infections (UTIs) and prolonged bleeding. Other respondents had experienced mental health issues such as stress and depression. Secondly, it should be pointed out that 30% of the respondents had pre-existing medical conditions before detention, while 70% had none. The pre-existing conditions included fibroids, diabetes, hypertension, HIV/AIDS, allergy to cold, dust, tuberculosis, pneumonia, asthma, arthritis, and bronchitis, to name a few. Prison authorities had been duly informed about these conditions. Thirdly, since women are a particularly vulnerable group, it was necessary to find out if they could access medical care during their pre-trial detention. Of those who responded, 94% confirmed that they had access to medical care, while only 6% had no access at all. Maternal health care (prenatal and postnatal) was accessible to 80% of the respondents who were pregnant, while 20% could not access such services.

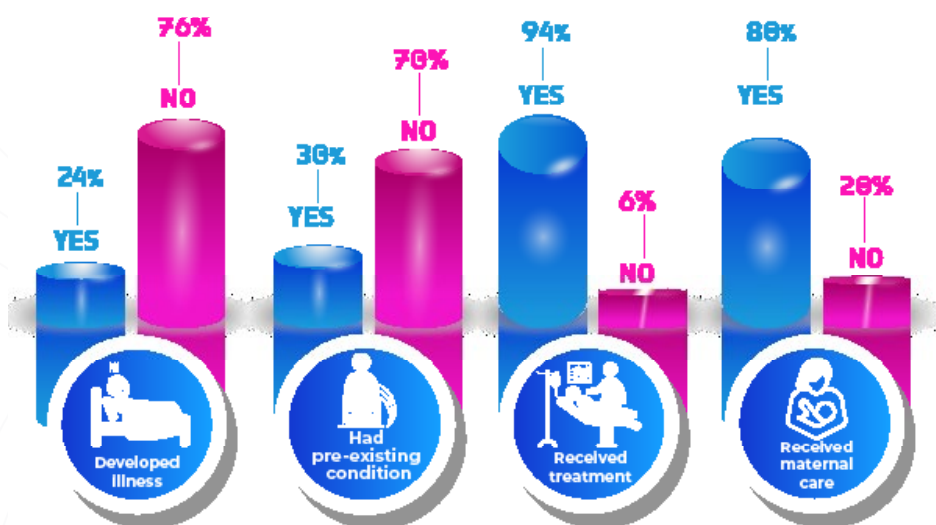


Figure 7: Access to health services

4.4.2.3 Nutrition

In terms of nutrition, 66 % of the respondents expressed their satisfaction with the food provided in detention and said it met dietary requirements, while 34% thought that the food was inadequate, stale, and unbalanced. The food provided in pre-trial detention, according to the respondents, included ugali, vegetables, beans, porridge, meat, githeri, and rice. Nearly all the respondents (99%) said they could access clean water for drinking as indicated in figure 8.

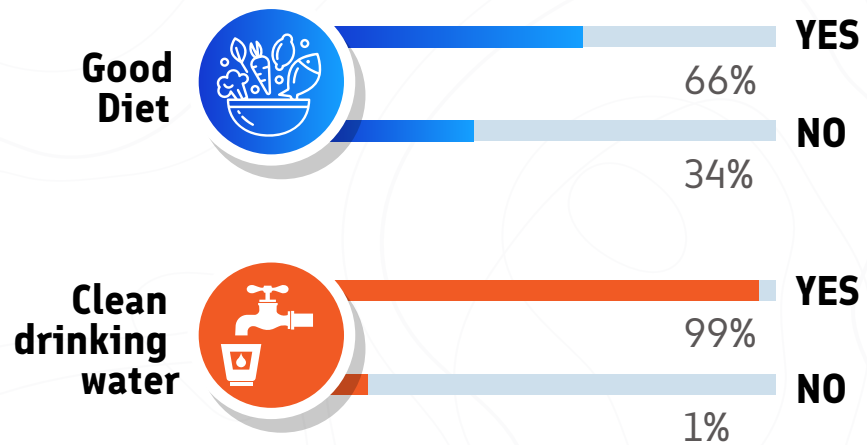


Figure 8: Nutrition

4.4.2.4 Other provisions

Additional rights of detainees as stipulated in regional and international instruments include the provision of educational facilities, family support, and religious observance. As figure 9 depicts, a slight majority (53%) of the respondents claimed that they had no access to vocational training and industry work in pre-trial detention. This figure is compared to 47% of those who acquired new skills in knitting, embroidery, catering, farming, beadwork, baking, soap-making, chicken rearing, business, basic computer, and driving, among others. The respondents were also asked to state whether they had the freedom to pray or exercise their religion. Of those who responded, nearly all (98%) said that there were provisions for religious observance in pre-trial detention. Concerning family support, 69% averred that they were granted daily rights of visitation by

their relatives while 31% did not enjoy such privileges. Some respondents clarified that they had not been visited by their relatives despite the provision of family support.

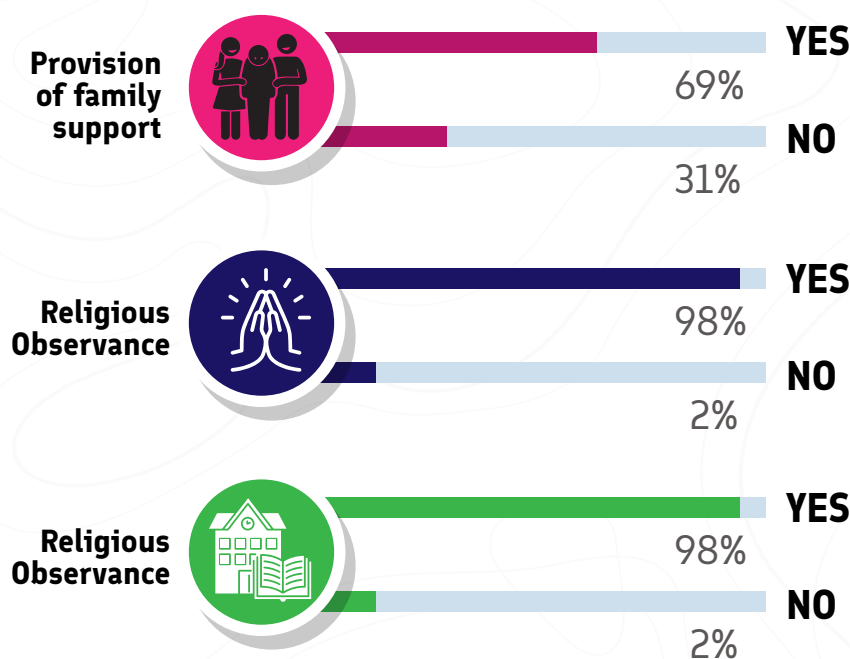


Figure 9: Family support, religious observance, and educational facilities

Overall, the survey results indicate that the Kenyan criminal justice system has, to a large extent, observed the regional and international guidelines and practices in the treatment of pre-trial detainees and prisoners. In referring to Rules 15, 16, 18, 22(1&2), 25, 58, 98, 104 under the United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), 2015, which apply to all prisoners (including pre-trial detainees) without discrimination, the specific needs and realities of women in pre-trial detention should be considered. These rules draw sufficient attention to hygiene, food and water, health care services, family support, and educational services for women in pre-trial detention.

While a sizeable majority of the survey respondents was satisfied with the conditions of pre-trial detention or prison, their counterparts in the lived experience group were largely dissatisfied. Participant 1, Participant 2, Participant 3, and Participant 6 said that strip and body cavity searches were undertaken in a



manner that was disrespectful of the human dignity and privacy of the individual. One of the participants shared her experience as follows.

“ The officers telling you to strip naked as you go into detention is very dehumanizing. There are people who are uncomfortable showing their body to just anyone. Maybe if you have one cop and someone else, it is understandable but not so many officers and everybody else.”

(Participant 3).

Rules 50, 51, 52, 53 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), 2015 prescribe the guidelines for searches of prisoners and cells. Rule 52(1) specifically states:

“ Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches. Intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.”

As the above rule recommends, the Kenyan criminal justice system has an obligation to take positive measures to address intrusive searches for women in pre-trial detention and prison. If there are no alternative measures, the strip and body cavity searches should be conducted in private. Accommodation and, by extension, overcrowding are contributing factors to poor prison conditions in Kenya and around the world. Poor accommodation and/or overcrowding weaken government efforts to provide basic human needs, such as hygiene, food, water, and healthcare for women in pre-trial detention. Several participants in the lived experience group shared their experiences. Participant 2, Participant 3, and Participant 5 were dissatisfied with the conditions of accommodation and especially overcrowding in pre-trial detention or prison. The participants said the wards were dirty, infested with fleas, and had little to no ventilation. The situation was far worse, according to one of the participants quoted below.

“ *My experience was a very hurtful one. I was taken to the cell for long-termers. There were mental cases in that cell, and that’s where the nightmare began. It was a noisy place, with no beds (you’re actually sleeping on the floor), overcrowding, and one toilet, which also doubled up as a bathroom. Water was scarce. It was a little hell on earth.* **”**

(Participant 5).

The lived experience participants also highlighted issues of sanitary facilities and personal hygiene in detention and prison. They observed that they were neither in good condition nor sufficient as one of the participants narrates.

“ *You share the toilet with men, who are not very clean. You don’t have a proper shower in place, so when I go to Kiambu there was no bathroom, where I could shower. It was just an open space for everybody. That was quite challenging.* **”**

(Participant 3).

The conditions described by Participant 3 are at odds with the hygiene and dignity of women and potentially exposes them to certain infectious diseases. Moreover, the Nelson Mandela Rules, 2015, proclaim that men and women shall be detained in separate institutions.¹¹¹ However, for an institution, which receives both men and women, the premise allocated to women shall be entirely separate. Secondly, the rules state that adequate bathing and shower installations shall be provided so that every detainee or prisoner can have a bath or shower as frequently as necessary for general hygiene.¹¹² The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010, bring more clarity to the special needs and treatment of women in pre-trial detention and prison.¹¹³ Rule 5 states explicitly:

¹¹¹ Above, No. 11(a)

¹¹² See Rule 16 of the *Nelson Mandela Rules*, (2015), 6.

¹¹³ UNODC, *The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, 2011), A/RES/65/229.



“ The accommodation of women prisoners shall have facilities and materials required to meet women’s specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating. ¹¹⁴ ”

Regarding access to health services, the participants had difficult experiences. Participant 2 had a pre-existing heart condition, and she underwent medical screening (for confirmation) in the process of admission to detention. The condition became worse during the length of her detention. On one occasion, she was unconscious for about twenty minutes. In the process, the nurse on duty administered the wrong medication. Participant 2 almost lost her life. Participant 5 was pregnant at the time of admission. Still, she was detained in an overcrowded cell with long termers, who were confirmed mental cases. The prison service only made separate provisions for her when she complained. She was transferred to a cell for women with special needs, where she stayed until she gave birth. Thereafter, Participant 5 was taken to another special cell for lactating mothers for another ten months. In the end, she was transferred to the main cells, which were no better as she explains herself.

“ I went to the main cells holding up to 70 women mostly with children. Again, no privacy, noisy place, and a harsh environment for the children. I went to court and swore an affidavit release for my son’s exit. Through the welfare office he was handed over to the father. ”

(Participant 5).

The Nelson Mandela Rules make provisions for preferential treatment of pregnant women and new mothers as with Rule 28, which prescribes special accommodation for all necessary prenatal and postnatal care and treatment.¹¹⁵ It also recommends arrangements, whenever practical, for children to be born in a hospital outside the prison. Participant 5 did receive preferential treatment as required by law except

¹¹⁴ Above, No. 9

¹¹⁵ Above, Rule 2(1), 2

for the postnatal care. Finally, the lived experience group findings also consisted of a foreign national's experience of pre-trial detention and prison in Kenya. Participant 4 was arrested for drug trafficking, which is a serious offence but her experiences illuminate the conditions of pre-trial detention in the context of this study. She shares her experiences as follows.

“ *I am a Burundian national. So, the first challenge was language barrier. I did not understand what the prison wardens and other detainees were saying. I had to learn the Swahili language while in prison. Even worse, I had an expensive phone and a passport, which were confiscated by prison wardens during my detention and incarceration. After serving my term, my phone and passport were never returned.* **”**

(Participant 4).

While it was unclear if Participant 4 was isolated, limited, or denied contact with the outside world, it would be necessary to note that The Nelson Mandela Rules clearly stipulate that all rules must be applied impartially regardless of race, colour, sex, language, religion, political, national or social origin, property, birth or any other status.¹¹⁶ In further consideration of what Participant 4 experienced upon her release, The Nelson Mandela Rules state in part:

“ *On the release of the prisoner, all money, valuables, clothing, and other effects shall be returned to him or her except in so far as he or she has been authorized to spend money or send any such property out of the prison. The prisoner shall sign a receipt for the articles and money returned to him or her.* ¹¹⁷ **”**

In view of the above findings, the Kenyan justice system should be able to address the broader criminal justice procedures towards ensuring respect for the human rights of foreign nationals and respond to their plight in law and practice as informed by regional and international treaties. The survey results and the lived experiences of incarcerated and formerly incarcerated women on conditions of pre-trial detention and prison, including discussions in the context of regional and

¹¹⁶ Above, Rule 2(1), 2

¹¹⁷ Above, Rule 67(2), 20



international instruments, were further validated by the key informants' views. To start with, all the key informants identified policy gaps in the Kenyan criminal justice system in relation to conditions of pre-trial detention and prison. According to the key informants, these gaps provide a setting for the rights violations of pre-trial detainees and prisoners. Generally, the key informants observed that there is a need to revamp detention and prison facilities in Kenya to guarantee the rights of accused and convicted persons pertaining to accommodation, hygiene, nutrition, health services, and other provisions as earlier discussed in this section. The quote that follows summarizes the key informants' views on the positive measures that the government should take.

“We need to improve and expand our prison facilities. I expect, for instance, a separate block for women, children, and another one for petty offenders. The government needs to refurbish the prison facilities expeditiously. In every police station, there is a gender desk and yet women, children, and men are detained within the same facility. We should sensitize the police officers, prison officers, and concerned government agencies about vulnerable groups who pass through the criminal justice system. Again, police and prison officers should not detain petty offenders together with individuals charged with robbery with violence.”

(Magistrate, female).

Another key informant highlights the special needs of women, including menstruation, pregnancy, and sanitation facilities that must be considered in the administration of justice. She recommends a policy shift within the Kenyan criminal justice system to address these special needs as captured in the quote below.

“Pre-trial detention policies should be gender-responsive. The criminal justice system must recognize the special needs that women in conflict with the law could have and include them in the policies. For the policies that already exist, there needs to be proper implementation and an accountability mechanism to measure the success of that implementation.”

(FIDA Lawyer, female).

This entire section has presented results and discussion on the rights and safeguards of accused persons with a view to minimizing prolonged pre-trial detention for women who commit petty offences. It has also underlined the conditions of pre-trial detention and prison in the context of regional and international legal instruments. It should also be noted that Principle 9 of the African Charter on the Decriminalization of Petty Offences in Africa underscores the inconsistency of petty offences are “with the right to dignity and freedom from ill-treatment on the basis that their enforcement contributes to overcrowding in detention or prison.”

¹¹⁸ The following section focuses on sentencing guidelines.

4.5 SENTENCING GUIDELINES

Sentencing has been a major issue of concern in the administration of justice in Kenya as evidenced by existing literature.¹¹⁹ The key reasons for lack of faith in the sentencing process as provided in literature include absurd, disproportionate and inconsistent sentences coupled with a lack of certainty and transparency in decisions made by judicial officers. To respond to these inadequacies, the Kenyan judiciary introduced the Sentencing Policy Guidelines (SPGs) in 2016.¹²⁰ More significant, the SPGs also address custodial and non-custodial sentences, underscoring in particular that the incarceration of petty offenders should be avoided as “the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody”. The SPGs further note that short sentences are disruptive and contribute to recidivism.¹²¹ Other policy documents that inform the results and discussion in this section include the Criminal Procedure Bench Book, 2018,¹²² serving as a quick reference for judges and magistrates presiding over criminal proceedings and The Judicial Service Act (no.1 of 2011), which contains formulated policies relating to the administration of justice.¹²³ Another important policy document is Alternative Justice Systems Framework Policy, 2020, which enhances access to justice in a holistic manner.¹²⁴

¹¹⁸ The African Commission on Human and Peoples’ Rights, *Principles on the Decriminalization of Petty Offences in Africa*, (2017) 13.

¹¹⁹ For further reading see: Mutunga, W., 2016, p. 2, Msagha, M., 2016, p.3, Indiazi, A., 2017, and Otieno, M., 2017

¹²⁰ For further reading of the SPGs see: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf. Accessed 12/11/2021.

¹²¹ Above, p. 21(7.18)

¹²² See policy document: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryCriminalProcedureBenchBook.pdf>. Accessed 17/11/2021

¹²³ See policy document: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/SentencingGuidelines.pdf>. Accessed 17/11/2021

¹²⁴ See policy document: <https://www.judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/>. Accessed 17/11/2021



The discussions in the section also take into account a number of international legal instruments, including but not limited to The Bangkok Rules, 2010 and The Tokyo Rules, 1990, which seek to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.¹²⁵

Of significance, the results and discussion presented in the pages that follow are aligned to focus areas in the sentencing hearing, determination of the sentence (custodial versus non-custodial sentence), and alternative sentencing.

4.5.1 Sentencing hearing

Article 50 (1) of the Kenyan constitution recognizes every person’s right to “have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.¹²⁶ Article 50 (2) proceeds to list the accused person’s rights, including the right to have the trial begin and conclude without unreasonable delay.¹²⁷ The results and discussion that follow speak to the length of the sentence hearing and the level of adherence to sentencing guidelines as stipulated by law, policy documents as well as regional and international legal instruments. This section is attentive to the findings of the lived experience group and key informant interviews. To start with, Participant 2, Participant 3, participant 5, and participant 6 in the lived experience group narrated the elaborate process of sentencing hearing. Participant 2 observed that since she was out on bail, she attended her sentencing hearing as instructed. Unfortunately for her, the entire process (sentencing hearing) took seven years, leading to the loss of income. Moreover, Participant 2 alleged that there was a lot of bribery in court and that the judge was compromised. She was also allegedly asked to part with Ksh. 150,000 for her case to be dropped, and if not, she would be jailed. She declined. For Participant 3, the sentencing hearing took six months, during which she had to commute from Lang’ata Women’s Prison to Kiambu court. However, it proved a waste of time and money because the complainant never showed up even once throughout the six months. Participant 5 said her sentencing hearing took two years but felt the due process was followed. Still, she was disappointed that the judge refused to grant the complainant’s wishes for an out-of-court settlement.

¹²⁵ See international instrument: <https://www.ohchr.org/documents/professionalinterest/tokyorules.pdf>.

¹²⁶ Above, Chapter Four- The Bill of Rights, Part 2. Rights and fundamental freedoms

¹²⁷ Above, Section 2 (e)

According to Participant 5, the court should provide a platform where the complainant and defendant are heard fairly. Participant 6 herself describes her experiences during the sentencing hearing as follows.

“The sentence hearing took over four years (2005-2009). I fell pregnant in between that period. Since the court took too long to hear the case, the complainant filed a case against the magistrate and so we moved to another magistrate. I was later acquitted but got rearrested on the court premises for the same case. So, the case started all over again but diverted to the Nairobi Law Courts. To me the process was unfair. I don’t understand why I was moved from Makadara Law Courts to Nairobi Law Courts during the hearing. Also being rearrested at the court premises after being acquitted was unfair.”

(Participant 6).

Based on the aforementioned lived experiences of participants, it is possible to suggest that the right to a trial without undue delay was violated. This right is found in several regional and international legal instruments such as the African Charter on Human and People’s Rights (Article 7(1d) and ICCPR (Article 14(3c). In summary, the right to a trial without undue delay is about the time by which a trial should commence and the time by which it should end and the judgment rendered. The events narrated by the participants, including bribery, an unresponsive justice system, and transfer of court proceedings to other venues, contributed to the undue delay of their trials. Participant 5 also expressed her disappointment with the judge refusing to grant the complainant’s request for an out-of-court settlement, which is at odds with Principle 3(3.4) of the SPGs, where both the offender and the victim should participate and inform the sentencing process. The key informants, for their part, provided insights into the sentencing hearing process in support of the participants and with specific reference to women who commit petty offences. They also concurred with the policy document guidelines outlined in the previous section. FIDA Advocate (female) averred that sentencing hearings for petty offences needed to be expedited to reduce the backlog in court. She proposed a mechanism through which the prosecutors can hear and judge the cases instead of taking them to the magistrates. As for the Magistrate (female), the SPGs give allowance for the court to ask for some discretion when it comes to petty offences. Still, she pointed out that there was a need for clearer guidelines such that the magistrate could listen to a petty offender immediately, even without asking for a social inquiry report. Furthermore, ICJ Lawyer (female) in the quote that follows argues for the simplification of the entire sentencing hearing process to effectively administer justice to the accused person.



“At times, the court process is hectic and complex for an ordinary Kenyan to understand. In fact, the language of the court is challenging to a first-time offender. The accused person is required to attend several court sessions, and the magistrate may not explain the significance of these hearings. It is the work of the legal representative to explain the proceedings, procedures, and expectations. It is worse if one does not have legal representation.”

(ICJ Lawyer)

The results and discussion in relation to the sentencing hearing process confirm that the Kenyan criminal justice system is obligated to monitor and fully implement the SPGs, the Judicial Service Act, and the Alternative Justice Systems Framework Policy, among others, while adhering to the regional and international laws and standards.

4.5.2 Determination of the sentence

The magistrate or judge has to determine the sentence, be it custodial or non-custodial, by referring to sentencing guidelines and the law. Therefore, the sentence determination process receives considerable attention in domestic, regional, and international legal instruments. The relevant instruments that provide the statutory framework for the determination of sentences in Kenya include the Penal Code, Rev. 2012, the Criminal Procedure Code (CPC), Rev. 2012, the SPGs, and the Criminal Procedure Bench Book, 2018, just to name a few. Several regional and international instruments also prescribe guidelines on the sentencing process, and they include The Tokyo Rules, 1990, The Bangkok Rules, 2010, The Nelson Mandela Rules, 2015, The ICCPR, 1966, and The African Commission on Human and Peoples' Rights (ACHPR), 1999.

Despite the existing guidelines mentioned above, there are gaps in the understanding of judicial discretion and how it is put into practice. The results and discussion in this section provide an understanding of how judicial officers determine sentences across the full range of sentencing options. Moreover, the discussion highlights some mitigating factors that may move judicial officers to impose lesser sentences, especially in the context of women who commit petty offences in Kenya.

The study could not establish the procedures involved in the determination of sentences based on the responses obtained from the survey participants. However, the lived experience group, key informants, policy documents, and legal instruments provided insights into the judicial determination. For their part, the survey respondents indicated that the length of sentences imposed was based on the seriousness of the offence committed. Of the 147 participants, who responded to the question, 49 (33%), representing a slightly significant majority, comprised women who had committed petty offences and were serving or had served shorter sentences spanning seven months or less. Those who were serving or had served between eight and fifteen months were 20%, while 12% were sentenced to between sixteen and twenty-three months. The respondents who got sentences of between twenty-four and thirty-seven months were 15%, while 19% were sentenced to thirty-eight months and above in prison, as shown in figure 10. It would be useful to mention that according to the Penal Code, Rev. 2012, the majority of respondents who were sentenced up to twelve months (one year) in prison were guilty of a misdemeanour, while some may have become recidivists.¹²⁸ Most petty offences fit within the definition of a misdemeanour in the Penal Code.¹²⁹ Similarly, the Penal Code imposes a sentence of up to 36 months (3 years) in prison for a misdemeanour such as obtaining by false pretences.¹³⁰ As such, it is also possible to conclude that some of the respondents who got sentences of up to 36 months had committed petty offences. The formerly incarcerated respondents added that they were released for various reasons, including payment of fines, decongestion of prison facilities during the COVID-19 pandemic period (early release), and on completion of the sentence imposed.

Length of sentences

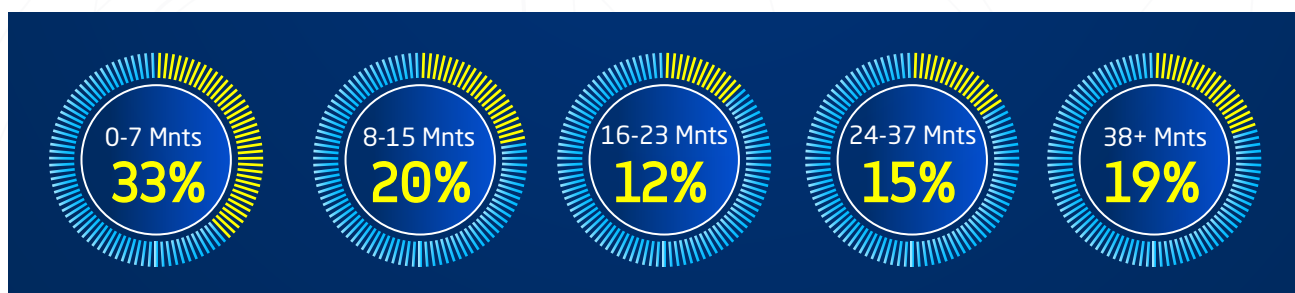


Figure 10: Length of sentences

¹²⁸ Above, see Section 175(i) and Section 182 (a) (b) (d) (e)

¹²⁹ Above, see Section 4, 6-16

¹³⁰ Above, see Section 313, 6-92



The lived experience group provided insights into determination of the sentence, with the participants giving an account of the length of sentences imposed with respect to the offences they committed. Participant 1 and Participant 3 were charged with obtaining money through false pretences. Participant 1 was sentenced to two years in prison but served one year and four months after getting a remission. However, Participant 3 was not sentenced because, throughout the sentencing hearing, the complainant never showed up in court. This meant that Participant 3 was detained at Lang’ata Women’s Prison for six months then released when the hearing fell through. Participant 2 (theft), Participant 4 (drug trafficking), and Participant 5 (grievous harm) got longer sentences ranging from five to eighteen years. Participant 6 (stealing) got a non-custodial sentence because she gave birth around the time of sentencing. She was given community service orders (CSOs) for one year at a secondary school, where she did cleaning work. Participant 7 was remanded for seven days for impersonation. Her accuser was a police officer who never recorded the offence of impersonation in the arrest register. Consequently, there was no sentencing hearing in court.

The survey and lived experience group results infer that a significant majority of the respondents got custodial sentences despite the large number of petty offences committed. As earlier quoted, the SPGs recommend non-custodial sentences for petty offences to avoid recidivism.¹³¹ Still, the SPGs allow judicial discretion for a custodial sentence if it is the most appropriate. However, to determine the length of the sentence, the court should consider aggravating and mitigating circumstances.¹³² Establishing these aggravating and mitigating circumstances was beyond the scope of the study, but the policy directions are clear about delivering non-custodial sentences for petty offences. The above assertion is further supported by The Bangkok Rules, which offer important guidelines on sentencing women offenders. For instance, Rule 61 states:

“When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women’s caretaking responsibilities and typical backgrounds.”¹³³

¹³¹ See section 5.5

¹³² The SPGs, see paragraphs 23.3 , 23.4, 23.5, 23.6, 23.7, 23.8, 23.9 (2016): 48-50.

¹³³ Above, No. 19

As the study results suggest, judicial officers in Kenya seem hesitant to adhere to the above rule in referring to non-custodial measures for women who commit petty offences. Additionally, the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990, provide a set of basic principles to promote the use of non-custodial measures. The Tokyo Rules specifically state in part:

“The criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.”¹³⁴

The above rule shows that there are opportunities for the Kenyan criminal justice system to consider non-custodial sentences for women who commit petty offences throughout the pre-trial and sentencing processes. The key informants reinforced the SPGs and the stipulated rules in international legal instruments. One of the key informants affirmed that a magistrate should not hand a custodial sentence to a first-time offender unless the offence committed is serious. She also provides a practical example of dealing with petty offences as follows.

“A petty offender found in possession of illicit brew should be handed a non-custodial sentence no matter the circumstance. However, in certain cases, some magistrates demand bribes without which the petty offender is imprisoned for up to six months.”

(Magistrate, female).

Another key informant concurs with the above assertions but also advocated for the abolishment of bail or bond in reference to petty offences and as justified in the quote below.

¹³⁴ Above, Rule 2.3



“Petty offences usually go before magistrates, who will not necessarily explore all the options other than a jail sentence. Secondly, they may impose a fine, which the sentencing guidelines allow, but sometimes it is exorbitant and the arrested person ends up in custody.”

(Lawyer 1, female).

Lawyer 1 also discussed the impact of corruption on the criminal justice system in Kenya. She argued that despite the judiciary putting in place measures to deal with the menace, corrupt magistrates still exist within the system. Lawyer 1 further revealed that there were situations where a magistrate exercised unrestrained judicial discretion in sentencing without relying on the stipulated sentencing guidelines. Such a magistrate may still impose a harsher sentence because the offender could not afford to pay a bribe or rejected the possibility of doing so outright. Overall, the results in this section prove that a custodial sentence is still the most preferred form of punishment for petty offences in the Kenyan criminal justice system. It is possible to argue that The Tokyo Rules and The Bangkok rules, for instance, cannot be applied equally in all places and at all times owing to the legal, social, economic and geographical conditions of individual countries and regions. However, the Kenyan criminal justice system has an opportunity to draw on the available international legal instruments in an effort to overcome practical difficulties in their application and to ensure access and administration of justice for women who commit petty offences. The following section presents results and discussion on a wide range of non-custodial measures relative to petty offences in Kenya.

4.5.3 Alternative sentencing

One of the fundamental aims of The Tokyo Rules requires the Member States to develop non-custodial measures within their justice systems to reduce the use of incarceration and to justify criminal justice policies. These measures should also safeguard human rights and facilitate social justice as well as the rehabilitation needs of the offender.¹³⁵ The Tokyo Rules further provide sentencing dispositions for judicial authorities to consider while disposing of cases.

¹³⁵ Above, Section 1 (1.5)

These dispositions include verbal sanctions such as warning, conditional discharge, fines, restitution to the victim, suspended or deferred sentence, probation, community service orders (CSOs), and house arrest, among other options.¹³⁶ Similarly, The Bangkok Rules encourage the Member States to “adopt legislation to establish alternatives to imprisonment [for women offenders] and to give priority to the financing of such systems and their implementation”.¹³⁷ In view of the above recommendations, the study’s primary participants were asked to state whether the court considered non-custodial measures during the pre-trial and sentencing processes. The results and discussion are presented in the paragraphs that follow.

Of those who responded to the survey question, 34% indicated that the court offered alternatives to imprisonment compared to 62% who said such options were unavailable, as depicted in figure 11. Few respondents (3%) did not know whether such options existed, which suggests they were uninformed about the sentencing process.

Were there options or alternatives to imprisonment?

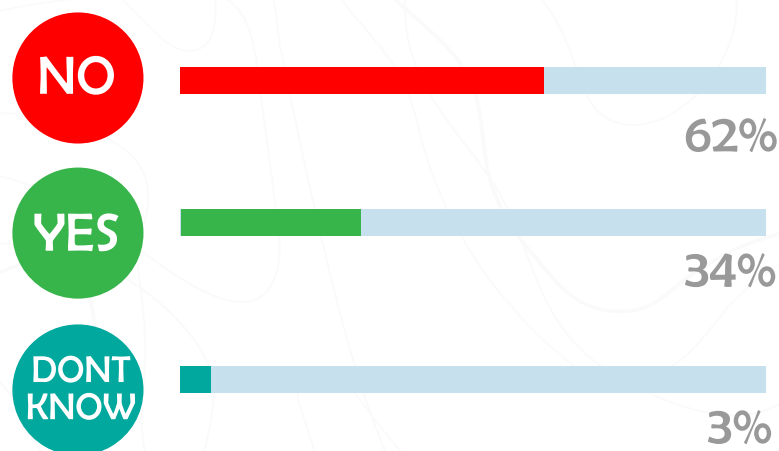


Figure 11: Alternatives to imprisonment

¹³⁶ Above, Section 8 (8.2) (a) to (i)

¹³⁷ Above, No. 5 (4)

The significantly high number of the respondents who did not get non-custodial sentences supports the view that the Kenyan criminal justice system still considers incarceration the most appropriate punishment for those who offend, including women petty offenders. Yet, evidence shows that Kenya has the best-developed infrastructure in the East African region for the implementation of alternative sentences. This infrastructure is due in large part to a major Probation and After-care Department within the Ministry of Interior and Coordination of National Government, which is responsible for the supervision of non-custodial court orders such as probation and community service orders.¹³⁸ The above explanation, therefore, confirms that the Kenyan government has the capacity to finance an alternative justice system and ensure its implementation. It is expected that such efforts are aimed at reducing the use of incarceration, especially for petty offenders, and to rationalize criminal justice procedures.

It was also necessary to ask the survey respondents if they had received support from probation officers. The relevance of this question is predicated on the role of the Probation and After-care Service department in providing advisory reports to court for the determination of bail and bond terms, sentencing, release, reintegration, and rehabilitation of offenders, including those serving various non-custodial sentences in the community.¹³⁹ As shown in figure 12, a significant majority (65%) of the respondents stated that they had no access to probation services during the bail/bond, pre-trial, and sentence hearing processes compared to 35% who had a meaningful engagement with a probation officer.

Did you engage with a probation officer?

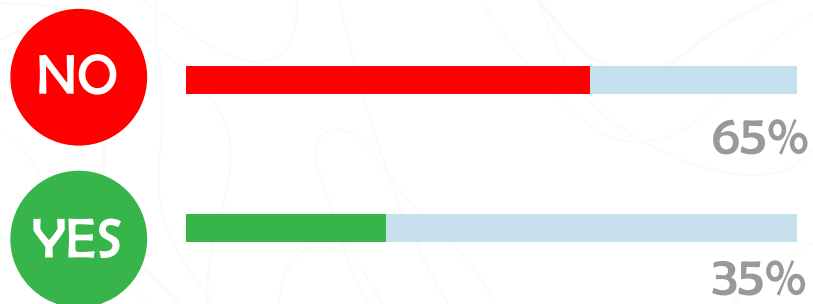


Figure 12: Access to probation services

¹³⁸ See Penal Reform International (PRI), 2012. Alternatives to imprisonment in East Africa Trends and challenges, London: PRI, p. 9.

Link: <https://cdn.penalreform.org/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf>. Accessed: 16/01/2022.

¹³⁹ For more information see: State Department for Correctional Services, Probation & Aftercare Services, (Nairobi: SDCS), <https://www.probation.go.ke/>. Accessed: 20/02/2022

The majority of those who had no access to probation services felt that they had limited options in their pursuit of justice. Still, some respondents who had interacted with probation officers were dissatisfied with the services received, stating that the probation officers and the court had not given their cases due consideration or their concerns were not even presented before the magistrate. Other respondents complained that their sentencing reports were still pending, while the rest had requested in vain (through the probation officers) that the court considers the time they had served in pre-trial detention while determining the sentence. As such, a significant majority of the respondents expected the probation officers to actively advocate for their rights. Overall, the majority of respondents who had received probation services felt that their interaction with probation officers did not provide alternatives in access and administration of justice. This result suggests that the respondents had little or no knowledge of the role of probation officers, as discussed in the previous paragraph, thus pointing to the inadequacies of the Kenyan criminal justice system.

Since the probation officer assists in preparing the social reintegration plan by carrying out an assessment of the offender, the victim and the community, the formerly incarcerated women were asked if prior to their release, they had been informed about and taken through the social reintegration process. Of those sampled, 42% indicated that they had received some form of guidance and counselling on how to cope with life after incarceration. A significant majority (58%) were neither informed nor taken through the process of reintegration into society, as shown in figure 13. The result supports the view that the Probation and After-care Department has not fully implemented government policies and procedures related to social reintegration.

Were you informed about coping with life after prison?

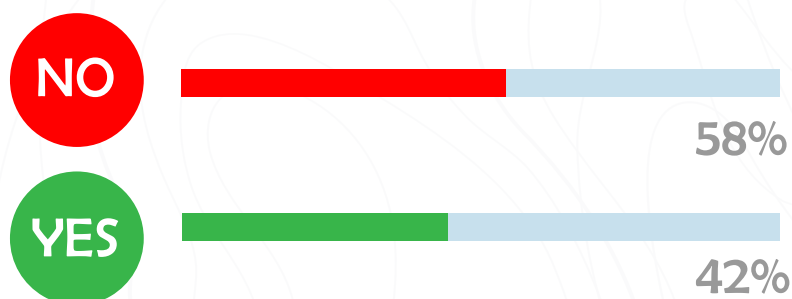


Figure 13: Access to social reintegration services



Participants in the lived experience group discussed issues of alternative sentencing and suggested various options based on their experiences. Participant 1 said that more investigations should have been done in her case for the real offender to be arrested and arraigned. Participant 1 added that before sentencing, the magistrate had advised her and the women who had accused her of fraud to settle the matter out of court. However, the women declined, and Participant 1 was eventually incarcerated. Therefore, according to Participant 1, the magistrate had presented a non-custodial measure, but the complainants felt that incarceration was the best form of punishment. For her part, Participant 2 got a custodial sentence but said the court should have considered an alternative sentence because she had a serious heart condition that resulted in frequent hospitalization during the period of incarceration. Participant 2 was only released after her case was aired on social media, prompting well-wishers to raise money to pay the fine imposed. Participant 3 did not understand why she was incarcerated for six months, yet she had already repaid the complainant Ksh. 200,000, and an agreement was already in place to clear the balance. Furthermore, Participant 3 said she was a first-time offender, and failure to repay the balance owed to the complainant was a petty offence. As such, the custodial sentence was unwarranted. The above experiences can be best understood in the context of policy documents and legal instruments. For instance, the SPGs prescribe several factors that should be considered in deciding whether to impose a custodial or a non-custodial sentence, including the gravity of the offence and the criminal history of the offender.¹⁴⁰ Regarding the gravity of the offence, the SPGs state that in the absence of aggravating circumstances, a sentence of imprisonment should be avoided in respect to misdemeanours.¹⁴¹ As for the criminal history of the offender, the SPGs advise the court to consider non-custodial sentences for first offenders.¹⁴² These two factors apply to the case of Participant 3, who was charged with a misdemeanour and was a first-time offender. In relation to Participant 2, the Probation of offenders Act, Rev. 2012 states, in part:

¹⁴⁰ Above, 7.19, p.2

¹⁴¹ Above, 7.19 (1)

¹⁴² Above, 7.19 (2)

“Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to... the health or mental condition of the offender,... it is expedient to release the offender on probation. The court may convict the offender and make a probation order; or without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.”¹⁴³

From the above explanation, it is possible to argue that there was an opportunity for the court to convict Participant 2 and make a probation order, then require the offender to enter into a recognisance, with or without sureties. In other words, the court could have exercised the power to permit conditional release of Participant 2. The key informants also provided more insights into the above discussions. Lawyer 1 (female) speaks directly to issues of alternative sentencing as captured in the following quote.

“I believe prison officers easily outnumber probation officers in the Kenyan criminal justice system. Perhaps that is one reason why magistrates do not impose probation or community service orders. Therefore, it is necessary to have a probation and aftercare service department properly funded and properly staffed because it will take many offenders off the hands of prison officers hence easing congestion in prisons.”

(Lawyer 1, female).

The above explanation is an indication that the Kenyan government has not prioritized the funding of Probation and After-care Service department. Lawyer 1 further observes that the Kenyan justice system needs to take seriously the process of reintegrating the formerly incarcerated persons into society and also promote restorative justice between the offender and his/her family, the complainant and his/her family, and the community at large. FIDA Advocate

¹⁴³ Above, see 4 (1) (a); (b), p.5



(female) posits that there is a societal expectation which demands that people who are in conflict with the law should be incarcerated to pay for their crimes. The advocate calls for a change in attitude and perception towards offenders and more focus on capacity building steered by prosecutors, judicial officers, and the police. These efforts would enable the adoption of alternative justice systems. Human Rights Defender 1 (male) supports the call by Lawyer 1 to finance the alternative justice system and recruit more personnel to assist in its implementation. This recruitment should also include paralegals who are mostly underfunded. Human Rights Defender 1 further submits that the Legal Aid Act, 2016, which prescribes the application of an alternative justice system, empowers the criminal justice system to adopt various mechanisms of alternative sentencing, as discussed in the quote that follows.¹⁴⁴

“We have what we call Court Annex Mediation, where the magistrate takes the accuser and the offender to a separate room, where they discuss and possibly come to an agreement. The court may also have an alternative justice suite where they have a committee of community elders who preside over and mediate petty offences.”

(Human Rights Defender 1, male).

The chief magistrate (male) hints that there is no clear-cut mechanism of alternative dispute resolution in petty offences. In some cases, people will try to solve the issues between themselves, but petty offences are between the police and the arrested person. The only alternative to this, according to the Chief magistrate, is for the OCS to interrogate the arrested person, make a decision, and discharge him or her. Going to court should be a last resort. However, the Senior prosecution counsel (male) seems to disagree with the Chief magistrate on the view that law enforcement should dispense with petty offences during the process of arrest and custody. Instead, he argues:

¹⁴⁴ For more information on the Legal Aid Act, 2016 see: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LegalAidAct_No._6_of_2016.pdf

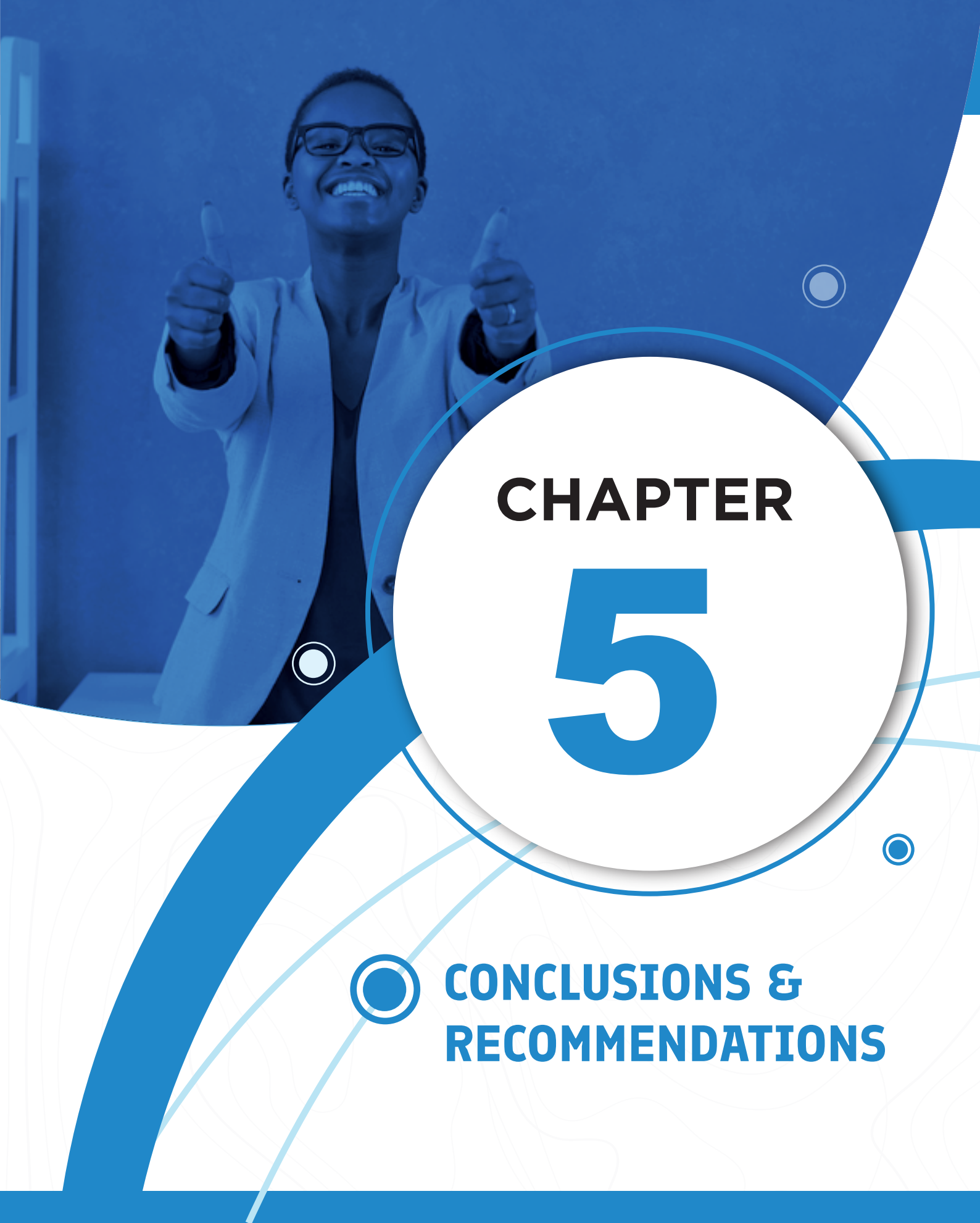
“There is a divergence of legal theory in the sense that the prosecutors may acknowledge that a case or the offence should be diverted and not taken to court, but that would also contradict the existing laws. Still, there is lack of administrative diversion options for some of the petty offences but in case a petty offence is not diverted, the court will sentence the offender to community service or to probation.”

(Senior prosecution counsel, male).

ICJ Lawyer (female) disagrees with the Senior prosecution counsel, stating clearly that the diversionary guidelines are developed by the Office of the Director of Public Prosecutions to guide on how to divert petty offences outside the court or even to prescribe other methods of punishment as opposed to imprisonment. The magistrate (female) reinforces the above assertion, insisting that there are options available in law like diversion and bargaining. She says it is up to the prosecutor to look at these guidelines and sensitize people on the available options. In the end, the Senior prosecution counsel holds that it would be better for the criminal justice system to sensitize members of the public on how to address some petty offences. He calls it “a community approach toward addressing petty offences”. The foregoing debate confirms that opinion is still divided on how petty offences should be dealt with in the Kenyan criminal justice system despite the various provisions in domestic and international law.

4.6 CONCLUSION

In summary, the results and discussion chapter has provided a setting for the criminal justice system in Kenya to consider the amendment of laws and policies to deal effectively with petty offences and avoid overcrowding in prisons. The discussions have also revealed that there is a need to adopt a multi-sectoral approach in dealing with petty offences instead of wholly depending on the court, which is often limited. For example, legislators and policy-makers can be included in these discussions to help them understand the inner workings of the criminal justice system and figure out how the rights of women who commit petty offences can be protected in their efforts to access justice.



CHAPTER

5



**CONCLUSIONS &
RECOMMENDATIONS**

5.1 INTRODUCTION

In this chapter, the conclusions and recommendations derived from the results and discussion of this study on opportunities in access and administration of justice for women who commit petty offences in Kenya are explained. The conclusions were based on the objectives, normative research questions and results of the study, while the recommendations draw on the conclusions and aims of the study.

5.2 SUMMARY OF THE STUDY

The study adopted a triangulation research design consisting of a survey, the lived experienced group, key informant interviews, and document analysis of existing domestic law and international legal instruments to achieve the study objectives and answer the normative research questions. A survey was conducted with conveniently sampled incarcerated and formerly incarcerated women drawn from ten counties in Kenya. Participants in the lived experience group were purposively sampled from a population of formerly incarcerated women. The researchers used a semi-structured interview guide to obtain data from the lived experience group. Key informants were also purposively sampled based on their knowledge and experience of the Kenyan criminal justice system. All the interviews were conducted in English and Kiswahili, tape-recorded, transcribed, and analyzed thematically. Document analysis involved the interpretation of several policy documents and legal instruments related to access and administration of justice for women. Themes and categories that emerged from the data were aligned to existing literature obtained from the Internet, including journal articles, research reports, policy documents, and legal instruments (regional and international). The research team ensured the trustworthiness of the data and upheld ethical considerations.

The aim of this study was to advocate for the implementation of non-custodial sentencing for women who commit petty offences. The following objectives drew on the aim described above.

- To identify the legal standards and procedures that law enforcement officers apply in the arrest and pre-trial detention of women who commit petty offences in Kenya.



- To establish the cross-cutting issues that law enforcement and judicial authorities should consider when administering justice to women who commit petty offences in Kenya.
- To assess the implementation of the available guidelines on arrest, detention, and sentencing of women who commit petty offences in Kenya.
- To determine the mechanisms of alternative dispute resolution that should be applied when administering justice for women who commit petty offences.

Three themes deductively emerged from existing literature and legal instruments. They included conditions of arrest, conditions of pre-trial detention, and sentencing guidelines. These themes consisted of eight major categories, namely:

- Types of offences committed
- Cross-cutting issues in access and administration of justice
- Procedural guarantees and the rights of arrested persons
- Length of detention
- Conditions of detention
- Sentencing hearing
- Determination of the sentence (custodial versus non-custodial sentence)
- Alternative sentencing

The results were discussed according to the themes and major categories that emerged from the literature survey and data.

5.3 SUMMARY OF RESULTS

The study confirmed that low-income women, who also happen to be the sole breadwinners of their households, are more likely to commit petty offences. However, the partial compliance with the guidelines on the conditions of arrest in reference to the types of offences committed by these women is a major contributing factor to the increasing number of petty offenders congesting Kenyan prisons.

Regarding cross-cutting issues, it emerged that the gender dimensions, which inhibit access to justice for women who commit petty offences, influence the decisions taken by law enforcement during arrest, police bond, and pre-trial detention. These decisions often lead to the violation of the rights of women who commit petty offences. In terms of economic level, the results confirmed

that economically marginalized women experience the worst of divergent law procedures within the criminal justice system in Kenya. Furthermore, poor women are less likely to engage the criminal justice system due to the high monetary costs involved in the access and administration of justice. Crucially, the results established that the Kenyan criminal justice system cannot fully guarantee the rights of persons with disabilities for effective access to justice at all phases of the administration of justice, including at the point of arrest and initial investigations. As for nationality, it was concluded that migrant and immigrant women have little or no meaningful access to justice within the Kenyan justice system because they have not been granted the right of recognition before the law.

It was clear from the results that Domestic law (the Constitution) and the guidelines contained in regional and legal instruments on procedural guarantees and the rights of arrested persons were not strictly observed or were applied selectively within the Kenyan justice system. Moreover, a significant majority of female petty offenders were not notified of their rights and the procedural guarantees were not applied in a way that ensured that the accused persons brought to trial were protected from the violation of their rights and freedoms. Also, for the majority of the respondents, bail was set at an exorbitant rate such that the accused person was unable to afford it.

The study concluded that the Kenyan justice system had done relatively well to improve the conditions of pre-trial detention, especially in terms of reducing the length of time spent in pre-trial detention as required by domestic and international legal instruments. The justice system has also largely adhered to regional and international guidelines and practices in the treatment of pre-trial detainees and prisoners in relation to hygiene, healthcare, nutrition, family support, religious observance, and provision of educational facilities. However, there were also significant cases, where the rights of accused persons in pre-trial detention were violated.

When it comes to the sentencing process, the study confirmed that a custodial sentence is still the most preferred form of punishment for petty offences in the Kenyan criminal justice system. It also emerged that the interpretation of the law is varied among legal practitioners, law enforcers, and judicial officers on the legal standards and procedures that should be followed in the administration of justice for women who commit petty offences. Yet, there are explicit provisions in domestic and international law recommending non-custodial sentences for persons who commit petty offences. Nonetheless, the study concluded that the Kenyan government has the capacity to finance an alternative justice system and ensure its implementation.



5.4 RECOMMENDATIONS

The study makes the following recommendations for guidelines on conditions of arrest, conditions of pre-trial detention, and sentencing guidelines for women who commit petty offences, in line with the existing legal standards and practices.

5.4.1 Guidelines on conditions of arrest

The following recommendations refer to the types of offences committed, cross-cutting issues in access and administration of justice, and procedural guarantees and the rights of arrested persons.

- To decrease the number of petty offenders congesting Kenyan prisons, law enforcement officers should fully comply with the guidelines on the conditions of arrest in reference to the types of offences committed and desist from making arbitrary arrests.
- During the bond decision-making process, police officers should consider cross-cutting issues of gender, income level, poverty, disability, and nationality, especially in relation to women who commit petty offences.
- The criminal justice system in Kenya should integrate and mainstream cross-cutting issues throughout the justice chain. For example, the integration of gender, income level, poverty, disability, and nationality raises important questions about inequalities being reproduced in the Kenyan justice system that inhibit fair, impartial, and non-arbitrary treatment for women who commit petty offences.
- There is a need to sensitize law enforcement officers about the procedural guarantees and the rights of women who commit petty offences during the process of arrest.
- The Kenyan justice system should simplify the legalese used in the Constitution and the Criminal Procedure Code to ensure that women who commit petty offences can effectively access justice and know their rights.
- Since the study has revealed that the majority of women who commit petty offences are either illiterate or semi-illiterate, the criminal justice system in

Kenya should institute a framework that enables women in conflict with the law to know their human and legal rights from the point of arrest, pre-trial detention, and sentencing.

- The study calls for the decriminalization and/or depenalization of petty offences such as loitering, hawking, and other livelihood related offences, which should no longer be in the statute books.
- The study recommends the completion of the revision of the Criminal Procedure Code, the Penal Code, the Prisons Act, the laws relating to county licensing laws and regulations, the decriminalization of civil matters, and the Anti-counterfeiting laws, amongst others.

5.4.2 Guidelines on conditions of pre-trial detention

The recommendations below focus on the length and conditions of detention.

- The Legal Aid Act, 2016, which establishes a legal institutional framework to promote access to justice and legal aid services to vulnerable groups including poor or needy persons and, women should be fully implemented in accordance with the law. The available legal aid services are still inadequate and cannot cater for the majority of needy women who commit petty offences.
- The Kenyan justice system should comply with the guidelines set out in regional and international legal instruments to ensure that detainees charged with petty offences can access quality legal services under conditions that guarantee their rights.
- Para legals have an important role in the provision of legal services to persons who are in conflict with the law, including women who commit petty offences. Therefore, they (para legals) should be granted similar rights and facilities afforded to lawyers to enable them to carry out their functions effectively.
- The Kenyan justice system should establish a legal framework that will guide the pre-trial detention of individuals (especially women) who commit petty offences. The absence of this legal framework has so far intensified the violation of the rights of accused persons, and certainly women in pre-trial detention.



- The justice system in Kenya has an obligation to take positive measures to address intrusive searches for women in pre-trial detention and prison. If there are no alternative measures, the strip and body cavity searches should be conducted in private.
- The justice system should bring to account law enforcement officers, who do not treat women offenders humanely and with respect for their inherent dignity in accordance with the relevant legal instruments.
- The Kenyan Government should address the broader criminal justice procedures towards ensuring respect for the human rights of foreign nationals and respond to their plight in law and practice as informed by regional and international treaties.
- There is a need to revamp detention and prison facilities in Kenya to guarantee the rights of accused and convicted persons pertaining to accommodation, sanitation, nutrition, health services, and other special needs of women.
- Pre-trial detention policies should be gender-responsive. The criminal justice system must recognize the special needs that women in conflict with the law could have and include them in the policies. For the policies that already exist, there should be proper implementation and an accountability mechanism to measure the success of that implementation.

5.4.2 Sentencing guidelines

The following recommendations pertain to sentencing hearing, determination of the sentence, and alternative sentencing.

- The SPGs give allowance for the court to ask for some discretion when it comes to petty offences. Still, there is a need for clearer guidelines such that the magistrate can listen to a petty offender immediately, even without asking for a social inquiry report.
- Considering that Section 176 of the CPC enjoins the court to promote reconciliation to parties in a misdemeanour, even on its own motion, the criminal justice system should accelerate the training of mediators and the increased accelerated operationalization of ADR in court and at police stations

for non-violent, petty offences, and poverty related crimes.

- To expedite the sentencing hearing of petty offences and consequently reduce backlog in court, the Kenyan justice system can consider mechanisms through which the prosecutors can hear and judge cases instead of taking them to the magistrates. Similarly, law enforcement officers can interrogate the arrested person, make a determination, and discharge him or her. Going to court should be a last resort.
- The study advocates for the institutionalization of petty offences courts within the existing framework of the criminal justice system to ensure that petty offences are tried under an accelerated and simplified procedure for greatest possible efficiency of the judicial process.
- The Kenyan criminal justice system should monitor, fully implement, and properly disseminate the SPGs, the Judicial Service Act, and Alternative Justice Systems Framework Policy, among others. Additionally, the justice system should adhere to the regional and international laws and standards in an effort to overcome practical difficulties in their application, rationalize criminal justice procedures, and reduce the use of custodial measures for women who commit petty offences.
- To enable the effective adoption of an alternative justice system in Kenya, there should be a change in attitude and perception towards petty offenders and more focus on capacity building steered by police officers, prosecutors, and judicial officers.
- There is a need to adopt a multi-sectoral approach in dealing with petty offences instead of wholly depending on the court, which is often limited. For example, legislators and policy-makers can be included in these discussions to help them understand the inner workings of the criminal justice system and figure out how the rights of women who commit petty offences can be protected in their efforts to access justice.
- The criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions, for women who commit petty offences. The number and types of noncustodial measures available should be determined in such a way that consistent sentencing remains possible.



- It is necessary to have a probation and aftercare service department adequately funded and properly staffed because it will take women who commit petty offences off the hands of prison officers hence easing congestion in prisons.
- The study recommends that the re-directing of prison officers to become probation officers per the Ministry of Interior should be institutionalized to bolster the probation and aftercare department.
- The Kenyan justice system needs to take seriously the process of reintegrating the formerly incarcerated women into society and to promote restorative justice between them and their families, the complainant and his/her family, and the community at large.

5.5 CONCLUSION

Hopefully, this research contributed to an understanding of the experiences of women who commit petty offences in terms of how they access justice and the legal standards applied by law enforcers, prosecutors, and judicial officers to administer the sought justice. The results and recommendations of this study can serve as a basis for future research projects and for continuation of best practices in the criminal justice system. It is also hoped that the experiences of the research participants could be used to formulate policies and procedures that can contribute to making the process of accessing justice less punishing for women who commit petty offences.

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