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Mental health and the criminal justice system

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Foreword

In recent years, Kenya has made significant strides in upholding the dignity of individuals with intellectual and psychosocial disabilities within its criminal justice system. The ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2008, and the enactment of the Constitution of Kenya in 2010, have placed a legal obligation on Kenya to ensure equitable access to justice for these individuals. This includes implementing reasonable accommodations tailored to their specific needs.

These obligations encompass various aspects, such as providing appropriate accommodations during legal proceedings, ensuring equal protection under the law, and safeguarding against unlawful deprivation of liberty. These rights are explicitly outlined in the CRPD under Articles 12-14.

At its core, Kenya's Constitution, particularly Articles 27(4) and 54, enshrine the rights of persons with disabilities and explicitly prohibit discrimination based on disability, emphasise the importance of treating them with dignity and prohibit the use of demeaning language. However, a pressing concern remains: the need to align Kenya's criminal law statutes, notably the Criminal Procedure Code and Penal Code, with the prevailing human rights standards aforementioned. Derogatory terms are still employed when referring to individuals with intellectual and psychosocial disabilities, thereby undermining the ongoing battle against stigma. Moreover, the inconsistent application of the 'insanity defence' further exacerbates the issue, compromising the legality of criminal proceedings and impeding the realisation of the fundamental principles outlined in the CRPD and the Constitution.

This book delves deeply into the legal gaps, issues and interlinked complexities of the arrests, nature of offences, criminal liability, violations of human rights standards and jurisprudential attention associated with persons with intellectual and psychosocial disabilities. It provides a

comprehensive history of Kenya's criminal justice system on the issue, and analyses the development of the rights of persons with disabilities both at the international and the regional levels. It analyses the current legal and policy frameworks, identifying offences that criminalise intellectual or psychosocial disability and the numerous gaps in the laws which regulate their arrests, trial, sentencing and institutionalisation.

The extensive research contained in this publication makes two important contributions: first, it creates awareness on mental health rights in Kenya, and second, it proposes solutions to mental health-related criminal justice issues. Such contributions from academia are vital because they can inform the various reform initiatives within the criminal justice sector and go a long way in advancing the rights of vulnerable persons.

I commend the Kabarak University School of Law faculty and students, for taking a significant scholarly stride in advancing the rights of individuals with intellectual and psychosocial disabilities within Kenya's criminal justice system. The law school's dedication to conducting research that directly enhances the application of law and the realisation of rights in Kenya while equipping law students with context-specific research skills is truly commendable.

I congratulate the Kenya National Commission on Human Rights and Validity Foundation for their valuable support in the publication and the underlying research. These partnerships and collaborations are crucial in translating the significant aspirations outlined in the CRPD and the 2010 Constitution into practical application within our nation.

Hon. Lady Justice Grace W. Ngenye,
Judge of the Court of Appeal, &
Chairperson, National Committee on Criminal Justice Reforms

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This research project has also involved a now traditional practice at Kabarak, in which students work in research assistance with their faculty to enhance their research skills, while advancing the progress of research output at Kabarak. In preparation for the 2021 Law Conference the following faculty participated in the research and made presentations at the Conference: Julie Matoke, Justus Otiso, Rahab Wakuraya Mureithi, and Ronald Ong'udi. They were assisted by our students then: Kevin Kipchirchir, Marion Joy Onchangwa, and Maryanne Gitonga as well as then Graduate Assistant, Lizzy Kibira. Kabarak Law School extends its heartfelt appreciation to them for their effort and camaraderie.

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Chapter 1

Introduction

Most of the nefarious principles the British introduced in African legal systems have tended to follow a common trajectory involving six steps. i) The colonists introduce a legal principle through an ordinance or similar proclamation. ii) Meanwhile, the principle itself is undergoing extensive reforms in Britain, to the extent that it is obsolete at home by the time it settles overseas. iii) Colonial officials entrench the principle in the emergent legal system firmly. iv) Post-colonial officials implement the principle for as long as five to six decades perhaps even better than their 'mentors'. v) Five or six decades later, reforms are attempted in the African legal system based on the changes in Britain or other Northern states. vi) But even these reforms are inadequate as international law has set even higher standards by this time. As the discussions in this book show, the legal principles applicable to persons with intellectual or psychosocial disabilities in their interactions with Kenya's criminal justice system have adopted this tried path.

Kenya's criminal justice system and its treatment of persons with intellectual or psychosocial disabilities have colonial origins. The *M'Naghten case*, which continues to influence how our criminal justice system treats persons with intellectual or psychosocial disabilities, was decided in 1843 by the Central Criminal Court of England and Wales in London.[1] Following this controversial decision, the House of Lords was invited to offer guidance on the law of 'insanity and crime'.[2] Although the decision of the House of Lords accumulated its own controversy, the residue of the M'Naghten case remained. Thus:

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1 M'Naghten Case (1843) 8 Eng Rep 718, 722. Jentrix Wanyama, 'A call to strengthen the law on insanity in Kenya', 2(1) *Strathmore Law Review*, (2017) 7.

2 *House of Lords (debate) on insanity and crime*, 13 March 1843, vol 67 cc714-44, at <https://api.parliament.uk/historic-hansard/lords/1843/mar/13/insanity-and-crime > accessed on 12 October 2021.

> If a man, labouring under some mental delusion, acts under the influence of that delusion, and the influence of the delusion is so powerful as to render him incapable of distinguishing right from wrong, in that case he cannot be considered in law as responsible for his act.[3]

The rule entailed absolving from criminal responsibility a person with intellectual or psychosocial disability where it was established that a mental impairment affected their judgement at the point of committing a crime. The United Kingdom incorporated this rule in the Trial of Lunatics Act, enacted in 1883, which provided that in the event an 'insane person' was found to have committed a crime, a special verdict of 'guilty but insane' would be entered.[4] The English 1800 Act for the Safe Custody of Insane Persons Charged with Offences or the Criminal Lunatics Act was also reviewed in 1884 to align with the changes above.[5] Ultimately, the legal system provided for the detention of persons with intellectual and psychosocial disabilities as 'criminal lunatics pending the pleasure of the Crown'.[6] While in prisons or asylums[7] the persons with disability would be punished, and not rehabilitated,[8] hence reinforcing

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3 Lord Chancellor's address in *House of Lords (debate) on insanity and crime.*

4 Trial of Lunatics Act 1883.

5 Criminal Lunacy HC Deb 19 June 1922 Vol 155 cc838-9W https://api.parliament.uk/historic-hansard/written-answers/1922/jun/19/criminal-lunacy#S5CV0155P0_19220619_CWA_84 accessed on 5 March 2021.

6 Kang'ethe, 'The insanity of Kenya's "guilty but insane" verdict' 6, citing Section 2(1), Trial of Lunatics Act 1883 (Chapter 38 46 and 47 Vict), H Macdonald, 'The Straffen case and the M'Naghten rules' 7(1) *Southwestern Law Journal*, 1953, 113.

7 Kang'ethe, 'The insanity of Kenya's "Guilty but insane" verdict' 6, citing D Forshaw, 'The origins and early development of forensic mental health' in K Soothill, P Rogers and M Dolan (eds) *Handbook of forensic mental health*, Willan Publishing, Cullompton, 2008, 72-73.

8 Kang'ethe, 'The insanity of Kenya's "guilty but insane" verdict' 6, citing D Branch, 'Imprisonment and colonialism in Kenya c.1930-1952', *International Journal of African Historical Studies*, 2005, 244-245; O Stephens, 'A comparative study of prison systems in African countries', Unpublished thesis, University of South Africa, Pretoria, 2018, 100.

Timothy Harding's[9] position that the 'mad person' was seen as criminal, vagabond and indigent.[10]

As Lizzie Kibira establishes in Chapter 2 of this book, Britain exported the M'Naghten rule and the legal vessels that carried it to Africa at the dawn of colonialism.[11] In 1921, about a year after declaring the Kenya Colony, the British established the Supreme Court of Kenya with the power to apply the Indian Civil Procedure and Penal Code, the principles of the common law and equity, and the statutes of general application in force in England as at 12 August 1897.[12] Through these sources of law, Britain introduced not only the derogatory terms, which its legal system assigned to persons with intellectual or psychosocial disabilities, but also the M'Naghten rule and the assumed incapacity of persons with intellectual or psychosocial disabilities to stand trial or defend themselves against criminal charges.

As the table below shows, derogatory words referring to persons with intellectual or psychosocial disabilities such as 'idiots', 'imbeciles', 'insane persons', 'lunatics', and 'persons of unsound mind', continue to be used in important legislations, including the Criminal Procedure Code (CPC), the Penal Code, and the Constitution of Kenya, 2010 (2010 Constitution), which has been described as transformative. For instance, the 2010 Constitution uses the derogatory phrase 'unsound mind' thrice, all times to disqualify persons with intellectual or psychosocial disabilities from electoral processes either as voters[13] or contestants in political offices[14]. The derogatory terms are so entrenched that the rights-friendly language 'person with intellectual and psychosocial disability' still does not feature in any legislation or policy document.

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9 TW Harding, 'Human rights law in the field of mental health: A critical review,' (2000) 101, *Acta Psychiatrica Scandinavica*, 24.

10 Harding, 'Human rights law in the field of mental health: A critical review,' 24.

11 Milner, 'M'Nagthen and the witch-doctor', 1149.

12 The Kenya Colony Order-in-Council, 1921, in the Official Gazette of the Colony and Protectorate of Kenya Volume XXIII (No. 788) 7 September 1921.

13 Article 83(1)(b).

14 Member of Parliament, Section 99(2)(e); President, Section 137(1)(b); and Member of County Assembly, Section 193(2)(d).

	Word/ phrase	Constitution of Kenya (2010)		Criminal Procedure Code		Penal Code	
		Number of times used	**Article(s)**	**Number of times used**	**Section(s)**	**Number of times used**	**Section(s)**
1	Idiot	__	__	__	__	3	Section 146
2	Imbecile	__	__	__	__	3	Section 146
3	Insane	__	__	4	Section 166 (1) – 3 times; Section 167 (1) - Once	1	Section 13 2)(b)
4	Lunatic	__	__	1	Section 280	__	__
5	Unsound mind	3	Article 83 (1)(b) Article 99 (2)(e) Article 193 (2)(d)	5	Section 166 (1); Section 166(2); Section 163; and Section 280 (1)-(2 times)	2	Section 255

Another import of the received law was, as chapters 4, 5 and 6 of this book show, to establish a system of 'ability' apartheid whereby separate legal and administrative procedures are applied to accused persons with intellectual or psychosocial disabilities, between arrest and sentencing, with the result that their rights are compromised significantly. In this regard, the CPC articulates a number of principles, the combination of which is worrying.

First, it places the duty of inquiring into the mental status of an accused person on the trial court.[15] Where the trial court finds that an accused person has a mental illness and is incapable of making their defence, it has to postpone the proceedings. It may grant bail to the accused person on sufficient security being given that they will be taken

15 Section 162(1), CPC; see also the procedure in Section 166 of the CPC.

care of and prevented from doing injury to themselves or others.[16] Where the trial court does not grant bail, it is required to detain the accused person in a suitable place and to transmit the court record to the Cabinet Secretary responsible for prisons for consideration by the President.[17] The President may order the accused person to be detained in a mental hospital or other suitable place of custody until they make a further order in the matter or until the court, which found them incapable of making their defence, orders them to be brought before it again.[18]

Second, in case an accused person does not understand the charge against them, though they have no mental illness, a court may still hear the matter and either convict or discharge them based on the evidence available. Where such a person is convicted, the President is empowered to detain them at their pleasure.[19] Finally, the CPC maintains that where a court convicts a person but is convinced that their judgement was affected by mental illness at the time of committing an offence, it should enter a special finding of 'guilty but insane'. These procedures are operated by a complicated web of judicial and administrative bureaucracies and personnel, comprising judicial officers, prosecutors, officers in charge of mental hospitals and prisons, the Cabinet Secretary responsible for prisons, and the President. These complex procedures cause delays, leading to indefinite or lengthy institutionalisation, mostly in deplorable conditions, of persons with intellectual or psychosocial disabilities.

J Osogo Ambani, Kevin Kipchirchir and Alex Tamei argue in Chapter 6 of this book that since 2015, the High Court has explored three main solutions to the problems above, none of which has succeeded fully. Initially, High Court decisions would circumvent the cumbersome Government bureaucracies discussed above in matters concerning accused persons with intellectual or psychosocial disabilities in an attempt to eschew absurdities like presidential judicial decision-making

16 Section 162(3), CPC.
17 Section 162(4), CPC.
18 Section 162(5), CPC.
19 Section 167(1)(b), CPC.

and administrative delays. However, the Court of Appeal (CoA), in *Mwangemi Munyasia v Republic* (2015),[20] *Karisa Masha v Republic* (2015)[21] and *Nyawa Mwajowa v Republic* (2016),[22] discouraged this escapist approach and required both the judicial officers and Government administrators to observe the criminal procedure strictly. The second approach, originated in *Hassan Hussein Yusuf v Republic*,[23] impugned Sections 166 and 167 of the CPC for giving the President a role in judicial sentencing, legalising the 'guilty but insane' verdict, and creating avenues for indefinite sentences, among others. This approach relied on constitutional and human rights imperatives like separation of powers, judicial discretion, and the rights to human dignity, freedom from torture, cruel, inhuman and degrading treatment, freedom from discrimination, and fair trial.[24]

Perhaps to uphold human rights and preserve the impugned statutory provisions, then High Court Lady Justice, Jessie Lesiit, attempted a different approach that entailed sealing the sentencing lacunae by pronouncing definite sentences and justifying the role of the President in sentencing persons with intellectual or psychosocial disabilities as part of the prerogative of mercy. Yet again, the CoA has proceeded without giving much credence to the High Court decisions. Despite agreeing with the High Court about the problem, the CoA has ignored its prescriptions such as declaring sections 166 and 167 of the

20 *Leonard Mwangemi Munyasia v Republic,* Criminal Appeal 112 of 2014, Judgement of the Court of Appeal at Mombasa of 30 September 2015, eKLR.

21 *Karisa Masha v Republic,* Criminal Appeal 78 of 2014, Judgement of the Court of Appeal at Mombasa of 4 December 2015, eKLR, 5.

22 *Nyawa Mwajowa v Republic,* Criminal Appeal 46 of 2015, Judgement of the Court of Appeal at Mombasa of 29 July 2016, eKLR.

23 *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru on 10 May 2016, eKLR.

24 See for example, *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru on 10 May 2016, eKLR; *Republic v SOM,* Criminal case 6 of 2011, Judgement of the High Court at Kisumu of 30 April 2018, eKLR.

CPC unconstitutional. This is problematic since once a superior court declares a legal provision unconstitutional, the impugned provision ceases to apply unless an order of a higher superior court or subsequent legislative enactment overrules it. But sections of the High Court and the CoA have ignored this basic tenet of law with the result that sections 166 and 167 of the CPC remain in a state of confusion. This stalemate continues to enable the President to prescribe sentences, the Judiciary to outsource this mandate, and persons with intellectual or psychosocial disabilities to suffer the verdict of guilt without *mens rea*, as well as indefinite sentences mostly in deplorable conditions instead of treatment, among other challenges.

Chapter 7 of this book, by Justus Otiso and Kevin Kipchirchir, which reviews judicial jurisprudence from Namibia, South Africa, Uganda and Zimbabwe, confirms that the position in Kenya may be true for many African countries. This exposition also ascertains that the criminal justice systems introduced by especially the British colonists in the various African countries presented conditions that are conducive for the violations of the rights of persons with intellectual or psychosocial disabilities. In nearly all the study countries, persons with intellectual and psychosocial disabilities are not entitled to legal capacity and the due process of the law, and their disability is often the basis for their forceful, lengthy and indefinite deprivation of liberty, usually in inaccessible, neglected, deplorable, understaffed and ill-equipped institutions. The relevant procedural laws are cumbersome; they incorporate members of the executive in judicial decision-making, and are couched in derogatory terms. Although judicial intervention has helped in certain cases, like in Kenya's case, the reforms have not extended to affording legal capacity and the due process of the law for persons with intellectual and psychosocial disabilities.

These violations persist despite sufficient normative standards at the international level. Chapter 3 of this book establishes that international human rights law protects persons with intellectual or psychosocial disabilities including in the context of the criminal justice system. These rights include legal capacity, the due process of the law,

and liberty.[25] Thus, declarations of unfitness to stand trial or incapacity to be found responsible criminally and detention merely on the basis of disability or perceived danger on self or others could be challenged on the strength of instruments like the Convention on the Rights of Persons with Disabilities.[26]

Already, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has concluded that practices such as the ones highlighted above violate the Convention on the Rights of Persons with Disabilities (CRPD).[27] Additionally, international human rights law calls upon states to ensure that places of detention are in good living conditions, accessible to persons with disability,[28] staffed with qualified medical personnel and equipped with specialised facilities.[29] It also recommends social and psychiatric treatment, including after a person's release.[30] These are the standards against which we must hold the African criminal justice systems accountable.

With the foregoing noted, it is both equally fair and astounding to recognise that over the evolution of the legal regime in relation to persons with intellectual or psychosocial disabilities, the intention of legislation has been to help and to be just. In hindsight, many such attempts and improvements were paternalistic and even tokenistic, and it is unsurprising that they have had less than desirable real world effects.

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25 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,' para 6.

26 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,' para 16.

27 Committee on the Rights of Persons with Disabilities, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, the right to liberty and security of persons with disabilities,' Adopted during the Committee's 14th session, held in September 2015, para. 6.

28 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities' para 17.

29 UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA Resolution 70/175, annex, on 17 December 2015, rule 30 & 31.

30 Nelson Mandela Rules, rule 110.

At their core, the M'Naghten rules recognised that the criminal justice system as designed is too harsh for 'persons of feeble mind' as they were refereed to then, and as such, the court, once it becomes aware of the poor mental health of an accused person, is required to pause its normal procedures, and seek to place such person in the protective care of the state – in this instance almost as a ward of the King. The indefinite duration of such care was then considered a mark of kingly generosity. This attitude shaped the drafting of criminal procedure, the establishment of places of indeterminate detention for mental health patients, rules of engagement for police officers and even rules of international law. This fundamentally paternalistic approach can be viewed to be the basis of the prolonged use of these provisions, their embedding in the logic of government practice and even in the language of legislation, as the authors discuss in the chapters of this book. As discussed in Chapter Seven of this book, the colonial legacy is seen in the widespread practice of these notions across the continent of Africa.

As we continue to urge for urgent reforms in legislation, it is important to note that it is at the African Commission on Human and Peoples' Rights, back in 2003, that the current African challenge to and review of the colonial legacy of the M'Naghten Rules began in earnest. In this case, the long outdated Gambian legislation, the 'Lunatics Detention Act' was challenged by human rights defenders, and significantly, without challenge but rather with the concession of the state. In these proceedings, the Gambian state was eager to recognise that the law was outdated, and substantively, the indefinite detention of mental health patients was offensive to established fundamental human rights norms on personal liberties and the rights to fair trial. It is in this decision that the right to legal capacity and to legal aid, for mental health patients – and by extension, persons with psychosocial and intellectual disabilities, was established. This decision, to be clear, even predated the United Nations Convention on the Rights of Persons with Disabilities.

Throughout this volume, the editors have taken particular care to ensure that we do not perpetuate the legacy of use of derogatory terms in relation to persons with intellectual and psychosocial disabilities. Even

through the journey of two centuries, whenever the now undesirable terms are used, this is placed in quotation marks, and in clear reference to the law and its dated terminology. This is true, not only of national but also international legislation and policies.

The authors and editors of this volume hope to have made a strong case for the reform of national legislation to ensure that the persons with intellectual and psychosocial disabilities can be guaranteed of their rights. In addition, we hope to provide a text that can raise awareness among the personnel of critical institutions involved in the criminal justice system and the care of persons with intellectual and psychosocial disabilities. While legislative change is critical, positive steps to eradicate stigma and reform training methods and institutional memory of these critical institutions, especially the police, the prisons service and the mental health care institutions, will be needed, and even more urgently. Certainly, institutions of higher learning, and especially those that train legal professionals, have a special duty to take the lead in realising this change. This volume is our modest contribution to this task.

J Osogo Ambani and Humphrey Sipalla

Editors, June 2023

Chapter 2

'Pariah, prisoner or patient?': A brief history of persons with intellectual and psychosocial disabilities in Kenya's criminal justice system

Lizzy Muthoni Kibira

Introduction

Persons with intellectual and psychosocial disabilities have great difficulties living in society. It is also true that when such persons encounter the criminal justice system, these difficulties multiply. The common law tradition that Kenya adopted had understood in the nineteenth century that such persons require particular rules to protect them from the harshness of the criminal justice system. The main mechanism the common law developed was the so-called 'insanity defence' or the 'guilty but insane' rule, also known as the M'Naghten rules,[31] named after the case that established it.

This chapter is about the history of Kenya's criminal justice system in relation to persons with intellectual and psychosocial disabilities. This history traces its way back to the common law principles stated above, and their impact on persons with intellectual and psychosocial disabilities in the criminal justice system in Kenya and Africa at large. It involves a study of the development of the law, the field of psychiatry and their eventual intermingling from pre-colonial times to date. It also deals with developments such as the move to discontinue the use of derogatory terms like the 'insane' to more appropriate terminology.

The traditional legal position applicable to persons with intellectual and psychosocial disabilities demonstrates an impulse towards exclusion

31 *Rex v M'Naghten* [1843] 8 ER 718, 722.

rather than protection. The classical M'Naghten rules, which form the basis for what is termed as 'criminal insanity', exclude the 'insane' from criminal responsibility by finding such persons to be 'guilty but insane'. Such persons were to be held in custody 'at the pleasure of the Crown', akin to a ward[32] of the state. Similarly, in the criminal justice process, from arrest to imprisonment, persons with intellectual and psychosocial disabilities are often treated as incapable (of taking a plea, or of mounting a defence) and thus, excluded and committed to an institution for their own protection.

The origins of the 'insanity defence'

The Kenyan practice of determining whether or not an individual is fit to stand trial is largely borrowed from Europe and barely requires expert opinion.[33] Before its formulation, psychosocial disability connoted a lack of reasoning and for one to be pardoned for a crime, they had to be 'completely insane'.[34] Alvar Morris dates the concept of the 'insanity defence' to as far as Sir Matthew Hale's *History of the pleas to the Crown*, which states that the defence of insanity could not be pleaded by any individual who showed signs of rationality.[35] He traces the change in dynamic from *Rex v Arnold* (1723) where only 'complete insanity' was a defence, to *Rex v Hadfield* (1800) where both 'complete and partial insanity' were considered valid defences.[36]

It was in 1843 that the Central Criminal Court of England and Wales in London handed down its verdict, in the now classic *M'Naghten case*, to public scandal and uproar.[37] As a result, the House of Lords

32 In fact, the etymological roots of the word 'ward' confirm the connotations of protection. See, <https://www.etymonline.com/search?q=ward> accessed on 28 September 2021.

33 Alan Milner, 'M'Nagthen and the witch-doctor: Psychiatry and crime in Africa', 114 *University of Pennsylvania Law Review,* 1143.

34 Alvar A Morris, 'Criminal insanity' 43 *Washington Law Review* (1968), 588-589.

35 Morris, 'Criminal insanity', 589.

36 Morris, 'Criminal insanity', 591.

37 *Rex v M'Naghten* [1843] 8 ER 718, 722. Jentrix Wanyama, 'A call to strengthen the law on insanity in Kenya', 2(1) *Strathmore Law Review*, (2017) 7.

convened to ascertain the law and discuss necessary changes to the law on 'insanity and crime'.[38] The lengthy discussions centred on the parameters and applicability of the defence of insanity at trial. Yet, even on this single issue, the lords varied widely in their opinions. It was unclear if the 'insane prisoner' should be evaluated in terms of moral culpability – that is, regarding their knowledge of what is good and evil; or according to the *legal responsibility* paradigm that prioritised the knowledge of right and wrong – that which is allowed or prohibited by law. Indeed, even the definition of these terms (good, evil, right, wrong) proved contentious.[39]

Likewise, there was contention over the significance to be attached to an accused's understanding of the nature of the criminal act versus the knowledge of its 'wickedness' or 'wrongness'. More uncertain was the legal responsibility to be applied in cases of partial rather than 'perfect insanity'.[40] It is this complexity that forms the context within which the M'Naghten rules would later be formulated, stating:

> If a man, labouring under some mental delusion, acts under the influence of that delusion, and the influence of the delusion is so powerful as to render him incapable of distinguishing right from wrong, in that case he cannot be considered in law as responsible for his act.[41]

The English draft codes adopted the M'Naghten rules, which were then adopted by colonies in Africa.[42] It is this M'Naghten rule, and its corollary – the incapacity to stand trial and mount a defence – that formed the law on 'criminal insanity' applicable in Kenya post-1895 when Kenya became a British Protectorate,[43] and 1920 when it became a

38 *House of Lords (debate) on insanity and crime*, 13 March 1843, vol 67 cc714-44, at <https://api.parliament.uk/historic-hansard/lords/1843/mar/13/insanity-and-crime > accessed on 12 October 2021.

39 Lord Brougham's address in *House of Lords (debate) on insanity and crime.*

40 Lord Campbell's address in *House of Lords (debate) on insanity and crime.*

41 Lord Chancellor's address in *House of Lords (debate) on insanity and crime.*

42 Milner, 'M'Nagthen and the witch-doctor', 1149.

43 Colonial reports - Annual report on the social and economic progress of the people of the Kenya Colony and Protectorate, 1931, 4.

Colony and Protectorate.[44] In 1921, the British established the Supreme Court of Kenya and made it particularly clear that the court would apply the Indian Civil Procedure and Penal Code, and further, common law, law of equity, and the statutes of general application in force in England as at 12 August 1897.[45]

But before that, in 1883, the Trial of Lunatics Act provided that in the event an 'insane person' committed a crime, a special verdict would be given that the accused was 'guilty but insane'.[46] The 1884 Criminal Lunatics Act provided that once an 'insane person' was remitted to hospital and recovered, they were to be taken to prison.[47] This indeed occurred in 1864 when an 'insane individual' recovered, was certified sane and was remitted to prison,[48] an approach that is still in play in Kenya under written procedure.[49]

In 1964, the Criminal Procedure (Insanity) Act was enacted in England, repealing the provisions of Section 2 of the Trial of Lunatics Act of 1883.[50] The 1964 Act now read that an accused individual is not guilty by reason of insanity.[51] The Act introduced the unfit to plead concept. This concept was rendered and allowed as soon as it was pleaded in trial unless the jury decided to postpone the trial to a later time and unless the jury had made a verdict of acquittal, at which point the plea was not considered.[52] The 1964 Act also directed that in the event that the jury

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44 Kenya Order-in-Council, 1920, in the Special Official Gazette of the East Africa Protectorate Volume XXII (No.723) 23 July 1920.

45 The Kenya Colony Order-in-Council, 1921, in the Official Gazette of the Colony and Protectorate of Kenya Volume XXIII (No. 788) 7 September 1921.

46 Trial of Lunatics Act 1883.

47 Criminal Lunacy HC Deb 19 June 1922 Vol 155 cc838-9W <https://api.parliament.uk/historic-hansard/written-answers/1922/jun/19/criminal-lunacy#S5CV0155P0_19220619_CWA_84> accessed on 5 March 2021.

48 Criminal Lunacy HC Deb 20 June 1922 Vol 155 CC1027-8 <https://api.parliament.uk/historic-hansard/commons/1922/jun/20/criminal-lunacy#S5CV0155P0_19220620_HOC_144 > accessed on 5 March 2021.

49 Criminal Procedure Code, Cap 75 [England], Section 166(7).

50 Criminal Procedure (Insanity) Act [England] 1964.

51 Criminal Procedure (Insanity) Act [England] 1964, Section 1.

52 Criminal Procedure (Insanity) Act [England] 1964, Section 4.

found the accused to be 'insane', they were to order that the accused be placed in hospital, at the mercy of the secretary of the state who would in proceeding days decide whether the individual was fit for trial as advised by a medical officer.[53] This was in keeping with the 1959 Mental Health Act.[54] The individual could then be remitted to remand once declared fit for trial.[55]

By 1964, when the above developments took place in England, Kenya had already gained its independence and become a republic. The Kenya Independence Act made it particularly clear that no law passed on or after 12 December 1963 in Britain applied to Kenya,[56] but, the laws formulated earlier still formed part of Kenyan law.[57] Therefore, the changes introduced in England in 1964 were not applied in Kenya. Other developments in England would follow, which were likewise not applicable to Kenya. Notably, the English Law Commission recognised that the term 'insanity' is offensive and restricts the liberty of an acquitted person through hospitalisation.[58]

Despite legal challenges, the socio-cultural place of persons with intellectual and psychosocial disabilities has long been, and remains, complex and contentious. Often, discrimination and stigmatisation are rampant where persons with intellectual and psychosocial disabilities are considered deficient mentally.[59] However, there also seems to be some minor concessions, toleration or even accommodations granted to persons with intellectual and psychosocial disabilities, especially in quasi-traditional communal settings where their disability can simply be considered a difference. It is common for most Kenyans to be roughly

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53 Criminal Procedure (Insanity) Act [England] 1964, Section 5.

54 Criminal Procedure(Insanity) Act [England] 1964, Section 4 and 5.

55 Criminal Procedure (Insanity) Act [England] 1964, Section 5.

56 Kenya Independence Act [England] 1963, Section 1(2).

57 Kenya Independence Order-in-Council 1963, Section 4; Constitution of Kenya Amendment Act 1964, Section 14.

58 Law Commission (Law Comm No.177), Criminal law: A criminal code for England and Wales - Commentary on draft Criminal Code Bill 1989.

59 Taskforce on Mental Health in Kenya, *Mental health and well-being: Towards happiness and national prosperity*, 2020, 6.

familiar with one or two 'mad' people whom they have known to be part of the community.

Yet, it is indisputable that despite varying societal attitudes toward persons with intellectual and psychosocial disabilities, they have special or specific needs – for instance, medical, educational, and lingual – that often go unattended. Indeed, both the assessment of deficiency or difference is often accompanied by either exclusion or the urge to 'protect' them. Rarely, if at all, are they treated as full persons, living *with* disabilities and requiring the accommodations necessary for dignified life. Often, they are 'acted upon' as objects in need of *management,* rather than as persons who need facilitation in order to live full and dignified lives.[60] For instance, in 2014, the Kenya National Commission on Human Rights (KNHCR) found that communication between police and persons with intellectual and psychosocial disabilities is difficult for purposes of investigations and interviews.[61]

The origins of linkages between mental illness and criminal law in Kenya

In Kenya, as in many other post-colonial societies,[62] the entanglement of mental illness and the institutions of criminal law are of colonial emergence. Pre-colonial understandings and approaches to mental illness among the various peoples of contemporary Kenya remain mostly unknown having been either undocumented or obscured by colonial legacies.[63] However, it appears to have been the case that, in a

60 This forms the basis of the right to legal capacity for persons with intellectual and psycho-social disabilities. See generally Kenya National Commission on Human Rights (KNCHR), *Briefing paper on the implementation of Article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya, 2016*.

61 Kenya National Commission on Human Rights, *From norm to practice: A status report on implementation of persons with disabilities in Kenya*, 36.

62 Megan Vaughan, 'Introduction' in Sloan Mahone & Megan Vaughan (eds), *Psychiatry and empire*, Palgrave Macmillan, 2007.

63 '… in the late nineteenth century African context, there were several traditions, not just one. The tradition that colonial powers privileged as the customary was the one with the least historical depth… this monarchical, authoritative, and patriarchal

majority of such societies across Africa, mental illness or disability was understood through diverse frames including as: a tolerable difference in intellectual capacity;[64] spiritual possession; a curse;[65] and illness in need of treatment.[66] In fact, among the Kisii, a form of surgery was conducted as a treatment to 'insanity'.[67]

It was only upon the establishment of colonial rule in the East African Protectorate in 1897 that the intimate connection between mental illness and the institutions of criminal law was introduced in the territory now encompassing Kenya and Uganda. This was a connection that would go on to survive reform after reform in law, medicine and even the process of decolonisation itself and that Kenya's legal system continues to facilitate.

Indeed, it would be 26 years after independence that Kenya's Parliament would enact mental health legislation of its own.[68] Today, over 30 years after the commencement of the Mental Health Act of 1989, many of the same problems that necessitated its adoption persist. Once

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notion of the customary, ..., most accurately mirrored colonial practices. [...] It should not be surprising that custom came to be the language of force, masking the uncustomary power of Native Authorities.' Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton/James Currey/Fountain, 1996, 23.

64 See generally, Vaughan, 'Introduction'.

65 Jock McCulloh, *Colonial psychiatry and the 'African mind'*, Cambridge University Press, 1995.

66 McCulloh, *Colonial psychiatry and the 'African mind'*.

67 Frank Njenga, 'Focus on psychiatry in East Africa' 181 *British Journal of Psychiatry* (2002).

68 Mental Health Act, Cap 248 Laws of Kenya. Indeed, parliamentary discussions on the Mental Health Bill reflect a desire to craft a law that would respond to the Kenyan society in particular; distanced from colonial laws and in line with the scientific developments of the day. For instance, see, Mr Shikuku's comments on the proposed amendments to the Mental Treatment Act, 19 November 1986, *Kenya National Assembly Official Record (Hansard),* p 1486-1487 on 29 November 2021. See also Prof Saitoti's comments in seconding the Bill: ' ... the (Mental Health) Bill is supposed to repeal a rather outmoded legislation which was based on a United Kingdom legislation of 1948 ...' in *Kenya National Assembly Official Record (Hansard),* 1 November 1989.

out of sight – in remand, prison or medical institutions – persons with intellectual and psychosocial disabilities can, and often do, get forgotten in the system.[69] The National Gender and Equality Commission (NGEC) and the African Policing Civilian Oversight Forum (APCOF) have documented cases of persons with intellectual and psychosocial disabilities wandering the prison-mental institutions systems for more than six years, with no resolution in sight.[70] On its part, the KNCHR has documented that some persons with intellectual and psychosocial disabilities are burdened with pending court cases, in which they have been found unfit to proceed; while others are living in limbo, that is, a sentence of incarceration at the pleasure of the President.[71]

Despite the progressive aspirations of the legislators, persons suspected to be 'suffering from mental disorder' are still detained in prisons where they languish awaiting proper medical help.[72] To make matters worse, access to basic mental health care, let alone the specialised care that persons with intellectual and psychosocial disabilities in the criminal justice system often need, is scarce and of doubtful efficacy. Hence, the KNCHR recommends courts' involvement in institutionalising persons with intellectual and psychosocial disabilities to prevent their indefinite detention.

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69 Taskforce on Mental Health in Kenya, *Mental health and well-being: Towards happiness and national prosperity,* 2020, 30.

70 African Policing Civilian Oversight Forum (APCOF) and National Gender and Equality Commission (NGEC), *Pre-trial detention for persons with disabilities in correctional institutions,* 2017, 19 <https://www.ngeckenya.org/Downloads/APCOF%20PTD%20Kenya%20WEB.pdf> accessed on 7 March 2022.

71 KNCHR, *Draft advisory on the presidential pleasure sentence in Kenya,* May 2018.

72 This was acknowledged as a major problem in the parliamentary discussions of 19 November 1986. It remains a problem up to date as documented by the KNCHR in its *Draft advisory on the presidential pleasure sentence in Kenya.*

The development of ethno-psychiatry

Mathari National Teaching and Referral Hospital, located in the Kenyan capital Nairobi, remains the only national referral hospital for mental illness,[73] and its facilities remain as inadequate and dilapidated as ever.[74] Worse still, the maximum security unit at Mathari that accommodates persons with intellectual and psychosocial disabilities in conflict with the law does not receive sufficient funding from the Government.[75]

By the turn of the 20th Century, 'insanity' in the colonial metropole was increasingly understood as a medical concern; a mental form of illness, similar to physical illness; in need of thorough study and appropriate treatment rather than mere detention out of sight of the public.[76] Indeed, this period is marked by the rise of psychiatry as a discipline.[77] Yet, this concern occasioned by the increasing understanding of the workings of the mind was not restricted to the metropole alone. In the colonies, there developed several wings of psychiatry that saw the colonial reality not only as a suitable testing ground for existing European psychiatric theories, but also as a conceptual *terra nullius* to develop new conceptions of the 'native' mind.[78] The resultant faction, the now almost forgotten ethno-psychiatry, took root in Africa from about 1900 up to 1960.[79]

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73 Taskforce on Mental Health in Kenya, *Mental health and well-being: Towards happiness and national prosperity*, 2020, 52.

74 Indeed, in its report, the Taskforce on Mental Health in Kenya recommended that Mathari should be re-built. See, Taskforce on Mental Health in Kenya, *Mental health and well-being*, 55. As of October 2021, there are talks of it being 'moved, expanded and upgraded to a full-service Level 5 hospital in Karen'; Magdalene Saya, 'Upgrade for Mathari Hospital Maximum Security Unit' *The Star*, 6 October 2021, Nairobi.

75 Taskforce on Mental Health in Kenya, *Mental health and well-being*, 56, 58.

76 See *House of Lords (debate) on lunacy and mental disorder*, 24 February 1927, vol 66 cc232-57, at https://api.parliament.uk/historic-hansard/lords/1927/feb/24/lunacy-and-mental-disorder on 18 October 2021.

77 John Hookson, 'A brief history of psychiatry' in Pádraig Wright, Julian Stern and Michael Phelan (eds), *Core psychiatry* (3ed, Saunders Elsevier, 2012) 3-11.

78 McCulloh, *Colonial psychiatry and the 'African mind'*, 1-3.

79 McCulloh, *Colonial psychiatry and the 'African mind'*, 1.

In particular, Kenya was a fertile breeding ground for what came to be known as the 'East-African School'.[80] Two of this school's most prominent members, HL Gordon and JC Carothers, both served as senior medical officers at Mathari Mental Hospital between 1928 and 1950, despite neither possessing any formal training in psychiatry.[81] Both played key roles in driving reforms in Mathari, often lobbying for an increase in the capacity of the seemingly perpetually overcrowded institution,[82] as well as pursuing legislative reform.[83]

In their less administrative roles, both of these figures conducted highly controversial, and at times downright racist, 'studies' into the supposed etiology of mental illness in their patients at Mathari. The result: the claim that the 'African mind' was somehow naturally inferior, prone to conditions such a dementia, especially once exposed to (European) civilisation.[84] Thus, early colonial psychiatry in Kenya was indeed concerned with Africans as subjects of study; not so much as to understand the incidence of mental illness or handicap, but often in the service of their own disciplinary pursuits. These were pursuits that, in fact, served to denigrate the African even further under colonialism.[85]

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80 Sloan Mahone, 'East African Psychiatry and the practical problems of empire' in Mahone & Vaughan (eds), *Psychiatry and empire,* Palgrave Macmillan, 2007, 41-67. McCulloh notes that, psychiatric study and practice within the various colonies was often conducted in isolation, without knowledge of each other. Yet, a common theme that runs through the various schools, be it the Algiers School as documented by Fanon or the East African School; was the implicit assumption of the native (Muslim/African) mind as feeble, prone to mental illness or incapable of education.

81 McCulloh, *Colonial psychiatry and the 'African mind'*, 1, 21; Vaughan, 'Introduction', 8.

82 McCulloh, *Colonial psychiatry and the 'African mind'*, 21-22.

83 Gordon in particular was particularly concerned with the insufficiency of the laws regarding 'mental deficiency'. McCulloh, *Colonial psychiatry and the 'African mind'*, 21. On the complicated legacy of Gordon, as a racialist reformer, see also, Mahone, 'East African psychiatry and the practical problems of empire', 46.

84 Mahone, 'East African psychiatry and the practical problems of empire', 43, 47 & 48.

85 Colonial psychiatry provided the justification for a variety of racist policies towards Africans especially in education seeing as, according to the Carothers and Gordons of the time, Africans were uneducable. Furthermore, toward the twilight of empire

Away from the ambitions of those spearheading the discipline of psychiatry in the country at that time, the running of mental institutions was bogged down by more quotidian concerns. The causes and cures for mental illness or deficiency may have remained unknown, but the management of such persons was still a necessity. By 1927, when the *Report of the Royal Commission on Lunacy and Mental Disorder (Macmillan Report)* was considered by the House of Lords, the general conception of 'insanity' had changed. It was understood as 'mental ailment' not to be dealt with through the 'the old apparatus of locks, bars and prison-like surroundings' but by 'prevention and treatment' as a 'public health' concern.[86] Hence, the pertinent issues to be considered related to the improvement of facilities catering to the mentally ill, more medical officers and attendants, smaller wards and even new buildings.[87] A similar shift had followed the 1908 *Report of the Royal Commission on the Care and Control of the Feeble-Minded (Radnor Report).* Speaking specifically to the criminalisation of the 'feeble-minded', the report noted that such persons often 'pass(ed), in an unceasing stream, in and out of police-courts and prison'.[88] Thus, the Commission recommended that 'whenever a person charged before a court is "mentally defective", the court may remand the person to a reception ward or institution' for treatment rather than prosecution and imprisonment.[89]

Evidently, during the first half of the 20th Century, there were significant progressive legal, medical and social shifts in England

in Kenya, the colonial government also turned toward colonial psychiatry to fight native mass resistance. Especially with regard to the Mau, the regime would rush for a diagnosis of the African as prone to mass instability. As Mahone documents, this view, supported by the influential work of Carothers, found 'its most extreme application during the State of Emergency in Kenya'. See Mahone, 'East African psychiatry and the practical problems of empire', 46, 58-60.

86 *House of Lords (Debate) on lunacy and mental disorder.*

87 *House of Lords (Debate) on lunacy and mental disorder.*

88 WH Dickinson, 'Royal Commission on the Care and Control of the Feeble-Minded, 1908' (1909) 25(149) *Charity Organisation Review*, 242-243.

89 Dickinson, 'Royal Commission on the Care and Control of the Feeble-Minded, 1908', 251. This steady progressive stance is also evidenced in the *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency* 1954-1957 (Percy Report).

with regard to the management of mental illness. Part of this shift in paradigms would go on to be transplanted to the colonies, at least at policy level. Indeed, quoting in period-specific language:

> As early as July 1939, the Colonial Office had laid down a policy on the detention of lunatics. First, prisons were never to be regarded as suitable for the insane, and their use could be justified only as a temporary measure. Second, even where lunatics had committed a crime they were to be treated as ill rather than as offenders.[90]

Yet, this policy would remain only in the abstract in colonial Kenya. Patients with mental ailments, criminal or not, were primarily detained in prisons and gaols.[91] In the colonies, mental illness, especially that of natives, as a health concern ranked low. It was 'far outweighed in importance by the need for public health programmes to control diseases such as malaria and cholera'.[92] While the metropole moved towards care for (mental) patients; the colonies acquired a 'lunacy' system deeply entrenched within the penal system.[93] Consequently, in the early years of British presence in East Africa, 1900-1930, 'insanity', 'lunacy', or mental illness, was not *juridically* linked to criminal law. Rather, similar to the overall Government of the Protectorate,[94] mental illness and its management was *administratively* linked to the penal system. These administrative linkages are discussed below.

First, the management of the 'mental asylum', and later the mental hospital, was under the administration of the department of prisons in Kenya as in other British colonies.[95] Second, gaols and prisons were often used to house all mental patients, criminal or not. In fact, prior to

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90 McCulloh, *Colonial psychiatry and the 'African mind'*, 24.

91 McCulloh, *Colonial psychiatry and the 'African mind'*, 24-25.

92 McCulloh, *Colonial psychiatry and the 'African mind'*, 2.

93 McCulloh, *Colonial psychiatry and the 'African mind'*, 3.

94 See generally, Yash Pal Ghai & JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Oxford, 1970, 35-78.

95 This was the case in Zimbabwe, Nigeria, Nyasaland (Malawi) and South Africa. See, McCulloh, *Colonial psychiatry and the 'African mind'*, 13, 21.

the establishment of Mathari as a mental hospital in 1910, 'lunatics were housed in prisons'.[96] Such detention of persons with intellectual and psychosocial disabilities in prisons continued long after, often owing to overcrowding concerns in Mathari, which as of 1910 had only ten beds, two for Europeans and eight for Africans.[97] Third, as Jock McCulloh documents, 'the prison and asylum populations were to a large extent interchangeable', not only in the movement of inmates between the two institutions but also in the form of record-keeping regarding both populations.[98] Fourth, as Megan Vaughn argues, considering 'that many, if not most, colonial asylums in the second half of the 19th Century were over-crowded and neglected … (they) resembled prisons rather than hospitals'.[99] As documented by McCulloh, this evaluation holds true for the early 20th Century Mathari Mental Hospital.

This intimate relationship between the colonial mental hospital and the prison is attributable to the similarity of the social function performed by both institutions. Both the prison and the asylum often served as a place of the confinement and management of society's undesirables; be they unruly Europeans 'whose behaviour threatened their families and scandalised the white community'[100] or the troublesome detribalised natives. All the same, the net result of all these factors was the establishment of an almost unbreakable bond between the prison and the asylum, and consequently, the connection of the 'madman' and the criminal.

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96 McCulloh, *Colonial psychiatry and the 'African mind'*, 20.

97 This problem persisted even into the 1950s. McCulloh uncovers correspondence from the Central Province District Commissioner highlighting the problems involved in housing 'lunatics at the Fort Hall Prison'. See, McCulloh, *Colonial psychiatry and the 'African mind'*, 20-24.

98 McCulloh, *Colonial psychiatry and the 'African mind'*, 21.

99 Vaughan, 'Introduction', 5.

100 McCulloh, *Colonial psychiatry and the 'African mind'*, 22. See also, Will Jackson, *Madness and marginality: The lives of Kenya's white insane*, Manchester University Press, 2013.

It was not until 1930 that the link between 'insanity' and criminal law was merged. Before independence, Kenya as a colony had established its own penal code replacing the Indian Penal Code. In 1930, the Indian Penal Code that was in use in Kenya was abandoned and the Kenyan Penal Code was adopted.[101] It is important to note that the Indian Penal Code had no provision on the 'insanity defence' but the Kenyan Penal Code did; it makes reference to individuals with mental disability and to those that cannot understand court proceedings.[102]

Section 157 of the 1930 Penal Code provided that where the court believed one to be of unsound mind, the court was to inquire into the allegation, and if affirmative, postpone the trial proceedings.[103] The court would then take either of two actions: if bail could be granted, the accused would be released provided they were not a danger to themselves or other persons. Where bail could not be granted, the court was to report to the Colonial Secretary and through the Governor, the accused would be confined in a 'lunatic asylum' or other suitable place of custody.[104] If after trial the court found that indeed the accused was 'insane', a verdict of 'guilty but insane' was declared.[105] Just like present times, the courts had no power over directing the individual to a 'lunatic asylum'. Instead, the court directed that the person be placed in custody awaiting orders from the Governor, to remit the accused to an asylum, prison or other suitable place of custody.[106] This was also applicable during plea-taking.[107]

101 Official Gazette of the Colony and Protectorate of Kenya (Special Issue), Penal Code, Ordinance No, 10 of 1930, Section 2.
102 Penal Code 1930, Section 157 and 162.
103 Penal Code 1930, Section 157(1)(2).
104 Penal Code 1930, Section 157(3)(4).
105 Penal Code 1930, Section 157(4), 159.
106 Penal Code 1930, Section 159.
107 Penal Code 1930, Section 264.

From this vantage point, the primacy of Government administration in the treatment, care and management of persons with intellectual and psychosocial disabilities, and its seemingly unavoidable entanglement with criminal law, is clear. It is the quotidian concerns (over clean toilets, bed capacity, the scarcity of doctors, nurses and psychiatrists, and food quality), and bureaucratic procedures (the administrative relationships between the Department of Prisons, police and courts – and their infamous and never-ending backlog of cases, Mathari Mental Hospital, and the functioning of the Mental Health Board) that often end up causing harm to persons with intellectual and psychosocial disabilities, especially those within the criminal justice system.

Delayed transfers of patients or prisoners between institutions, unsanitary housing conditions, inordinately lengthy detentions and arbitrary arrests and detention, among others, characterise the typical experiences of persons with intellectual and psychosocial disabilities in the criminal justice system. It is at this mundane administrative level that their rights to equality, dignity, and procedural justice, among others, are violated, often without remedy.

Recent legal developments

Underlying the administrative structure discussed in the previous section, is the law. While the law may not necessarily sanction the abuses suffered, it forms the framework within which such violations occur. Either by its provisions or omissions, the law is the background against which the various institutions involved with persons with intellectual or psychosocial disabilities operate, as the source of their respective mandates as well as their final regulator.

Furthermore, the law often embodies as well as modifies the socio-political paradigms of its society. The law forms a fertile ground on which progressive gains consolidate, as well as a value-setter for the society to aspire to. Indeed, in the quest for justice and dignity for persons with intellectual and psychosocial disabilities, the law has been on a progressive course. For instance, the legislative change in the terms

used to refer to persons with intellectual and psychosocial disabilities has always been progressive[108] – from 'lunacy' to 'unsoundness of mind'; from 'mental defectives' to 'idiots' and 'imbeciles'.[109]

This move is clearly seen from the 1930 Penal Code to the current Criminal Procedure Code. In the 1930 Penal Code, provisions on the 'insanity defence' were encapsulated in sections 157 to 162 while in the Criminal Procedure Code, these are in sections 159 to 167. Firstly, Section 162 of Criminal Procedure Code replaces the wording of Section 157 of the Penal Code, 'lunatic asylum', with 'detainment in a mental hospital'.[110] The language of the Penal Code was so harsh as to refer to persons with intellectual and psychosocial disabilities as 'criminal lunatics'.[111]

Secondly, the noble aspirations of legislators have always been present and continue to date.[112] Indeed, this is encapsulated by the comments of then Vice President**,** Professor George Saitoti, at the second reading of the then Mental Health Bill in 1989. Professor Saitoti stated:

> … we hope that (the Mental Health Bill) is going to open a new chapter in the treatment of mental cases. But, much more important [sic] I hope this Bill is really going to change the attitudes of Kenyans towards mental patients, because I believe that is the most important thing.[113]

A 2020 report by the Taskforce on Mental Health in Kenya urges the Government to raise awareness on the use of less stigmatising words to refer to mental illness.[114] The Taskforce further reported that

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108 Claire Hilton, '90 years ago: The Mental Treatment Act 1930' *Royal College of Psychiatrists,* 9 September 2020, <https://www.rcpsych.ac.uk/news-and-features/blogs/detail/history-archives-and-library-blog/2020/09/09/90-years-ago-the-mental-treatment-act-1930-by-dr-claire-hilton> on 29 January 2022.

109 See *Royal Commission on the Care and Control of the Feeble-Minded (Radnor Report)* 1908, 323-325 at <https://iiif.wellcomecollection.org/pdf/b28038551> on 29 January 2022.

110 Criminal Procedure Code, Section 162(5); Penal Code, Section 157(4).

111 Penal Code 1930, Section 159.

112 See the discussion of the Mental Health Bill 2018 later in this book.

113 *Kenya National Assembly Official Record (*Hansard*),* 1 Nov 1989.

114 Taskforce on Mental Health, *Mental health and well-being*, 6, 43.

Kenyans themselves considered the terms used to refer to persons with intellectual and psychosocial disabilities as demeaning and derogatory.[115] Yet, despite a number of progressive developments in the law, the travails encountered by persons with intellectual and psychosocial disabilities persist.

Conclusion

This chapter has traced the history and development of Kenya's criminal justice system in relation to persons with relation to persons with intellectual and psychosocial disabilities. It has shown that historically, persons with intellectual and psychosocial disabilities have been disadvantaged, neglected and even abused within the criminal justice system. While there are strong colonial influences in the law, there were a number of reforms in England that independent Kenya neither mirrored nor developed. This has resulted in out-dated laws, which leave persons with intellectual and psychosocial disabilities in the criminal justice system in limbo especially when institutionalised. Nevertheless, there has been slow progress towards improving the place of persons with intellectual and psychosocial disabilities such as the move towards changing derogatory terminologies to reflect modern knowledge. In conclusion, the historical analysis shows deep-seated legal, institutional or even systemic prejudices against persons with intellectual and psychosocial disabilities that are due for urgent reform.

115 Taskforce on Mental Health, *Mental health and well-being*, 45.

Chapter 3

The evolution of the rights of persons with intellectual and psychosocial disabilities in international human rights law

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Introduction

The aim of this chapter is to establish the international normative framework applicable to persons with disabilities in general, and persons with intellectual and psychosocial disabilities in particular. Although there is no consensus on the definition of disability, the chapter first gives an overview of the definitions of disability in international human rights law. The chapter then analyses the development of the rights of persons with disabilities both at the United Nations (UN) and the African Union (AU) levels. The study of the UN human rights framework begins by reviewing interventions such as the 1971 UN Declaration on the Rights of Mentally Retarded Persons (1971 Declaration)[116] and the 1975 UN Declaration on the Rights of Disabled Persons (1975 Declaration) all the way to the 2006 Convention on the Rights of Persons with Disabilities (CRPD), which charts the path for a new epoch where the rights of persons with disabilities are protected by a specific binding human rights instrument.

116 Declaration on the Rights of Mentally Retarded Persons, 20 December 1971, Resolution 2856 (XXVI), UNGA.

The discussion then shifts to the important milestones of the African human rights system, which include: the African Decade of Persons with Disabilities, 1999-2009; the African Charter on Human and Peoples' Rights (African Charter);[117] the African Commission on Human and Peoples' Rights decision in *Purohit & Moore v The Gambia*;[118] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Charter Protocol);[119] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol);[120] and the African Charter on the Rights and Welfare of the Child (African Children's Charter).[121] Finally, the chapter narrows down to the specific rights of persons with intellectual and psychosocial disabilities, first broadly, and then in the context of the criminal justice system.

The definition of 'disability' in international human rights law

The term 'disability' has not received a concise uniform definition. Different disciplines have defined disability in different ways for different purposes.[122] Medical, political and sociological perspectives have influenced the definition of 'disability'.[123] However, the lack of consensus on a definition does not diminish the importance of having a theoretical definition of disability.[124] Definitions are critical as they could determine programme eligibility and legislative coverage, thus, affecting the lives of persons with disabilities directly.[125] For instance, if a government agency

117 1 June 1981.

118 Communication No. 241/2001 (2003) ACHPR 49 (29 May 2003).

119 29 January 2018.

120 1 July 2003.

121 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

122 Deborah Kaplan 'The definition of disability: Perspective of the disability community' 3 *Journal of Health Care Law & Policy* (2000) 352.

123 Kaplan 'The definition of disability: Perspective of the disability community' 352.

124 Sophie Mitra, 'The capability approach and disability' 16(4) *Journal of Disability Policy Studies* (2006) 236.

125 David Pfeiffer 'The conceptualization of disability' in BM Altman and S Barnartt (eds) *Exploring theories and expanding methodologies: Where we are and where we need to go,* Emerald Group Publishing, 2001, 29-52.

responsible for providing services to persons with disabilities adopts a definition that excludes a certain kind of disability, then the people affected by that disability could be excluded in the strategic planning and programmatic implementation of the agency,[126] which might result in violations of the rights of the excluded persons.

Some commentators have argued that the lack of consensus might be good because each model of defining disability brings a useful perspective to understanding disability.[127] The various models of disability that have been proposed include the medical model,[128] social model,[129] functional limitation paradigm,[130] and International Classification of Functioning (ICF) model developed by the World Health Organisation.[131]

According to the CRPD, persons with disabilities include those with 'long-term physical, mental, intellectual or sensory impairments, which

126 BM Altman and S Barnartt, 'Introducing research in social science and disability: An invitation to social science to "get it"' in BM Altman and S Barnartt (eds) *Exploring theories and expanding methodologies: Vol. 2. Research in social science and disability,* Oxford, 2000, 1-25.

127 Simon Darcy and Dimitrios Buhalis 'Conceptualising disability: Medical, social, WHO ICF, dimensions and levels of support needs' in D Buhalis and S Darcy (eds) *Accessible tourism: Concepts and issues* (2011) 21-44.

128 This model looks at disability as a problem arising from disease or injury or a health condition and therefore alleviated by treatment and rehabilitation. Pfeiffer 'The conceptualization of disability' 31.

129 This model looks at disability as a social construct. It posits that society disables people who are impaired and the resulting in their exclusion and isolation from participation in the society. See generally, Michael Oliver, *The politics of disablement: A sociological approach*, St Martin's Press, 1990, and the later reprint, Michael Oliver, *Understanding disability: From theory to practice*, Palgrave Macmillan, 1996.

130 This model is also known as the Nagi Model. It proposes that disability is 'an inability or limitation in performing socially defined roles and tasks expected of an individual within a socio-cultural and physical environment.' See, SZ Nagi, 'Disability concepts revisited: Implications for prevention' in AM Pope and AR Tarlov (eds) *Disability in America: Toward a national agenda for prevention,* National Academy Press, 1991, 309-327.

131 World Health Organisation, 'International classification of functioning, disability and health', 2001.

in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'[132] The CRPD, which describes disability as 'an evolving concept',[133] shifts from viewing disability merely as a medical issue to seeing it as a social factor.[134] The 'social model' of disability proffers that persons with disabilities face barriers in society not only because they have a disability but because there are societal attitudes that actively hinder their full participation.[135] For example, if a person with a mobility impairment cannot access the tenth floor of a building, the problem is the building's inaccessibility, not the person's impairment.[136] The social model also suggests that disability is a 'socially-produced injustice', which can be done away with through radical social modification.[137]

Other commentators have argued that the CRPD adopts a 'human rights model of disability', which could be an improvement to the 'social model'.[138] The human rights model first looks at the inherent dignity of the person and, only when necessary, considers the individual's medical attributes.[139] This model positions the individual at the centre of all

132 Convention on the Rights of Persons with Disabilities, 13 December 2006, Article 1.

133 Convention on the Rights of Persons with Disabilities, Preamble.

134 Office for the High Commissioner for Human Rights (OHCHR), *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors*, United Nations, 2010, 15.

135 Office for the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities*, 15.

136 FXB Center for Health and Human Rights, 'Health and human rights resource guide', 2014 –<https://www.hhrguide.org/2014/03/21/disability-and-human-rights/> on 26 June 2021. See also, OHCHR, *Monitoring the Convention on the Rights of Persons with Disabilities*, 15.

137 Anna Lawson and Angharad E Beckett, 'The social and human rights models of disability: Towards a complementarity thesis' 25(2) *International Journal of Human Rights* (2021) 348-379.

138 Lawson and Beckett, *The social and human rights models of disability,* 349.

139 G Quinn and T Degener, 'The moral authority for change: Human rights values and the worldwide process of disability reform', in G Quinn and T Degener (eds) *Human rights and disability: The current use and future potential of human rights instruments in the context of disability*, United Nations, 2002, 14 and 15.

choices that impact them and shifts the problem from the person to society.[140]

On its part, the African Charter Protocol offers a definition aimed at including persons with psychosocial, intellectual, neurological, developmental, and other sensory impairments in addition to physical factors specifically.[141] This makes for a more comprehensive and inclusive definition of persons with disabilities.

The UN human rights framework

As early as 1955, the international community had already agreed on the need to adopt an instrument for the protection of persons with disabilities. However, there was no legally binding instrument unique to the rights of persons with disabilities until 2006 when the CRPD was adopted.[142] Before then, the rights of persons with disabilities were often pegged on the right to equality and non-discrimination contained in general human rights instruments without providing for persons with disabilities specifically.[143] For example, the rights of persons with disabilities were understood to be included in the language of the Universal Declaration of Human Rights (UDHR), which entitles every person to all the human rights articulated in it without any distinction.[144]

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140 Lawson and Beckett, *The social and human rights models of disability*, 349.

141 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, Article 1.

142 Beth Ribet 'Emergent disability and the limits of equality: A critical reading of the UN Convention on the rights of persons with disabilities' 14 *Yale Human Rights and Development Law Journal* (2011) 155.

143 UN Enable, 'Overview of International Legal Frameworks for Disability Legislation', UN Department for Economic and Social Affairs, 2007 - <https://www.un.org/esa/socdev/enable/disovlf.htm> on 27 June 2021.

144 Universal Declaration of Human Rights, 10 December 1948, A/RES/3/217 A, Articles 1, 2, and 7.

That said, the important non-binding instruments that were adopted prior to 2006 guided and influenced the development of the CRPD. The first UN instrument to address the rights of persons with disabilities is the 1971 Declaration,[145] which was followed by the 1975 Declaration.[146] Going by its title and contents, the 1971 Declaration aimed to protect the rights of persons with intellectual and psychosocial disabilities.

Despite using derogatory words like 'mentally retarded persons' to refer to persons with intellectual and psychosocial disabilities, including in the name of the instrument itself, the 1971 Declaration articulates very progressive rights for the persons with intellectual and psychosocial disabilities in just seven articles. These include, the rights to: equality; medical care; education and training; decent living, productive work; community life, normal life; protection of a qualified guardian when this is required for their personal wellbeing and interests; protection from exploitation, abuse and degrading treatment; due process with full recognition to the degree of mental responsibility; legal safeguards, including periodic review and avenues for appeal to higher authorities, should there be need to restrict the rights of persons with intellectual and psychosocial disabilities.

The 1975 Declaration enunciates the same rights as the 1971 Declaration, largely, except that it broadens their scope to cover the rights of persons with disabilities generally, and adds new provisions such as the requirements to consult organisations of persons with disabilities in all matters affecting them, and to educate and sensitise persons with disabilities, their families and communities on their rights. The 1975 Declaration defines a person with disability as 'person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities'.

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145 Declaration on the Rights of Mentally Retarded Persons, 20 December 1971, Resolution 2856 (XXVI), UNGA.

146 Declaration on the Rights of Disabled Persons, 9 December 1975, Resolution 3447 (XXX), UNGA.

Following the 1975 Declaration, the UN designated 1981 as the International Year of Disabled Persons. During this time, the World Programme of Action Concerning Disabled Persons (WPA)[147] was formulated. The UN's Department of Economic and Social Affairs describes WPA as a global strategy (based on the human rights perspective) for enhancing disability prevention, rehabilitation and equalisation of opportunities for the full participation of persons with disabilities participate in social life and national development – preferably in the context of normal community services.[148] The WPA analyses the principles, concepts and definitions relating to disabilities; provides an overview of the world situation regarding persons with disabilities as at the time of enactment; and recommends the action required at the national, regional and international levels.[149]

It is the WPA that provided the philosophical basis for the CRPD.[150] The CRPD was also foreshadowed by the UN Standard Rules for Equalisation of Opportunities for Persons with Disabilities (Standard Rules), adopted at the close of the UN Decade of Disabled Persons, which lasted from 1983 to 1992.[151] The 1993 Standard Rules aimed at ensuring all persons with disabilities enjoyed similar rights and obligations as other members of society.[152] The Standard Rules were intended to be policy guidelines for state action and reiterated the goals set by WPA.[153]

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147 Adopted by the General Assembly on 3 December 1982, UNGA Res A/37/52.

148 See, United Nations Department of Economic and Social Affairs – Disability, 'World programme of action concerning disabled persons' https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html. Accessed on 26 April 2023.

149 See United Nations Department of Economic and Social Affairs – Disability, 'World programme of action concerning disabled persons'.

150 The philosophical link to the World Programme of Action Concerning Disabled Persons is explicitly noted in the preamble to the CRPD.

151 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, 4 March 1994, UNGA/RES/48/96, Preamble.

152 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, para 15.

153 UN Enable, 'Developmental and Psychiatric Disabilities', UN Department for Economic and Social Affairs, -<https://www.un.org/esa/socdev/enable/disdevelopmental.htm#_edn37> on 28 June 2021.

The Standard Rules further provided for the commissioning of a Special Rapporteur to monitor their enactment and implementation.[154]

The inclusion of persons with disabilities in other general human rights instruments can also be seen in the Vienna Declaration and Programme of Action (VDPA) of 1993.[155] The VDPA first reaffirms that human rights are universal and unreservedly include persons with disabilities. Second, it emphasises that the place of persons with disabilities is everywhere. Thus, 'persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers, be they physical, financial, social or psychosocial, which exclude or restrict full participation in society'. Finally, the VDPA recalls the WPA and endorsed the Draft Standard Rules by calling upon the UN General Assembly (UNGA) and the Economic and Social Council to adopt them during their 1993 meeting.

The rights of persons with disabilities are also articulated in other instruments with general provisions on equality and non-discrimination such as the International Covenant on Civil and Political Rights (ICCPR),[156] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[157]

The Convention on the Rights of the Child (CRC) provides for the specific rights of children with disabilities.[158] It recognises that a mentally or physically disabled child should enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.[159] The CRC

154 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, Part IV.

155 Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Articles 63, 64 and 65.

156 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Article 26.

157 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Article 3.

158 Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 23.

159 CRC, Article 23(1).

also recognises that children with disabilities might require special care, and to this extent calls upon states to give appropriate support to their caregivers.[160] Additionally, the CRC underscores that it may be necessary to provide the special needs for children with disabilities free of charge; particularly the measures designed to ensure that they receive education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to their achievement of the fullest possible social integration and individual development including their cultural and spiritual development.[161] Finally, the CRC calls upon states parties to promote, in the spirit of international cooperation, exchange of information in the field of preventive health care and of medical, psychological and functional methods of rehabilitation, education and vocational services to enable states parties to improve their capabilities and skills and to widen their experiences in these areas: particular account being taken of the needs of developing countries.[162]

Like the UNGA, the General Conference of the International Labour Organisation (ILO) has also enacted significant international standards relevant to their mandate for the protection of persons with disabilities. In this regard, the ILO adopted the Vocational Rehabilitation (Disabled) Recommendation early on in 1955 'to meet the employment needs of the individual disabled person and to use manpower resources to the best advantage necessary to develop and restore the working ability of disabled persons by combining into one continuous and co-ordinated process medical, psychological, social, educational, vocational guidance, vocational training and placement services.'[163] The 1955 Recommendation defined a disabled person as an individual whose prospects of securing and retaining suitable employment are substantially reduced as a result of physical or mental impairment.

160 CRC, Article 23(2).

161 CRC, Article 23(3).

162 CRC, Article 23(4).

163 See Vocational Rehabilitation (Disabled) Recommendation, 1955, Preamble.

In 1983, about two years after the International Year of Disabled Persons, the ILO adopted an upgraded Vocational Rehabilitation (Disabled) Recommendation to:

i. accommodate the requirements of the WPA to provide effective measures at the international and national levels for the realisation of the goals of full and equal participation of disabled persons in social life and development,

ii. cater for the significant developments, which had occurred in the understanding of rehabilitation needs, the scope and organisation of rehabilitation services, and the law and practice of many states on the questions covered by the 1955 Recommendation, and

iii. adopt new international standards on the subject to take care of the need to ensure equality of opportunity and treatment to all categories of disabled persons, in both rural and urban areas, for employment and integration into the community.[164]

While the instruments above limit themselves to providing for persons with disabilities generally, with the exception of the 1971 Declaration, they are relevant in protecting the rights of persons with intellectual and psychosocial disabilities since they apply to all persons under the principle of universalism.[165]

The CRPD is the first legally binding instrument to address the rights of persons with disabilities specifically. The CRPD supplants all UN frameworks as the most specialised, extensive, and recent

164 See Vocational Rehabilitation (Disabled) Recommendation, 1983, Preamble.

165 UN Enable, 'Overview of international legal frameworks for disability legislation', UN Department for Economic and Social Affairs, 2007 <https://www.un.org/esa/socdev/enable/disovlf.htm> on 27 June 2021.

instrument catering for persons with disabilities.[166] Its drafting process involved persons with disabilities and their organisations largely.[167] It was adopted in 2006, entered in force in 2008, and had been ratified by 186 states as at 25 April 2023.[168] Its Optional Protocol has been ratified by 104 states on the same date.[169] The main focus for this book, Kenya, ratified the CRPD on 19 May 2008, but had not ratified the Optional Protocol by the time of writing.

While the CRPD has been accepted widely among African countries, these countries contend that the CRPD fails to take into account certain preventive factors or progress towards the amelioration of disabilities. A good example is the substantive relation between poverty and advancement of disabilities. For instance, it is argued that taking measures against malnutrition, poor hygiene, and lack of pre-natal and post-natal services could reduce related disabilities significantly.[170] Additionally, the causes of disabilities vary from economic, social, biological, and social harmony factors such as warfare. Thus, a compelling case has been made that the CRPD should tackle social, political, economic and cultural barriers as well as the underlying causes of disability such as medical-related causes in order to achieve its goal fully.[171] Notably, while the CRPD is a binding instrument creating

166 UN Department of Economic and Social Affairs, 'Disability backgrounder: Disability treaty closes a gap in protecting human rights', United Nations Department of Public Information, 2008 < https://www.un.org/development/desa/disabilities/backgrounder-disability-treaty-closes-a-gap-in-protecting-human-rights.html> on 27 June 2021.

167 Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities,* Handicap International 2010, 7.

168 Committee on the Rights of Persons with Disabilities 'Report of the Committee on the Rights of Persons with Disabilities on Its Twenty-Fourth Session (8 March-1 April 2021)', 2021, 1.

169 CRPD Committee 'Report of the Committee on the Rights of Persons with Disabilities, 1.

170 B Ribet 'Emergent disability and the limits of equality', 155.

171 Arlene S Kanter, 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' 34 2011 *Syracuse Journal of International Law and Commerce* 287.

state obligations and rights for persons with disabilities, it is not specific to persons with intellectual and psychosocial disabilities.

Implementing and monitoring compliance with the CRPD

State parties are required to implement the CRPD in line with their legal and administrative systems.[172] This includes having independent mechanisms to monitor, promote and protect its implementation,[173] and to consult closely with and actively involve persons with disabilities and their representative organisations in decision-making processes that concern them.[174] This follows the clarion call, 'Nothing about us without us!'.

The CRPD establishes the Committee on the Rights of Persons with Disabilities (CRPD Committee) as an independent monitoring body comprising experts in the field of disability rights.[175] State parties are required to submit periodic reports to the CRPD Committee outlining the steps taken to implement their CRPD obligations and hindrances to the full realisation of the rights of persons with disabilities.[176] Once the CRPD Committee reviews the performance of state parties, it makes concluding observations in its capacity as a UN treaty body.[177]

Additionally, the Optional Protocol to the CRPD grants the CRPD Committee jurisdiction to determine complaints filed against state parties by or on behalf of individuals concerning violations of the CRPD.[178] This jurisdiction is limited to state parties that have ratified the Optional Protocol.[179] In 2011, the first case was brought before the CRPD

172 Convention on the Rights of Persons with Disabilities, Article 33(1).

173 Convention on the Rights of Persons with Disabilities, Articles 33(2) and (3).

174 Convention on the Rights of Persons with Disabilities, Articles 4(3) and 33(3).

175 Convention on the Rights of Persons with Disabilities, Articles 34 (1), (3) and (4).

176 Convention on the Rights of Persons with Disabilities, Article 35.

177 Office of the UN High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities,* 2021 <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> on 27 June 2021.

178 Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Article 1.

179 Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 2.

Committee, namely, *HM v Sweden*.[180] It involved a Swedish national with a chronic disorder who was barred by a local municipality from installing a hydrotherapy pool in her property for her rehabilitation. In barring her, the municipality claimed that building the hydrotherapy pool would be against the country's Planning and Building Act of 1987. Despite the difficulties and risk of injury she faced if she kept leaving her house to receive the rehabilitation, the municipality declined to grant her an exemption.[181]

After exhausting domestic remedies, she moved to the CRPD Committee. HM argued that failure to consider her special circumstances in applying a neutral law amounted to discrimination contrary to Article 25 of the CRPD.[182] HM further argued that Sweden violated her right to health under Article 19(b) and denied her full participation in life through rehabilitation under Article 26 of the CRPD. The CRPD Committee found, in favour of HM, that Sweden's actions were against the principle of proportionality, and discriminatory and contrary to Articles 2, 3 and 5 of the CRPD for failing to give reasonable accommodation where the same would not impose an undue burden on the State.[183]

The Optional Protocol also empowers the CRPD Committee to conduct inquiries after receiving reliable information that a state party has gravely or systemically violated the rights in the CRPD.[184] In 2014, the CRPD Committee established its first inquiry under Article 6 of the Optional Protocol.[185] The CRPD Committee conducted an inquiry on the United Kingdom (UK) regarding welfare policies that 'disproportionately and adversely' affected people with disabilities. The investigation was conducted pursuant to receiving reliable evidence

180 *HM v Sweden,* Communication No. 3/2011, CRPD/C/7/D/3/2011, CRPD (2012).

181 *HM v Sweden,* para 4.5.

182 *HM v Sweden,* para 3.1.

183 *HM v Sweden*, para 8.5.

184 Optional Protocol to the CRPD, Article 6.

185 CRPD, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under Article 6 of the Optional Protocol to the Convention, CRPD/C/15/R.2/Rev.1, 6 October 2016.

from organisations representing persons with disabilities.[186] The CRPD Committee found that the UK had infringed on the rights of persons with disabilities gravely, by introducing welfare cuts that affected persons with disabilities adversely, and made recommendations to address the same.[187] Initially, the UK Government rejected the CRPD Committee's report, but it subsequently took steps to redress the violations, including formulating policies for the amelioration of conditions for persons with disabilities.[188]

In April 2012, Kenya submitted its initial state report to the CRPD Committee,[189] where it highlighted the various measures it had undertaken to comply with the CRPD. The CRPD Committee gave its concluding observations on Kenya's report in 2015.[190] The CRPD Committee observed that Kenya allowed for the detention of persons with disabilities in violation of Article 14 of the CRPD.[191] Further, it noted that Kenya's laws enabled differential treatment for persons with intellectual and psychosocial disabilities in the criminal justice system.[192] The CRPD Committee also recommended reform of the impugned laws to align with the requirements of the CRPD.[193] Even so, in compliance with Article 33 of the CRPD, Kenya has put in place institutional frameworks for the implementation of the CRPD such as the National Council for Persons

186 CRPD, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland, para 3.

187 CRPD, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland, paras 97, 98 & 100.

188 Philip Loft and others, *The UN Convention on the Rights of Persons with Disabilities: UK Implementation* Briefing Paper No 07367, 18 November 2020 (House of Commons Library 2020).

189 Kenya's Initial Report Submitted Under Article 35(1) of the Convention on the Rights of Persons with Disabilities, 31 August 2011.

190 CRPD Committee, Concluding Observations on the Initial Report of Kenya: Committee on the Rights of Persons with Disabilities, CRPD/C/KEN/CO/1, 30 September 2015.

191 CRPD Committee, Concluding observations on the initial report of Kenya, para 27.

192 CRPD Committee, Concluding observations on the initial report of Kenya.

193 CRPD Committee, Concluding observations on the initial report of Kenya, para 5, 6, 28, 42 & 55.

with Disabilities,[194] and the Kenya National Commission on Human Rights (KNCHR), which is the State's principal monitoring agency, under Article 33(2) of the CRPD.[195] The KNCHR works with the National Gender and Equality Commission in its monitoring role.[196] These institutions work with civil society organisations closely to advocate for the rights of persons with disabilities.

UN Special Rapporteur on the Rights of Persons with Disabilities

A Special Rapporteur of the Human Rights Council is an independent human rights expert with a mandate to report on human rights on a thematic or a country-specific issue.[197] The Special Rapporteur on the Rights of Persons with Disabilities is mandated to develop dialogue with states and other independent monitoring agencies to identify and promote good practices that enhance the rights of persons with disabilities.[198] The mandate also includes an obligation to gather information and offer technical support to national efforts towards the realisation of the rights of persons with disabilities. The mandate of the Special Rapporteur further includes submitting annual reports to sessions of the UN Human Rights Council and the UNGA.[199] The reports are thematic and give recommendations and guidance to UN members and other stakeholders.[200]

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194 Elizabeth Kamundia, 'Choice, support and inclusion: Implementing Article 19 of the CRPD in Kenya' 1 *African Disability Rights Yearbook,* 2013, 63.

195 Kenya National Commission on Human Rights, 'Disability focal point,' https://www.knchr.org/Our-Work/Research-and-Compliance/Disability accessed 16 August 2021.

196 Kenya National Commission on Human Rights, 'Disability focal point'.

197 Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Special Procedures of the Human Rights Council' https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx accessed 8 December 2021.

198 Human Rights Council, 'Resolution adopted by the Human Rights Council on 16 July 2020: Special Rapporteur on the Rights of Persons with Disabilities,' A/HRC/RES/44/10, para 3(a).

199 Human Rights Council, 'Resolution adopted by the Human Rights Council on 16 July 2020,' para 3(j).

200 OHCHR, 'Special Procedures of the Human Rights Council.'

The mechanism has submitted a number of reports on various state parties.[201] The Special Rapporteur has also submitted a number of thematic reports. For example, the 2020 report on the theme of disability-inclusive international cooperation emphasises the significance of international cooperation in supporting the implementation of the rights of persons with disabilities and offers guidance to states parties on how to achieve inclusivity and accessibility of the said international cooperation to persons with disabilities.[202]

The AU human rights framework

The AU has been deliberate in making initiatives to actualise the rights of persons with disabilities. These efforts include the initiation of the African Decade of Persons with Disabilities 1999-2009, which was adopted by its predecessor, the Organisation of African Unity (OAU), to ensure the full inclusion, participation and empowerment of persons with disabilities on the continent.[203] An action plan was adopted and measures proposed on how to achieve all the objectives of the Decade. Its purpose was to guide state parties' national implementation plans and

201 See, for example, OHCHR, 'End of mission statement by the United Nations Special Rapporteur on the Rights of Persons with Disabilities, Ms Catalina Devandas-Aguilar, on her visit to Canada' 12 April 2019 https://www.ohchr.org/en/statements/2019/04/end-mission-statement-united-nations-special-rapporteur-rights-persons accessed 31 May 2022.

202 Special Rapporteur on the Rights of Persons with Disabilities, 'Annual thematic report of the Special Rapporteur on the Rights of Persons with Disabilities' https://www.ohchr.org/en/issues/disability/srdisabilities/pages/reports.aspx, accessed 27 June 2021.

203 UN Enable, 'The African Decade of Persons with Disabilities 1999-2009', Regional observances, United Nations, 4, 2003 <https://www.un.org/esa/socdev/enable/disafricadecade.htm> accessed on 23 January 2022. This was a result of the recommendation by the Labour and Social Affairs Commission of OAU in its 22nd Session in April 1999 which was adopted by the OAU Assembly of Heads of State and Government in July of the same year. It was later endorsed in the 72nd Session of the OAU Council of Ministers and 36th Assembly of Heads of State and Government, in July 2000 (Decision CM/Dec. 535 (LXXII) Rev.1).

to serve as an instrument for monitoring the progress of state parties in achieving the goals of the Decade.[204]

Upon its expiry, the Decade was extended from 2010 to 2019.[205] The extension was to encourage state parties to formulate more policies and programmes for the full participation of persons with disabilities in the social and economic development of their countries. These efforts encouraged policy reforms for children with disabilities, youth with disabilities, women with disabilities and elderly persons with disabilities; detailed research on persons with disabilities; and the fulfilment of the rights of persons with disabilities, particularly equality before the law, the right to rehabilitation and healthcare services as well as freedom from torture, abuse and exploitation.[206] In addition, the Decade led to the development of institutional and organisational advocacy for persons with disabilities to ensure implementation. These institutions include Organisations of Persons with Disabilities (OPDs), African Rehabilitation Institute (ARI), and the Working Group on the Rights of Older Persons and Persons with Disabilities (under the African Commission on Human and Peoples' Rights).[207]

Alongside these efforts, the AU human rights legal framework has also promoted the rights of persons with disabilities. Instructively, the African Charter is the heart of the AU human rights normative framework.[208] Article 2 of the African Charter entitles all individuals to the enjoyment of the human rights enshrined in it without distinction.[209]

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204 African Union, Continental Plan of Action for the African Decade of Persons with Disabilities (1999-2009), 1 2000 <https://afri-can.org/empowerment/CONTINENTAL%20PLAN%20OF%20ACTION%20(1999-2009).pdf> on 14 February 2022.

205 The extension was decided by the 1st AU Conference of Ministers of Social Development in Windhoek, in October 2008 and adopted by Executive Council Decision EX.CL/Dec.473 (XIV), in Addis Ababa, Ethiopia, in January 2009.

206 African Union Commission of Social Affairs, 'Continental Plan of Action for the African Decade of Persons with Disabilities', 2010-2019, 9.

207 African Union Commission of Social Affairs, 'Continental Plan of Action for the African Decade of Persons with Disabilities', 2010-2019, 9.

208 African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3.

209 African Charter on Human and Peoples' Rights, Article 2.

Though disability is not among the grounds of discrimination listed under Article 2, the African Court on Human and Peoples' Rights has interpreted the ground titled 'any other status' to mean that the list is not exhaustive but includes grounds that could not have been foreseen during the adoption of the African Charter.[210]

The African Commission is the main institution of the AU for promoting the human and peoples' rights under the African Charter.[211] It achieves this aim through hearing and determining communications from individuals and states claiming the violation of the African Charter by the states parties, among other ways,[212] With the exception of Morocco, all the African states are party to the African Charter and, therefore, subject to the jurisdiction of the African Commission.

It is under the interpretative jurisdiction of the African Commission that mental health advocates acting for patients held at the Psychiatric Unit of the Gambian Royal Victoria Hospital lodged the *Purohit & Moore v The Gambia* communication in 2001. The matter challenged The Gambia's 1917 Lunatics Detention Act (LDA),[213] which governed the detention and treatment of persons with intellectual and psychosocial disabilities, for violating, in its provisions and application, the duties of The Gambia under the African Charter.

Both in the title and in the body, the LDA referred to persons with intellectual and psychosocial disabilities in derogatory terms as 'lunatics', defining them as 'idiot(s) or person(s) of unsound mind'. The LDA did not establish sufficient safeguards during the diagnosis, certification and detention of persons with intellectual and psychosocial disabilities,[214] but relied on general medical practitioners to determine their institutionalisation without according them avenues for appeal.

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210 *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9, para 138.

211 African Charter on Human and Peoples' Rights, Article 30.

212 African Charter, Article 55.

213 Lunatics Detention Act Cap 40:05, Laws of The Gambia.

214 *Purohit and Moore v The Gambia,* para 3-5.

The complainants alleged violation of the following entitlements: the right to protection against discrimination[215] based on the wording of the LDA and its indefinite institutionalisation of patients; the right to human dignity[216] on the basis of the conditions under which The Gambia detained the patients; the right to the security and liberty of the person[217] on the ground of the LDA's automatic detention of persons considered 'lunatics'; and right to fair trial[218] because the patients had no mechanism to challenge their detention.

The African Commission ruled that calling persons with intellectual and psychosocial disabilities as 'lunatics' and 'idiots' dehumanises them in contravention of the right to human dignity under the African Charter,[219] which The Gambia had ratified.[220] Therefore, as early as 2001, it was clear that the use of disparaging language in reference to persons with intellectual and psychosocial disabilities was in breach of the African Charter. The African Commission referred to Principle 1(2) of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care (MI Principles), which require that 'all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person'.[221] It recommended that mental health patients should be specially treated with the objective of enabling them to enjoy optimum levels of independence according to Article 18(4) of the African Charter.[222]

215 African Charter, Articles 2 and 3.
216 African Charter, Article 5.
217 African Charter, Article 6.
218 African Charter, Article 7(1)(a)(c).
219 Article 5 of the African Charter guarantees the right to respect for everyone's human dignity.
220 *Purohit*, para 60.
221 *Purohit*, para 60.
222 *Purohit*, paras 71, 81 & 83.

The African Commission also addressed the claim that the LDA did not have sufficient safeguards during the diagnosis, certification, and detention of patients.[223] The Gambia conceded that the LDA did not have provisions enabling the review or appeal against an order to detain an individual as a 'lunatic'. Neither did it offer remedies where an individual was diagnosed wrongly or treated because of an error on the part of medical practitioners. In addition, for a patient to be detained on this ground, two separate medical certificates had to be issued by a duly qualified medical practitioner (indicating they were 'lunatics').[224] However, the LDA did not allow for the patients detained on the basis of this dual certification to challenge the medical certificates.[225] The African Commission found this to violate sub-articles 7(1)(a) and (c) of the African Charter, which guarantee every individual the right for their cause heard.[226]

Further, the LDA defined a 'duly qualified medical practitioner' as 'every person possessed of a qualification entitling him to be registered and practice medicine in The Gambia'.[227] The African Commission noted the fact that general medical practitioners may not be experts in the field of mental health and as such could misdiagnose patients and cause them to be detained under the LDA wrongfully. Yet, the victims lacked capacity to challenge such institutionalisation as the LDA did not offer review procedures. Even so, while the African Commission recognised that this did not measure up to international standards (such as the UN Principles),[228] it disagreed with the complainants that this violated Article 6 of the African Charter.[229] The African Commission's rationale for this position was that the purpose of the right to the security and liberty of the person (under Article 6 of the African Charter) was 'not

223 *Purohit*, para 4.

224 LDA, Section 3(1).

225 *Purohit*, para 27 & 71.

226 *Purohit*, para 71.

227 LDA, Section 2.

228 UN Principles for the Protection of Persons with Mental Illness and the Improvement of Medical Care, Principles 15, 16 & 17.

229 Article 6 of the African Charter provides for the security and liberty of the person.

to address the plight of persons needing medical assistance or who are institutionalised'.[230]

Although the African Commission's decision above demonstrates the potential of the African Charter in the protection of the rights of persons with intellectual and psychosocial disabilities, the African Charter Protocol, adopted in 2018, is the most elaborate human rights instrument providing for the rights of persons with disabilities.[231] The aim of the African Charter Protocol is to promote, protect and ensure the full and equal enjoyment of all human and peoples' rights by all persons with disabilities.[232] It mandates state parties to take appropriate measures to ensure they respect, protect, promote and fulfil the rights and dignity of persons with disabilities.[233] The African Charter Protocol entitles persons with disabilities a cluster of rights, including the rights to non-discrimination, equality and recognition before the law, and the right to habilitation and rehabilitation to ensure they attain and maintain maximum independence.[234]

The Maputo Protocol also extends a number of protections to African women. The Maputo Protocol establishes measures for special protection of women with disabilities, with particular emphasis on the need to ensure their access to employment, professional and vocational training, as well as their participation in decision-making.[235] The Maputo

230 *Purohit*, para 68.

231 This treaty is not in force as only 3 of the 15 required states have deposited the instrument of ratification. Kenya ratified the Protocol on 15 November 2021, and deposited the instrument of ratification on 4 February 2022.

232 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Article 2.

233 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Article 4.

234 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Article 18.

235 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, Article 23(a).

Protocol also entitles women with disabilities to the rights to dignity, freedom from violence and freedom from discrimination on the basis of disability.[236]

The African Children's Charter,[237] adopted by the Organisation of African Unity in 1990 with a view to accentuate the peculiar concerns of child protection in Africa,[238] protects the dignity of children with disabilities and the promotion of their self-reliance and active participation in the community.[239] Additionally, it requires states to ensure that children with disabilities, at their full convenience, are facilitated in movement and access to facilities, training, and preparation for employment and recreation opportunities.[240] Notably, the African Children's Charter's provisions on the rights of children with disabilities precede the CRPD by 16 years.

Specific rights of persons with intellectual and psychosocial disabilities under international human rights law

There is no human rights treaty that addresses the rights of persons with intellectual and psychosocial disabilities specifically.[241] It can be argued that persons with disabilities have been homogenised and the solutions proposed have assumed a 'one size fits all' approach.[242] As a result, the rights of persons with intellectual and psychosocial disabilities are often attached to the general rights of all categories of

236 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 23(b).

237 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

238 Humphrey Sipalla, '(In)Validity of Egypt's reservations to the African Charter on the Rights and Welfare of the Child' 4 *Kabarak Journal of Law and Ethics* (2019) 193-223.

239 African Charter on the Rights and Welfare of the Child, Article 13(1).

240 African Charter on the Rights and Welfare of the Child, Article 13(2) & (3).

241 UN Department of Social and Economic Affairs, 'Progress of efforts to ensure the full recognition and enjoyment of the human rights of persons with disabilities – Report of the Secretary-General [A/58/181]' (UNDESA).

242 SC Girimaji, AJ Pradeep, 'Intellectual disability in international classification of diseases-11: A developmental perspective' (2018) *Indian Journal of Social Psychiatry* 68-74.

persons with disabilities and the right to health. This is not to say that issues of mental health have not been provided for in the texts of the key human rights treaties discussed above.[243] In fact, since the adoption of the Universal Declaration of Human Rights (UDHR), efforts have been made to read the rights of persons with intellectual and psychosocial disabilities into these key human rights treaties. In addition, through the use of soft law instruments, the rights of persons with intellectual and psychosocial disabilities have also found grounding. Articles 1 and 2 of the UDHR and even Article 2(1) of the ICCPR have been interpreted to mean that persons with mental disabilities are entitled to every right granted to all persons since human rights apply to all persons without distinction.

Efforts to address the rights of persons with intellectual and psychosocial disabilities in the international human rights arena began as early as 1971 with the adoption of the 1971 Declaration.[244] As already stated above, 1971 Declaration establishes that persons with mental disabilities have the same rights as all human beings but also specifies their entitlements.[245] These include the right to develop to their maximum ability and potential through education, proper health care, physical therapy, training, guidance and rehabilitation.[246] The 1971 Declaration also pronounces the rights of persons with intellectual and psychosocial disabilities to decent living standards and economic security to enable them to engage in meaningful occupations and perform productively.[247] It further entitles them to participate in the community and live with their families or be in foster care or under a qualified guardian.[248] Finally,

243 For example, ICESCR, Article 12; African Charter, Article 16.

244 Elizabeth J Reed, 'Criminal law and the capacity of mentally retarded persons to consent to sexual activity' (1997) 83(4) *Virginia Law Review* 779.

245 Declaration on the Rights of Mentally Retarded Persons, preamble; UN Department for Economic and Social Affairs, 'Developmental and Psychiatric Disabilities' (UNDESA), para 1.

246 Declaration on the Rights of Mentally Retarded Persons, preamble; UN Department for Economic and Social Affairs, 'Developmental and Psychiatric Disabilities,' para 2.

247 Declaration on the Rights of Mentally Retarded Persons, para 3.

248 Declaration on the Rights of Mentally Retarded Persons, para 4 & 5.

persons with intellectual and psychosocial disabilities are protected from abuse, degrading treatment and exploitation and are entitled to due process of the law.[249]

These efforts were maintained and spilled over to 1982, when UNGA adopted the WPA. The WPA affirmed that persons with disabilities are not a homogeneous group, distinguishing mental disabilities from other disabilities and emphasising that every group of disabilities faces unique obstacles and, thus, has to be dealt with uniquely.[250] The WPA also affirms that the psychiatric treatment of persons with intellectual and psychosocial disabilities should be accompanied by social support to them and their families, as they are often under strain. While not particularly prohibiting forced treatment, the WPA envisions that its measures will lessen the length of stay and the chances of renewed referral of persons with intellectual and psychosocial disabilities to rehabilitative institutions.[251]

Children are specifically provided for in the CRC**,** which requires states parties to ensure that each child is provided with information from diverse sources to promote, among other necessities, their mental health.[252] Article 23 entitles children with intellectual and psychosocial disabilities to a full and decent life in conditions that uphold their dignity, self-reliance and active participation in the community.[253] Article 25 requires periodic reviews of mental or physical health treatment and circumstances of children committed to any such treatment by relevant authorities.[254]

In 1991, UNGA adopted the UN Principles for the Protection of Persons with Mental Illness and for the MI Principles**.** The MI Principles are non-binding but set the basic standards expected in mental health systems as well as provide for rights of persons diagnosed with mental

249 Declaration on the Rights of Mentally Retarded Persons, para 6 & 7.
250 World Programme of Action Concerning Disabled Persons, para 11.
251 World Programme of Action Concerning Disabled Persons, para 107.
252 Convention of Rights of the Child, Article 17.
253 Convention of Rights of the Child, Article 23.
254 Convention of Rights of the Child, Article 25.

illnesses or receiving mental healthcare. For example, Principle 1 provides for fundamental freedoms and rights, including, the right to the highest attainable mental health care, dignity, protection from all forms of exploitation, abuse and degrading treatment, and, the right to freedom from negative discrimination. The MI Principles reiterate the entitlement to all rights recognised under relevant human rights instruments.[255]

Other rights contained in the MI Principles include the right to participation in the community, to determination of mental illness and treatment in accordance with international medical standards, to confidentiality of their information, to be taken care of by the community and to respect of their culture. The MI Principles also provide for the rights of persons with intellectual and psychosocial disabilities to be notified of their rights personally or via a representative, to the full exercise of their rights and freedoms within healthcare facilities, to access information concerning their health except where such knowledge will endanger their health, and to lodge complaints subject to domestic law.[256] The MI Principles allow limitations on the rights on lawful grounds necessary to protect public safety, order, morals, rights, or a person's health.[257]

UN treaty bodies have also made use of their mandate to develop mental health rights. In 2000, the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 14 on the right to the highest attainable standard of health, [258] which is provided for in Article 12 of the ICESR.[259] Later in 2009, the CESCR built on this, and interpreted the definition of 'health status' under Article 2(2) of the

255 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles), Principle 1.

256 MI Principles, Principle 2-21.

257 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, general limitation clause.

258 Committee on Economic, Social and Cultural Rights, General Comment No 14 (2000).

259 ICESCR, Article 12 (1).

ICESR to include either physical or mental health.[260] The CESCR affirms further that Article 12 is not merely a right to be healthy, nor is it only a right to receive medical care, but is also about the underlying factors that affect health, such as socio-economic factors. Therefore, the right is dependent on the fulfilment of other factors such as access to food, water and sanitation.[261] States have an obligation to undertake steps to ensure the realisation of Article 12.[262]

Building on the CESCR's take on mental health rights in 2009, the Committee on the Rights of the Child (CRC Committee), by way of General Comment 9 of 2009, advises that measures taken to realise the rights of children with disabilities should aim at their maximum inclusion in society.[263] The CRC Committee affirms that any action to address difficulties faced by children with disabilities has to address the social, cultural, attitudinal and physical obstacles that children with disability face.[264] General Comment 9 establishes further that children with disabilities are entitled to all the civil rights including the right to a nationality and a name, preservation of identity, freedom of conscience, assembly, thought and association.[265] General Comment 9 requires states to guarantee the right to liberty and to be protected from torture and inhuman and degrading treatment among other rights.[266] Within the ambit of criminal justice, General Comment 9 instructs that should a child commit an offence, the reaction to the offence should be proportionate to, among others, the mental health needs of the

260 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para 33.

261 Committee on Economic, Social and Cultural Rights, General Comment 14, para 4 & 11.

262 Committee on Economic, Social and Cultural Rights, General Comment 14, para 33.

263 CRC Committee, General Comment 9 on the Rights of Children with Disabilities (2006).

264 CRC Committee, General Comment 9, para 6.

265 CRC Committee, General Comment 9, para 34.

266 CRC Committee, General Comment 9, para 34.

child.[267] The General Comment further prohibits any punishment that compromises the mental health of a child.[268]

Specific rights-based protections for persons with intellectual and psychosocial disabilities in the criminal justice system

Part of the international human rights framework outlined above also applies to the specific rights-based protections for persons with intellectual and psychosocial disabilities in their interactions with the criminal justice system. For example, the standards established in the CRPD apply to all persons with intellectual and psychosocial disabilities who are within the criminal justice system. In particular, the rights to access justice, equality, non-discrimination and legal capacity protect persons with intellectual and psychosocial disabilities within the criminal justice system.[269]

Pointedly, Article 12 of the CRPD requires states to ensure that persons with disabilities have a right to be recognised as persons before the law and to enjoy legal capacity like any other persons.[270] Through General Comment 1 (2014), the CRPD Committee expounds on the link between human rights interventions for persons with mental, intellectual, cognitive or psychosocial disabilities in the criminal justice system vividly. First, General Comment 1 explains that legal capacity and mental capacity are two distinct phenomena and that mental capacity (whether perceived or actual) is not a legitimate ground for denial of legal capacity.[271] Where it is not possible to determine the will and preferences of a person with intellectual and psychosocial disability, the CRPD Committee recommends that the 'best interpretation of the wills and preferences' approach must be used rather than 'the best interests' approach as it is incompatible with the guarantees in Article 12 of the CRPD especially where the person with intellectual and psychosocial

267 CRC Committee, General Comment 24 (2019), para 76.
268 CRC Committee, General Comment 24, para 95(g).
269 CRPD, Articles 12, 14 & 25.
270 CRPD, Article 12(1) & (2).
271 CRPD Committee, General Comment 1 (2014), para 13.

disability is an adult.[272] Such an approach is an additional safeguard to the legal capacity of persons with mental disabilities.

Second, General Comment 1 expounds on Article 12(4) of the CRPD, which requires states to establish safeguards to prevent abuse of persons with intellectual and psychosocial disabilities in the exercise of their legal capacity.[273] Such safeguards are meant to protect persons with disabilities from undue influence from their caregivers, whether such influence is through fear, threat, deception, or manipulation, while at the same time respecting their rights to choose and make their own mistakes.[274]

Third, General Comment 1 guides that 'recognition of the right to legal capacity is essential for access to justice in many respects'.[275] For persons with disabilities to access justice on an equal basis with the others, the persons have to be recognised as persons with equal standing in institutions of justice. General Comment 1 notes that in various jurisdictions, persons with intellectual and psychosocial disabilities lack access to legal representation, which needs to be remedied not only by offering the representation but also by ensuring that those who experience hindrances accessing legal representation have the means to challenge the same, either through legal representation or by themselves, and that such matters should be justiciable before courts.[276] This includes involving them in the justice system, for instance, as witnesses, lawyers, judges and members of the jury, where the system allows.[277]

Fourth, General Comment 1 calls for training and raising awareness among the officers in the criminal justice system, including judicial officers,[278] so that they can appreciate persons with intellectual and psychosocial disabilities as 'full persons before the law'.[279] For instance,

272 CRPD Committee, General Comment 1, para 21.
273 CRPD, Article 12(4).
274 CRPD Committee, General Comment 1, para 22.
275 CRPD Committee, General Comment 1, para 38.
276 CRPD Committee, General Comment 1, para 34.
277 CRPD Committee, General Comment 1, para 34.
278 CRPD Committee, General Comment 1, para 35.
279 CRPD Committee, General Comment 1, para 39.

persons with intellectual and psychosocial disabilities who testify during criminal proceedings should be accorded legal capacity and the relevant accommodation for their participation.. Accommodation in this regard includes measures like recognition of various means of communication, allowing testimonies via video and accommodating persons with disabilities in the legal procedures.

Reversing the 'insanity defence' through the right to legal capacity

Notably, the CRPD Committee clarifies that persons with intellectual and psychosocial disabilities have the right to legal capacity, which is a change from the historical view that deprives them of such rights; which explains why they would often be locked up until 'they got better'.[280] On the flipside, the rights-based approach demands more accountability from persons with intellectual and psychosocial disabilities, especially in the criminal justice system, as the legal capacity package comes with the liability to be tried.[281] This shakes the long-existing 'insanity defence'. The 'insanity defence' is invoked when a person accused of a criminal offence is assumed to lack 'legal capacity' due to intellectual or psychosocial disability and, thus, incapable of being held liable criminally.[282]

While Article 12 of the CRPD on the right to legal capacity has potential to reform the challenges which the 'insanity defence' poses, its lack of clarity has elicited diverse interpretations by commentators, which could widen the existing gaps in law.[283] Some commentators interpret the right to legal capacity to abolish the 'insanity defence', others suggest that there is need for disability-neutral rules on criminal liability, and a case has been made for retaining the 'insanity defence' while introducing safeguards such as constant review of the institutionalised cases.

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280 CRPD Committee, General Comment 1, para 7.

281 Remarks by Elizabeth Kamundia at the Roundtable on persons with mental disabilities in the criminal justice system, Kabarak University School of Law, 4 August 2021.

282 *Rex v M'Naghten* [1843] 8 ER 718.

283 Heléne Combrinck 'Rather bad than mad? A reconsideration of criminal incapacity and psychosocial disability' 6 *African Disability Rights Yearbook* 2018 3-26.

The CRPD Committee's 2015 Guidelines expound on Article 14 of the CRPD, which stipulates that 'the existence of a disability shall in no case justify a deprivation of liberty'.[284] The Guidelines state that declarations of unfitness to stand trial or incapacity to be found responsible criminally and detention of persons merely on the basis of disability are contrary to Article 14[285] because they deprive a person of due process, which is a right of every accused person despite their disability. The Guidelines also establish that it is a violation of Article 14 of the CRPD to detain persons with intellectual or psychosocial disabilities based on the perceived danger that they might pose to themselves or to others as it amounts to arbitrary deprivation of liberty.[286] Further, the Guidelines recommend that state parties should take steps to ensure that places of detention are accessible to persons with disability and in good living conditions.[287] Additionally, the Guidelines propose that state parties should ensure that persons with intellectual and psychosocial disabilities are allowed to live independently and participate in daily life fully, even while in detention.[288]

Lastly, in 2015, the UNGA adopted the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules),[289] which set standards for what is generally accepted good practice in the treatment of prisoners and prison management.[290] Rule 109 provides that persons whose mental health conditions will worsen if they stay in prison and are found to be free of criminal liability or cannot be detained in prison

284 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,' para 6.

285 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,' para 16.

286 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities' para 13 & 14.

287 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities' para 17.

288 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities' para 18.

289 UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA Resolution 70/175, annex, on 17 December 2015.

290 Nelson Mandela Rules, Preliminary observation 1.

because of critical mental health conditions and/or disabilities, are to be transferred to a mental health centre expeditiously.[291] Rule 109 requires further that other prisoners with intellectual or psychosocial disabilities are to be attended to under the supervision of qualified medical personnel and in specialised facilities.[292] Rule 110 urges that psychiatric treatment should continue even after a prisoner's release and that social-psychiatric care should be offered alongside the treatment.[293]

Conclusion

Since the 1970s, the rights of persons with intellectual and psychosocial disabilities have gained traction incrementally in the UN and African human rights frameworks. In the UN, it began with the 1971 Declaration resulting in the CRPD and related soft laws. The African Charter, the Purohit communication by the African Commission and the African Charter Protocol are examples of progressive African regional developments. Not only have the human rights instruments developed incrementally, their substance has also grown progressively. For instance, derogatory terms like 'retarded' that featured in the 1971 UN Declaration have since disappeared.

Despite these welcome developments, there is still no binding international law instrument tailored for the rights of persons with intellectual and psychosocial disabilities. While this may be concerning, the deliberate efforts made in the development of soft law instruments such as General Comment 1 and the Nelson Mandela Rules show commitment to the course of human rights, and signal that a binding instrument could be on the way. Most importantly, this chapter has demonstrated that persons with intellectual and psychosocial are not without normative cover.

291 Nelson Mandela Rules, Rule 109.

292 Nelson Mandela Rules, Rule 30 & 31.

293 Nelson Mandela Rules, Rule 110.

Chapter 4

An overview of the legal and policy framework for the protection of persons with intellectual and psychosocial disabilities in Kenya

Rahab Wakuraya Mureithi
Maryanne Njogu

Introduction

This chapter highlights the mechanisms for the protection of persons with intellectual and psychosocial disabilities in Kenya's criminal law and policy frameworks. It begins from the premise that Kenya has no specific law on the rights, responsibilities, treatment and care for persons with intellectual and psychosocial disabilities generally, let alone in their interaction with the criminal justice system. Even the rights-friendly language 'person with intellectual and psychosocial disabilities' does not feature in any legislation. Out-dated and derogatory language comprising words and phrases like 'insane persons', 'persons of unsound mind', 'idiots', 'imbeciles' and 'lunatics', continue to apply in important legislations including the Constitution of Kenya, 2010 (2010 Constitution).

The chapter covers the 2010 Constitution, which is the overarching legal framework; before reviewing the Criminal Procedure Code (CPC),[294] Mental Health Act,[295] Prisons Act,[296] and the Penal Code,[297] which regulate persons with intellectual and psychosocial disabilities when in conflict with criminal law. Finally, the chapter looks at a number

294 Chapter 75, Laws of Kenya.
295 Chapter 248, Laws of Kenya.
296 Chapter 90, Laws of Kenya.
297 Chapter 63, Laws of Kenya.

of relevant policies, including: the 2015 Bail and Bond Policy Guidelines; 2016 Sentencing Policy Guidelines; 2017 National Police Service Standing Orders (Standing Orders); and the Office of the Director of Public Prosecutions (ODPP) 2019 Guidelines on the Decision to Charge.

2010 Constitution

The 2010 Constitution contains a comprehensive and progressive Bill of Rights with special provisions for persons with disabilities. While the 2010 Constitution does not have explicit provisions on persons with intellectual and psychosocial disabilities, Article 260 defines the term disability broadly to include 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities'.[298] Therefore, the inclusion of mental conditions or illness could be construed to include intellectual and psychosocial disabilities. This is because, in the evolution of the rights of persons with intellectual and psychosocial disabilities, the term 'mental illness' was a precursor to 'intellectual and psychosocial disability'. Beyond Article 260, there are other constitutional guarantees for persons with intellectual and psychosocial disabilities within the Bill of Rights and without it.

Rights within the Bill of Rights

Article 54 of 2010 Constitution entitles persons with disabilities to:

> [b]e treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; reasonable access to all places, public transport and information; use sign language, Braille or other appropriate means of communication;

298 Constitution of Kenya (2010), Article 260.

and access materials and devices to overcome constraints arising from the person's disability.[299]

In addition, Article 54 requires the State to ensure that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities. The State is to implement this progressively.[300]

On the implementation of rights and fundamental freedoms, the 2010 Constitution stipulates that all State organs and all public officers have the duty to address the needs of vulnerable groups in the society, including persons with disabilities.[301] In guaranteeing everyone equality and freedom from discrimination, the 2010 Constitution prohibits the State from directly or indirectly discriminating upon anyone on the basis of their disability.[302]

The 2010 Constitution gives a proviso that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but which are recognised or conferred by law, except to the extent that they are inconsistent with Chapter 4 of the 2010 Constitution or where they are limited constitutionally.[303] It means that the rights of persons with disabilities provided for in international law such as those discussed in Chapter 3 of this book apply to Kenya under Articles 2(4), (5) and (6) of the 2010 Constitution. This is important for the fullest enjoyment of the rights of persons with intellectual and psychosocial disabilities since international human rights law guarantees them elaborate protection including within the criminal justice system as Chapter 3 of this book shows.

299 Constitution of Kenya (2010), Article 54(1).
300 Constitution of Kenya (2010), Article 54(1).
301 Constitution of Kenya (2010), Article 21(3).
302 Constitution of Kenya (2010), Article 27(4).
303 Constitution of Kenya (2010), Article 19(3).

Rights outside the Bill of Rights

In addition to the specific rights of persons with intellectual and psychosocial disabilities, which the Bill of Rights articulates, there are other supportive constitutional provisions. To begin with, Chapter 2 of the 2010 Constitution mandates the State to promote the development and use of communication formats and technologies that are accessible to persons with disabilities.[304] Secondly, as part of the core principles of the electoral system in Kenya, the 2010 Constitution recognises the fair representation of persons with disabilities.[305] It also requires Parliament to enact legislation to ensure that voting at every election takes into account the special needs of persons with disabilities.[306] Persons with disabilities also have special seats in the National Assembly – being the 12 seats reserved for parliamentary political parties based on their proportion of members of the National Assembly to represent special interests, among them, persons with disabilities.[307] The composition of the Senate also includes two special seats reserved for a man and a woman representing persons with disabilities.[308] The 2010 Constitution further mandates Parliament to enact legislation to ensure the representation of persons with disabilities in Parliament.[309]

At the devolved government level, the 2010 Constitution requires certain seats to be reserved for the representation of members of marginalised groups, including persons with disabilities. It assigns Parliament the power to determine the number of seats for this representation.[310] Finally, the principles and values of the public service include ensuring adequate and equal opportunities, training and advancement for persons with disabilities at all levels of the public service.[311]

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304 Constitution of Kenya (2010), Article 7(3)(b).
305 Constitution of Kenya (2010), Article 81(c).
306 Constitution of Kenya (2010), Article 82(2).
307 Constitution of Kenya (2010), Article 97(1)(c).
308 Constitution of Kenya (2010), Article 98(1)(d).
309 Constitution of Kenya (2010), Article 100(b).
310 Constitution of Kenya (2010), Article 177(1)(c).
311 Constitution of Kenya (2010), Article 232(10(i).

Despite these great guarantees, in a rather uncharacteristic fashion, thrice, the 2010 Constitution uses the derogatory phrase 'unsound mind'; all times to deny persons with intellectual and psychosocial disabilities either the right to vote or to be elected to the Legislature and by extension the Executive.[312]

Acts of Parliament

In addition to and even preceding the 2010 Constitution, several pieces of legislation address the question of persons with disabilities and their interaction with the criminal justice system. The following sub-sections review these laws and demonstrate how they affect the rights of persons with intellectual and psychosocial disabilities.

Criminal Procedure Code

The CPC[313] regulates court procedures during criminal trial. Some of these processes, which affect persons with intellectual and psychosocial disabilities, are highlighted below. It is worth noting that the CPC, which acquired the force of law on 1 August 1930, during the colonial era, still refers to persons with intellectual and psychosocial disabilities using derogatory terms such as 'insane' and 'unsound mind'.

Plea-taking

The CPC provisions on plea-taking have an impact on persons with intellectual and psychosocial disabilities. If an accused person is arraigned in court to take plea, but out of malice remains silent or neither by will nor by reason of infirmity is unable to answer directly to the information/charge, the trial court may order the Registrar or another court officer to enter a plea of 'not guilty' on behalf of the accused person. This plea will have the same force and effect as if the accused

312 See, the Constitution of Kenya (2010), articles 83(1)(b), 99(2)(e) and 193(2)(d). To vie to be President, a person must be qualified to stand for election as a Member of Parliament, among others. See 2010 Constitution, Article 137(b). To contest a gubernatorial seat, a person must be qualified to stand for election as a member of county assembly, among others. See 2010 Constitution, Article 180(2).

313 Criminal Procedure Code (Cap 75 Laws of Kenya), Sections 162-167.

had pleaded it. Nonetheless, the CPC offers the trial court the option of assessing whether the accused person is of sound or 'unsound mind' – whether they are capable of making their defence. If found to be of sound mind, the trial court proceeds with the trial, otherwise, the trial court will order the trial to be postponed and order the temporary and safe custody of the accused person in a place and manner as it deems fit. The trial court should then report the case to the President, who may order the accused person to be confined in a 'lunatic' asylum, a prison or any other suitable place for safe custody.[314]

Court's inquiry on an accused's 'soundness' of mind

If during a trial or committal proceedings, the trial court has reason to believe that an accused person is of 'unsound' mind and consequently incapable of making their defence, the CPC requires the court to inquire into the fact of 'unsoundness' of the accused.[315] Where the trial court opines that the accused is of 'unsound mind', it is required to postpone further proceedings in the case.[316]

If the case is one in which bail may be taken, the court may release the accused person on condition that sufficient security is deposited assuring that the accused person will be taken care of properly and prevented from injuring themselves or other persons or sufficient assurance is made that when required, they will appear before the court or a court-appointed officer who may act on the court's behalf.[317] If the case is one in which bail may not be taken, or if the deposited security is insufficient, the trial court is required to order the detention of the accused person in safe custody, and to transmit the court record or its certified copy to the relevant Minister for consideration by the President.[318]

314 Criminal Procedure Code, Section 280(2).
315 Criminal Procedure Code, Section 162(1).
316 Criminal Procedure Code, Section 162(2).
317 Criminal Procedure Code, Section 162(3).
318 Criminal Procedure Code, Section 162(4).

Once the President considers the record, they may, by order addressed to the court, direct that the accused be detained in a 'mental' hospital or other suitable place of custody. The CPC also requires the President to issue a warrant in accordance with that order, which serves as sufficient authority for the detention of an accused person until the President makes a further order in the matter, or until the court, which found the accused person incapable of making their defence, orders them to be brought before the court again.[319]

Since all accused persons in Kenya are entitled to bail,[320] sub-sections 162(4) and (5) are unconstitutional to the extent that they envision offences where bail cannot be granted by the trial court, and outline procedures to be invoked in such cases. These sub-sections, which survived the revisions made to the CPC in 2018, require revision to reflect the realities of the 2010 Constitution.

Procedure when the court finds a court-adjudged 'person of unsound mind' is subsequently capable of making their defence

Where a medical officer in charge of a 'mental' hospital or any other place of custody where a person is detained finds an accused person capable of making their defence, the medical officer is required to issue a certificate notifying the Director of Public Prosecutions (DPP) of such finding.[321] Upon receipt of this certificate, the DPP is required to inform the court that recorded the finding under Section 162 of the CPC whether or not the State intends to continue the proceedings against such person.[322] If so, the court shall order the person's release from detention and have them arraigned before it for the resumption of trial. Otherwise, the court shall issue an order for that person to be discharged and released from custody. However, this discharge and release does not

319 Criminal Procedure Code, Section 162(5).
320 Constitution of Kenya, Article 49(1)(h).
321 Criminal Procedure Code, Section 163(1).
322 Criminal Procedure Code, Section 163(2).

bar the DPP from initiating proceedings on the same charges against the accused person at a later date.[323]

Special finding of 'guilty but insane'

Where a person is charged for an act or omission, but evidence is given on trial which proves that the accused person was 'insane' at the time of committing the offence so as not to be criminally responsible, and it appears so to the court, it shall make a special finding that the person is 'guilty but insane'.[324] When the court makes this special finding, it is required to report the case to the President to make an order, and in the meantime, order the accused person to be kept in custody in such place and in such manner as the court shall direct.[325] The President may order the person to be detained in a 'mental' hospital, prison or other suitable place of safe custody.[326]

Once detained, the officer in charge of the 'mental' hospital, prison or other place where the person is detained is required to write a report to the Cabinet Secretary responsible for prisons for the President's consideration. The report should address the condition, history and circumstances of the detained person. It should be written at the expiration of three years from the date of the President's order and once every two years from the date of the last report.[327] Alternatively, the said officer in charge may write a special report, addressing these same particularities, but at any time after the person has been detained, as opposed to the timelines mentioned.[328] On consideration of the report, or the special report, the President may order that the person be discharged. Besides the two alternatives mentioned, the President may also order that the person is dealt with in another way that ensures they remain under supervision, and their safety and welfare and that of

323 Criminal Procedure Code, Section 163(3).
324 Criminal Procedure Code, Section 166(1).
325 Criminal Procedure Code, Section 166(2).
326 Criminal Procedure Code, Section 166(3).
327 Criminal Procedure Code, Section 166(4).
328 Criminal Procedure Code, Section 166(6).

the public.[329] The CPC gives an additional prerogative to the President to order at any time the transfer of a detained person from a 'mental' hospital to a prison or from a prison to a 'mental' hospital, or from any place where they are detained/under supervision to either a prison or a 'mental' hospital.[330]

Penal Code

Like the CPC, the Penal Code has colonial origins although it has undergone some reforms for compliance with the 2010 Constitution. Again, like the CPC, the Penal Code uses derogatory language when referring to persons with intellectual and psychosocial disabilities. Therefore, while the Penal Code provides for certain offences to protect persons with intellectual and psychosocial disabilities, such safeguards are articulated in insulting language. For instance, Section 146 criminalises defiling an 'idiot or imbecile', Section 216 obligates every person having charge of a person of 'unsoundness of mind', among others, to provide necessaries for their life and health, and Section 255 criminalises the kidnapping of any 'person of unsound mind' from their lawful guardians.

The Judiciary resents the use of such terms in legislations. In *Republic v SOM*, Justice David Majanja regretted the use of words such as 'lunacy' since they reflect 'the 18th Century foundations of the current law.[331] Indeed, although the cover that the Penal Code extends to persons with intellectual and psychosocial disabilities is crucial for their wellbeing, it requires a thorough lexical review to rid it of the tens of out-dated derogatory words mentioned above.

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329 Criminal Procedure Code, Section 166(5) & (6).

330 Criminal Procedure Code, Section 166(7).

331 *Republic v SOM,* Case 6 of 2011, High Court at Kisumu (Judgement of 30 April 2018) eKLR, para 18.

Mental Health Act

The Mental Health Act of 1989 is the most comprehensive law relating to persons with intellectual and psychosocial disabilities. As its title suggests, the law was enacted:

> [T]o amend and consolidate the law relating to the care of persons who are suffering from 'mental disorder' or 'mental subnormality with mental disorder'; for the custody of their persons and the management of their estates; for the management and control of 'mental' hospitals; and for connected purposes.[332]

Thus, the law concerns the 'management' of persons with intellectual and psychosocial disabilities as subjects moving in and out of 'mental hospitals' primarily. To this end, the Mental Health Act requires that any person who is detained for treatment in a 'mental hospital' under the auspices of the CPC must be detained taking into consideration its provisions.[333]

The Mental Health Act establishes the Kenya Board of Mental Health with the power to authorise places within prisons for the reception and treatment of remand prisoners and convicted prisoners who suffer from 'mental disorder', during their term of remand or imprisonment.[334] Additionally, the Mental Health Act authorises the person in charge of a 'mental hospital' to order the discharge of any admitted person following their recovery from 'mental disorder'. This order must be accompanied by a recommendation of the medical practitioner in charge of the person's treatment in the hospital. However, this order does not apply to a person who has been detained under the CPC.[335]

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332 Mental Health Act, Cap 248 Laws of Kenya.

333 Mental Health Act, Section 3.

334 Mental Health Act, Section 9(3).

335 Mental Health Act, Section 21.

Mental Health (Amendment) Act, 2022

The Mental Health (Amendment) Act, 2022[336] is designed to fix certain oversights in the drafting of the Mental Health Act of 1989 regarding persons with intellectual and psychosocial disabilities. For example, the Mental Health (Amendment) Act provides for positive obligations on both national and county governments to adopt strategies and launch initiatives to promote 'the realisation of the rights of persons with mental illness under Article 43 of the Constitution and put in place measures designed to improve the general welfare and treatment of persons with mental illness'.[337] Further, it outlines the rights of persons with intellectual and psychosocial disabilities clearly including the rights to legal capacity, protection from exploitation, medical insurance, mental health services, and consent to treatment.[338]

Assented to on 21 June 2022,[339] the Amendment Act is envisioned to encourage holistic legal and health-based treatment and care of persons with intellectual and psychosocial disabilities, through measures such as strengthening the frameworks for expanding care infrastructure, and recognising family-based support systems and rehabilitation programmes.[340]

Prisons Act

The 1962 Prisons Act[341] specifies that whenever a medical officer is of the opinion that any prisoner is of 'unsound mind', they may direct that the prisoner be detained at any 'mental hospital' in Kenya. The medical officer's order serves as the authority for the person's detention

336 Kenya Gazette Supplement No. 136 (Senate Bills No. 32).

337 Mental Health (Amendment) Bill, 2018, Section 2C(d).

338 Mental Health (Amendment) Bill, Section 3A-K.

339 PSCU 'President Kenyatta signs 10 parliamentary bills into law' 21 June 2022 https://www.president.go.ke/2022/06/21/president-kenyatta-signs-10-parliamentary-bills-into-law/ on 22 June 2022.

340 Njoki Kihiu, 'Mental Health Amendment Bill 2020 awaits President Kenyatta's assent after Senate approval' *Capital News,* 9 June 2022.

341 Chapter 90, Laws of Kenya.

in the 'mental hospital' until they are removed or discharged.[342] If in the opinion of the person in charge of the 'mental hospital' the prisoner is no longer of 'unsound mind', the person in charge will have them returned to the prison if still eligible to be confined.[343] Importantly, the duration the person is detained in the 'mental hospital' forms part of the imprisonment term.[344]

Persons Deprived of Liberty Act

The Persons Deprived of Liberty Act permits lawful limitation of the rights to privacy for persons deprived of liberty if there is need for psychiatric treatment for those suffering from mental illness.[345] Non-governmental organisations dealing with the rights of persons with intellectual and psychosocial disability such as Users and Survivors of Psychiatry in Kenya (USP Kenya), have opposed this provision and called for its repeal.[346]

Policies and guidelines

The Standing Orders

As if to further the tradition in which intellectual or psychosocial disabilities are conflated with criminality, as discussed in Chapter 2 of this book, the Standing Orders envision situations where such persons may be taken into police custody. According to the Standing Orders, any police officer of or above the rank of inspector or officer-in-charge of a police station (OCS) may take into their custody any person whom they have reason to believe is suffering from a 'mental disorder or defect', if the person is found within the limits of their jurisdiction 'wandering at large'.[347] Additionally, a police officer may take a person within their

342 Prisons Act, Section 36(1).
343 Prisons Act, Section 36(2).
344 Prisons Act, Section 36(4).
345 Persons Deprived of Liberty, No. 23 of 2014, Section 4(e).
346 USP Kenya, *Advancing the rights of persons with psychosocial disability in Kenya*, 10.
347 National Police Service Standing Orders, Chapter 15, Section 34(1)(a)(i).

jurisdiction, who acts or is likely to act against public decency, because they are 'suffering from a mental disorder'.[348] After they are detained in police custody, the officer is obligated to ensure the person is presented before the nearest magistrate.[349] The Standing Orders also obligate the OCS to report improper care, neglect or cruel treatment of any such person occasioned by any relative or guardian within their jurisdiction. In turn, the magistrate may order the person with a mental disability to be brought before them;[350] they may examine them, and if they consider that there are grounds for proceeding further, shall refer them to a medical practitioner for examination, and make such other necessary inquiries relevant to the circumstances.[351]

The Standing Orders have specific standard procedures on how the police should handle persons with intellectual and psychosocial disabilities. They are as follows:[352]

- Upon the police bringing the patient with 'mental disorder' to the police station, they should search them. They should remove their personal property, other than clothing, and account for them on a detainee's property receipt, which two officers will check.
- The officer accepting any 'mental patient' must first inspect the cell where they intend to hold them in order to ascertain that it is secure and there is nothing in it that they could use to injure themselves.
- Following this search, the officer should then make an entry into the occurrence book confirming they conducted the search.

348 National Police Service Standing Orders, Chapter 15, Section 34(1)(a)(ii).
349 National Police Service Standing Orders, Chapter 15, Section 34(1)(a)(iii).
350 National Police Service Standing Orders, Chapter 15, Section 34(1)(b).
351 National Police Service Standing Orders, Chapter 15, Section 34(1)(c).
352 National Police Service Standing Orders, Chapter 15, Section 35(1)(a)-(k).

- The officer must place a 'mental patient' in a cell of their own, and under no circumstances may they place any other prisoners in the same cell.
- Immediately a 'mental patient' is detained, the officer must inform the OCS.
- A special cells officer must be allocated to the cell, and in case the mental patient becomes violent or attempts to injure themselves, the officer must report to the officer-in-charge of the report office immediately. The officer is further prohibited to enter the cell of the mental patient alone, under any circumstances whatsoever.
- Once the officer-in-charge of the report office receives the information that the patient has become violent, they shall proceed to the cell with sufficient constables to restrain the 'mental patient' if necessary. One constable ought to remain outside the cell, and not less than two should enter the cell to prevent the patient from causing themselves any further injury. If the situation calls for it, and where it is practical, the officers should call for and seek the assistance of a medical officer.
- All police officers dealing with 'mental patients' ought to appreciate that they are 'sick persons', and therefore, to be humane in their actions and only use the minimum service required to restrain them.
- When serving meals, the patient must consume theirs in their cell, and the officers must not place any knives, forks or other implements in the cell.
- When the patient is for any reason removed from their cell, they must never be left unobserved, and must always be accompanied by two or more police officers.
- Only upon the instructions of the Officer Commanding Station (OCS) can police officers use handcuffs, leg irons or other mechanical means to restraint a 'mental patient'.

Guidelines on the Decision to Charge, 2019

The 2019 Guidelines on the Decision to Charge advise prosecutors to first consider whether a suspect is, or was at the time of the offence, affected by any significant mental illness or disability, as this would make the initiation of the prosecution less likely. On the other hand, the prosecutors also have to consider how serious the offence was, whether the suspect is likely to commit it again, and whether there is need to safeguard the public or their care-providers. The Guidelines further require the prosecutors to be proactive when dealing with cases under Section 162 of the CPC; specifically, they are advised not to wait for trial courts to inquire whether an accused is capable of making their defence, but rather make that inquiry themselves where it is clear that one is required.[353]

Bail and Bond Policy Guidelines

The 2015 Bail and Bond Policy Guidelines state that when a court is making a decision on whether to grant bail to an accused person with special mental health care needs, it should first consider alternatives to remand such as close supervision and only turn to detention as a last resort. The court should also take into account the nature and circumstances of the offence, and the risks that such persons pose to the public.[354]

The Guidelines also recognise certain shortcomings in the interaction between persons with intellectual and psychosocial disabilities and the criminal justice system. For instance, it acknowledges that accused persons with special mental health care needs face considerable challenges in places of detention. These include discrimination and insensitivity to their needs[355] as well as long periods of institutionalisation during the pre-trial and pre-conviction phases,

353 Office of the Director of Public Prosecutions, *Guidelines on the Decision to Charge*, para 3.2.2.1.

354 National Council on Administration of Justice, *Bail and Bond Policy Guidelines*, 2015, para 4.28.

355 *Bail and Bond Policy Guidelines*, para 6.10.

which undermines the principle of presumption of innocence. The Guidelines attribute this state of affairs to inadequate regulation of the judicial process for determining whether an accused person is of 'sound mind' and capable of making their defence. Therefore, the Guidelines recommend five years as the maximum duration within which such determination should be finalised.[356]

Conclusion

This chapter set out to outline the national legal framework on the interaction between persons with intellectual and psychosocial disabilities and the criminal justice system in Kenya. It found that while the laws and policies in Kenya make certain provisions in this regard, their recognition, accommodation and facilitation of persons with intellectual and psychosocial disabilities remains minimal. On the contrary, the frameworks facilitate massive violations of the rights of persons with intellectual and psychosocial disabilities. Additionally, the frameworks use derogatory language and are at odds with both the 2010 Constitution and the international normative framework discussed in Chapter 3 of this book. Therefore, a review of the national legal framework is long overdue.

356 *Bail and Bond Policy Guidelines*, para 6.3.

Chapter 5

Between arrest and sentence: Treatment of persons with intellectual and psychosocial disabilities in Kenya's criminal justice system

Lizzy Muthoni Kibira
Kevin Kipchirchir

Introduction

As discussed in Chapter 3 of this book, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has noted with concern that persons with disabilities are often detained on the basis of actual or perceived impairment, their perceived danger to others or themselves, and the assumption that they need care and/or treatment, in violation of the Convention on the Rights of Persons with Disabilities (CRPD).[357] As chapters 4, 6 and 7 of this book further show, Kenya's and comparable African criminal procedures legalise the imprisonment and detention of persons with intellectual and psychosocial disabilities in healthcare institutions as involuntary users, often at the pleasure of an office in the executive,[358] and to their detriment in terms of human rights.

357 Committee on the Rights of Persons with Disabilities, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, the right to liberty and security of persons with disabilities,' Adopted during the Committee's 14th session, held in September 2015, para. 6.

358 Criminal Procedure Code [Kenya], Section 166.

This treatment of persons with disabilities has historic beginnings. Timothy Harding notes that laws and societal attitudes treat persons with intellectual and psychosocial disabilities as social outcasts.[359] The 'mad person' is seen as criminal, vagabond and indigent, and society has a tendency to reject those who are different.[360] It is against this backdrop that colonial laws such as the English 1800 Act for the Safe Custody of Insane Persons Charged with Offences (Criminal Lunatics) Act, and the Trial of Lunatics Act (1883) were enacted.[361] Under these laws, persons with intellectual and psychosocial disabilities would be detained as 'criminal lunatics pending the pleasure of the Crown'.[362] Meanwhile the prisons or asylums[363] would punish, and not rehabilitate, them.[364] Have matters changed in modern-day Kenya?

This chapter studies how Kenya's criminal justice system treats persons with intellectual and psychosocial disabilities between arrest and sentence. It comments on the applicable practices, policies and

359 TW Harding, 'Human rights law in the field of mental health: A critical review,' (2000) 101 *Acta Psychiatrica Scandinavica*, 24.

360 Harding, 'Human rights law in the field of mental health: A critical review,' 24.

361 Mitchelle Wanjiku Kang'ethe, 'The insanity of Kenya's "guilty but insane" verdict,' *Strathmore Law Review*, 1, citing JO Ambani and O Ahaya, 'The wretched African traditionalists in Kenya; The challenges and prospects of customary law in the new constitutional era,' 1(1) *Strathmore Law Journal*, 2015, 47; D Ndetei, J Muthike and E Nandoya, 'Kenya's mental health law' 14(4), *Bjpsych International*, 2017, 96. See also, Trial of Lunatics Act 1883 (Chapter 38 46 and 47 Vict); Criminal Lunatics Act 1800 (39 & 40 Geo 3 c 94).

362 Kang'ethe, 'The insanity of Kenya's "guilty but insane" verdict' 6, citing Section 2(1), Trial of Lunatics Act 1883 (Chapter 38 46 and 47 Vict), H Macdonald, 'The Straffen case and the M'Naghten rules' 7(1) *Southwestern Law Journal*, 1953, 113.

363 Kang'ethe, 'The insanity of Kenya's "Guilty but insane" verdict' 6, citing D Forshaw, 'The origins and early development of forensic mental health' in K Soothill, P Rogers and M Dolan (eds) *Handbook of forensic mental health*, Willan Publishing, Cullompton, 2008, 72-73.

364 Kang'ethe, 'The insanity of Kenya's "guilty but insane" verdict' 6, citing D Branch, 'Imprisonment and colonialism in Kenya c.1930-1952', *International Journal of African Historical Studies*, 2005, 244-245; O Stephens, 'A comparative study of prison systems in African countries', Unpublished thesis, University of South Africa, Pretoria, 2018, 100.

the law, and their impact on the rights of persons with intellectual and psychosocial disabilities.

Offences criminalising intellectual or psychosocial disability

Arrest, trial, sentencing and detention all dovetail around offences. Yet certain offences in law, without any question to their underlying legislative intent, have the effect of criminalising mental illness or disability. The offence of attempted suicide is typical. Under Section 226 of the Penal Code, an attempt at one's own life is a misdemeanour punishable by 'imprisonment for a term not exceeding two years or with a fine, or with both'.[365]

It is now understood that suicidal ideation and behaviour is often caused by mental illness or disability. Conditions such as manic depression are known to involve an element of suicidality. In noting this medical reality, the Taskforce on Mental Health in Kenya recommended the decriminalisation of attempted suicide.[366] According to Lukoye Atwoli, the criminalisation of attempted suicide helps no one, neither the State in preventing suicide nor patients who are stigmatised into hiding.[367]

Other offences criminalise persons with intellectual and psychosocial disabilities, not in their formulation, but in their enforcement. This is the case with petty offences in Kenya. As documented by the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), the enforcement of petty offences often involves the profiling of minority groups, the poor, and persons with intellectual and psychosocial disabilities, among others.[368] Offences such as common nuisance[369] and idle and disorderly persons[370] form the pretext

365 Penal Code, Section 36.

366 Taskforce on Mental Health in Kenya, *Mental health and well-being,* 23.

367 Lukoye Atwoli, 'It is time we decriminalise suicide attempt' *Daily Nation,* 29 November 2020.

368 ICJ-Kenya, *Laws and policies on petty offences and practices affecting populations at the national level and in Kisumu, Mombasa and Nairobi counties,* 2018, 9.

369 Penal Code, Section 175.

370 Penal Code, Section 182.

for the arbitrary arrest and prosecution of persons with intellectual and psychosocial disabilities. Sadly, these injustices do not stop here, especially when persons with intellectual and psychosocial disabilities undergo the criminal justice process on their own.

Already pre-disposed to criminalisation, the actual process of arrest of persons with intellectual and psychosocial disabilities suspected of committing offences is rife with rights' violations. While the abuse of police powers of arrest is a perennial problem in Kenya,[371] it is all the more exacerbated when applied to such vulnerable groups. First, persons with intellectual and psychosocial disabilities, especially those found wandering around are likely to be subjected to mass arrests. Njoroge Macharia, a speaker at the 2021 Kabarak Annual Law Conference, described that reasons for arrest could be as simple as being in the 'wrong place at the wrong time' during one of the police raids.

Second, arrest is often accompanied by disproportionate violence. This situation is once again worsened when applied to a person with an intellectual or psychosocial disability. For instance, in April 2020, it was reported that a 35-year-old mentally ill man, Ramadan Juma, was believed to have been beaten by police as they were enforcing the dusk to dawn curfew occasioned by the outbreak of the COVID-19 pandemic. So severe were the injuries that, despite his hospitalisation, he sadly passed away a few days after the encounter with the police.[372] It is likely that, being mentally ill, Juma was unaware of the law and, therefore, the offence he was accused of committing.

Finally, even where an individual with an intellectual or psychosocial disability is not accused of committing an offence, the police still deal with them as if they were criminal. Police are often the first responders called to intervene where an individual is thought to be having a mental breakdown or wandering about. Although it is within their mandate as set out in the National Police Service Standing

371 National Council on the Administration of Justice (NCAJ), *Criminal justice system in Kenya: An audit,* 2016, 38.

372 Tonny Ndungu**,** 'Mentally ill man 35, reportedly beaten to death by police enforcing curfew in Kakamega' *Citizen Digital News,* 2 April 2020.

Orders,[373] contrary to the same provisions, which outline the humane way to treat mental patients,[374] the police often approach persons with intellectual and psychosocial disabilities as dangerous in need of forceful restraining. A typical case is that of a teacher in Nyeri who, while undergoing a mental episode at his place of work, received no assistance either from colleagues or medics. On the contrary:

> His colleagues got worried and feared that he would turn violent even though he had already expressed his need to get support from somebody who understood his condition. The colleagues decided that they should take him to a police station, for the police to escort him to the hospital. This was despite the fact that he had not committed any criminal act or made any disruptions at the school. Once at the police station, they tied him up and opted to pay the police officer to accompany him to the hospital. He made all efforts to convince them that he could make his own decisions, but they doubted him.[375]

Cases like this speak to the knowledge gap that exists in society as well as in the police service. As wielders of force, the police ought to be trained properly and equipped to deal with persons with intellectual and psychosocial disabilities, whether suspects or not, in a manner that upholds their dignity.

On a positive note, some progress has been made. For instance, there have been efforts to train police and other relevant actors on the rights of persons with intellectual and psychosocial disabilities related to access justice. Such programmes have been driven primarily by civil society organisations such as Kenya Association for the Mentally Handicapped (KAIH), Users and Survivors of Psychiatry - Kenya (USP-K), Open Society Initiative for East Africa (OSIEA) and the Human

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373 Office of the Inspector-General, *National Police Service Standing Orders* [Kenya], Chapter 15, para 34-35.

374 *National Police Service Standing Orders* [Kenya], Chapter 15, para 35.

375 United Disabled Persons of Kenya (UDPK), *A shadow report to the initial report on the United Nations Convention on the Rights of Persons with Disabilities (CRPD) to the UN Committee on the Rights of Persons with Disabilities,* 41.

Rights Initiative.[376] However, there is need for more long-term, State-driven efforts to close this and other gaps identified above.

Arrest and intellectual or psychosocial disability

Arrest is the first typical point a person with intellectual or psychosocial disability starts their interaction with the criminal justice system. In addition to when they are arrested on suspicion of committing a crime, they are liable to be arrested merely on the basis of their disability. The National Police Service Standing Orders (Standing Orders) empower any police officer of or above the rank of inspector or officer-in-charge of a police station (OCS) to take into their custody any person whom they have reason to believe is suffering from a 'mental disorder or defect', if the person is found within the limits of their jurisdiction 'wandering at large'.[377] Further, a police officer may arrest any person who acts or is likely to act against public decency because of their intellectual or psychosocial disability.[378] Although the Standing Orders encourage police officers dealing with persons with intellectual and psychosocial disabilities to treat them humanely, and to use only the minimum service required to restrain them, the OCS can authorise police officers to use handcuffs, leg irons or other mechanical means to restraint them,[379] which may provide opportunities for abuse.

As a check on these powers, the police are obligated to present a person arrested under the circumstances above to the nearest magistrate,[380] where they can also report whether such a person has been mistreated by any person responsible for them. The magistrate may require the person to be brought before them for examination;[381]

376 KAIH, USP-K & Elizabeth Kamundia, *Kenya: Submissions on Human Rights Council resolution 31/6*, 19.

377 National Police Service Standing Orders, Chapter 15, Section 34(1)(a)(i).

378 National Police Service Standing Orders, Chapter 15, Section 34(1)(a)(ii).

379 National Police Service Standing Orders, Chapter 15, Section 35(1)(a)-(k).

380 National Police Service Standing Orders, Chapter 15, Section 34(1)(a)(iii).

381 National Police Service Standing Orders, Chapter 15, Section 34(1)(b).

may refer them to a medical practitioner for examination, and make such other necessary inquiries relevant to the circumstances.[382]

Decision to charge a person with intellectual or psychosocial disability

In addition to the usual considerations like the weight of the evidence and the public interest, when making the decision to charge a person with intellectual or psychosocial disability, a prosecutor is required to take into account whether they are, or were at the time of the offence, affected by any significant mental illness or disability, as this would make the initiation of the prosecution less likely.[383] They are also required to consider the seriousness of the offence, whether the suspect is likely to commit it again, and whether there is need to safeguard the public or their care-providers.[384] The Guidelines on the Decision to Charge further require a prosecutor to be proactive when dealing with cases under Section 162 of the CPC; specifically, they are advised not to wait for a trial court to inquire whether an accused is capable of making their defence, but rather make that inquiry themselves where it is clear that one is required.[385]

Fitness to stand trial

Within 24 hours of arrest, an accused person is required constitutionally[386] to be arraigned in court for plea-taking where the charges brought against them are read out and the plea is taken. It is at this stage where the court may, either unilaterally[387] or by reason of the accused person's refusal to plead,[388] order a mental test to confirm

382 National Police Service Standing Orders, Chapter 15, Section 34(1)(c).

383 Office of the Director of Public Prosecutions, *Guidelines on the Decision to Charge*, para 3.2.2.1.

384 Office of the Director of Public Prosecutions, *Guidelines on the Decision to Charge*, para 3.2.2.1.

385 Office of the Director of Public Prosecutions, *Guidelines on the Decision to Charge*, para 3.2.2.1.

386 Constitution of Kenya, Article 49(f).

387 Criminal Procedure Code, Section 162(1).

388 Criminal Procedure Code, Section 280(1).

their 'sanity' and, therefore, their capacity to stand trial and make a defence. Should an accused person be found to be of 'unsound mind' and incapable of defending their case, their trial is postponed.[389] The court may order such an accused person to be placed in safe custody, and the case reported to the President.[390] The President can order detention in 'a *lunatic* asylum, prison or other suitable place'.[391] In practice, this often means that an accused person spends more time in detention until they are certified fit to stand trial medically.[392] However, an accused person with intellectual or psychosocial disability may be released on bail[393] if it is demonstrated to court that they will be taken care of properly and will neither injure themselves nor others.[394]

The finding of unfitness to stand trial has been criticised widely, particularly in reference to the standard set by Article 12 of the CRPD; the CRPD Committee has concluded it to be, in itself, a denial of the right of an accused person to exercise their legal capacity to plead not guilty and to test the evidence adduced against them.[395] In this respect, rather than cast aside an accused person with intellectual or psychosocial disability, the situation requires provision of the necessary support and accommodations to allow them to exercise their legal capacity and to access justice effectively. As discussed below, under Kenyan law, no such overall facilitations exist for accused persons with intellectual or psychosocial disabilities.

389 Criminal Procedure Code, Section 162(2).

390 Criminal Procedure Code, Section 162(4)(5) and 280(1)(2).

391 Criminal Procedure Code, Section 280(2).

392 Criminal Procedure Code, Section 163 and 164.

393 The CPC makes reference to bailable offences only as defined in Section 123. However, Article 49(1)(h), Constitution of Kenya extends the scope of bailable offences to include all offences.

394 Criminal Procedure Code, Section 162(3).

395 *Marlon Noble v Australia* CRPD Comm. No 007/2012, Decision of 12 September 2016.

The 'insanity defence' during trial

The application of the 'insanity defence' in Kenyan courts has been uncertain as the following precedents illustrate. In *HM v Republic (of Kenya)*, the accused person was charged with rape of a person with a mental disability. Upon medical assessment, the accused person was found to have had a 'mild intellectual disability', characterised by, among others, general absent-mindedness and 'poor grades' in his early school life, which led him to drop out.[396] The High Court was convinced that the accused person raped the complainant twice. When asked if he committed the act, he responded saying that 'it is true as she loved me'. However, considering his history, the High Court found that it could be '*presumed* that at the time the act was committed, the appellant was mentally sick and not capable of knowing that the act he committed was unlawful'.[397]

A different conclusion was reached in nearly similar circumstances in *Republic v Robert Ndung'u Nderitu*,[398] where the High Court found an accused person guilty of killing his pregnant wife by stabbing her fifteen times. According to the various witnesses, the couple had previously been on good terms and there was no apparent motive for the killing. Per the post-mortem report, 'the cause of death was massive blood loss following neck vessel injuries due to sharp force trauma to the neck and multiple stab wounds and term gestation'.[399] During evidence, it was narrated how the accused person, after the act, chased away anyone around him, shouting that he would kill them, just as he had 'killed Delilah' or 'Queen Sheba'.[400]

396 *HM v Republic,* Criminal Appeal 17 of 2017, Judgment of the High Court at Meru on 9 November 2017, 2.

397 *HM v Republic,* 2.

398 *Republic v Robert Ndungu Nderitu,* Criminal Case 11 of 2017, Judgement of the High Court at Naivasha of 9 April 2020, eKLR.

399 *Republic v Robert Ndungu Nderitu,* para 9.

400 *Republic v Robert Ndungu Nderitu,* para 5.

Upon considering the plea of 'insanity', the High Court found the accused person guilty of manslaughter. Despite the plea on 'insanity', Judge Richard Mwongo asserted:

> I have already found that there was no evidence of long-term mental instability on his (the accused's) part ... it appears that the accused's alleged long term mental problem never manifested itself in the presence of any other people, and did not affect anyone or reveal itself in any acts that he was seen to do until the material day.[401]

At the same time, the High Court conceded that:

> There is no (other) evidence of his intent and malice aforethought disclosed in the evidence. *There is however evidence that his most mediate actions to the killing, show that* ***he was not in his normal mind*****:** such as *his hostility, the wild running around, the incoherence and incongruence of his behaviour; and his forgetfulness.*[402] [Emphasis added]

While in one instance the High Court satisfied itself with a presumption following a history of 'mild intellectual disability'; in another, it was unconvinced by evidence showing that the accused was *not in his normal mind* at the material time, especially without proof of prior mental illness.

Perhaps it is for challenges such as these that the Court of Appeal, in *Leonard Mwangemi Munyasia v Republic,*[403] was optimistic that the solution to the uncertain application of the law lay in incorporating medical experts in the criminal process. According to the judges:

> Technical terms such as *bipolar disorder, schizophrenia* and *mild psychosis* have been used in evidence to describe the appellant's state of mind. How do these conditions affect a person's state of mind? Again, these are questions which ought to have been answered at the trial by the experts.[404]

401 *Republic v Robert Ndungu Nderitu,* para 42-43.

402 *Republic v Robert Ndungu Nderitu,* para 43.

403 *Leonard Mwangemi Munyasia v Republic,* Criminal Appeal 112 of 2014, Judgement of the Court of Appeal at Mombasa of 30 September 2015, eKLR.

404 *Leonard Mwangemi Munyasia v Republic,* 6.

Once more, the medico-legal gap was accent in the following excerpt where the Court of Appeal could not find answers to certain questions about mental health medication despite referring to medical literature copiously:

> According to the *British Medical Journal (BMJ)* Vol. 1 No. 4909 (5th February 1955) pages 338-339, *largactil* (chlorpromazine hydrochloride) is used to treat symptoms of *schizophrenia* (a mental illness that causes disturbed or unusual thinking, loss of interest or inappropriate emotion and other forms of psychotic [*sic*]). *Artane, on the other hand is stated to be medicine for the treatment of the symptoms of Parkinson's disease*. An expert would have explained why such a drug was prescribed for the appellant. Finally, *serenance* is also used for treatment of illnesses such as *schizophrenia,* mania or severe anxiety.[405] [Emphasis added]

Medical experts would undoubtedly be useful in instances such as the above. However, with more medicalisation, questions of the reliability of medical experts arise as well as whether mental illness or handicap have to be diagnosed for the 'defence of insanity' to hold.[406] What is certain is that while a pre-existing diagnosis of mental illness does not guarantee a finding of 'insanity', its absence can, and does, diminish the chances of such a finding. This complex question of the evidence of 'insanity' is at least mitigated by the lower standard of proof. Although the burden of proof of 'insanity' rests with an accused person, they need only prove 'insanity' on a balance of probabilities, unlike the high standard of proof – beyond reasonable doubt – required of the prosecution to prove their case.[407]

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405 *Leonard Mwangemi Munyasia v Republic,* 6.

406 It is this complexity of the involvement of medical experts that drove the development of the 'insanity defence' in the US. See *Durham v United States* (214 F.2d 862).

407 *CNM v Republic,* Criminal Appeal 116 of 1985, Judgement of the Court of Appeal at Nairobi of 11 December 1985, eKLR.

Support and facilitation through intermediaries in court proceedings

Besides medical experts, criminal trials involving persons with intellectual and psychosocial disabilities as accused persons, victims or witnesses may also require intermediaries. Article 50 of the Constitution of Kenya, 2010 (2010 Constitution) guarantees all accused persons the right to a fair hearing, which includes the right to be understood by the court. Other relevant entitlements include: the rights to access relevant information (including opposing evidence and a copy of the proceedings),[408] have the information delivered in a language understandable to the person concerned,[409] and facilitated communication with the court through the aid of an interpreter[410] or intermediary[411] where necessary. Such provisions are meant to assist the person, whether represented by counsel or not,[412] to mount a defence,[413] challenge the evidence adduced against them and give evidence of their own.[414] Moreover, the trial should be concluded in good time, without undue delays.[415]

As already observed, the overall experience of persons with intellectual and psychosocial disabilities in the criminal justice system is usually already fraught with difficulties. At trial, such challenges are usually exacerbated and compounded yet appropriate accommodations often lack. Even if provided for in law, they may not be available in fact; and where they exist in fact, they tend to be insufficient and/or to result in negative outcomes for persons with intellectual and psychosocial disabilities. Should an accused person with an intellectual or psychosocial disability be eventually certified fit to stand trial – often overcoming long detention without proper medical care – courts usually

408 Constitution of Kenya, Article 50 (2)(b)(j), (5).
409 Constitution of Kenya, Article 50 (3).
410 Constitution of Kenya, Article 50 (2)(m).
411 Constitution of Kenya, Article 50 (7).
412 Constitution of Kenya, Article 50 (2)(g)(h).
413 Constitution of Kenya, Article 50 (2)(c).
414 Constitution of Kenya, Article 50 (2)(k)(l).
415 Constitution of Kenya, Article 50 (2)(c).

assume them to be 'sane' and treat them like other accused persons. While this may sound ideal, it is in fact detrimental.

Classically, criminal law understood 'insanity' as the impairment of a human otherwise ruled by reason, capable of directing their will towards a pre-meditated object. Such impairment could be caused by a disease of the mind, assumed to occur in bouts that could have the same person sane at one instance and 'insane' at another. This general assumption of sanity is reflected in Section 11 of the Penal Code. However, considering contemporary medical understanding of mental illness, disability and impairment – their incidence, causes and effect on a patient – this view is out-dated. Indeed, as far back as 1945, the US Appellate Court for the District of Columbia observed that:

> The modern science of psychology … proceeds on an entirely different set of assumptions (from law). It does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go.[416]

In this regard, insanity in criminal law is seen as the negation of sanity, not-sane. Criminality amongst persons affected by mental illness, disability or impairment is not assessed in its own right. Without such an understanding, the unique needs of persons with intellectual and psychosocial disabilities during trial remain unknown to the court. Therefore, a proactive approach is necessary to ensure an accused person with an intellectual or psychosocial disability can participate in a trial effectively through appropriate accommodations such as the use of technological aids[417] and intermediaries.

Even though the 2010 Constitution provides for the appointment of intermediaries to assist a complainant or an accused person to communicate with the court,[418] the legal framework for this measure is

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416 *Holloway v US* 148 F.2d 665 (1945), para 667.

417 For instance, see Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (Legal Notice 117), Rule 3(5)(d).

418 Constitution of Kenya 2010, Article 50(7).

yet to be enacted.[419] In the absence of a legal framework, the interpretation of the intermediary role varies from one judicial officer to another[420] thereby posing a challenge to the efficacy of the scheme. Additionally, there are no proper procedures for appointing qualified intermediaries,[421] and the intermediary scheme is only limited to witnesses in criminal proceedings mainly under the Sexual Offences Act.[422]

The Sexual Offences Act 2006 provides that intermediaries should be provided for vulnerable witnesses during trial. A *vulnerable witness* is defined to encompass a 'person with mental disabilities'[423] or persons vulnerable on account of 'intellectual, psychological or physical impairment'.[424] According to the Sexual Offences Act, an intermediary is:

> ... a person authorised by a court, on account of his or her expertise or experience, to give evidence on behalf of a *vulnerable witness* and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker.[425] [Emphasis added]

Section 31 of the Sexual Offences Act provides that, upon the declaration of the vulnerability of a witness, the court can allow the witness to deliver evidence through an intermediary and may proceed to

419 Paul Juma, 'Right to self-representation for people with mental disabilities in Kenya's courts,' 7 *African Disability Yearbook,* 2019, 90.

420 See, *RMM v Republic*, Criminal Appeal No. 21 of 2018, Judgement of the High Court at Machakos of 26 July 2019, eKLR; *Nahashon Otieno Odhiambo v Republic,* Criminal Appeal 66 of 2015, Judgement of the Court of Appeal at Kisumu on 7 October 2019, eKLR.

421 Juma, 'Right to self-representation for people with mental disabilities in Kenya's courts,' 93, 94.

422 Sexual Offences Act, No 3 of 2006. See also, Juma, 'Right to self-representation for people with mental disabilities in Kenya's courts,' 92, 93.

423 Sexual Offences Act, Section 2.

424 Sexual Offences Act, Section 31(2)(b).

425 Sexual Offences Act, Section 2.

direct the appointment of one.[426] Several actors can initiate the inquiry as to vulnerability. As per the Court of Appeal in *MM v Republic*:[427]

> ... it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court ... can [also] on its own motion, through *voir dire* examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration.[428]

However, the appointment of an intermediary is not guaranteed. Although the Sexual Offences Act allows a court to 'summon an intermediary to appear before the court and advise the court on the vulnerability of such witness',[429] as per *MM v Republic*;

> The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. *The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.*[430] [Emphasis added]

Thus, the intermediary regime takes a largely victim-based approach as the Court of Appeal stated further:

> It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of Section 31 (of the SOA) was, in our view, *to moderate these traumatic effects in criminal proceedings.*[431] [Emphasis added]

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426 Sexual Offences Act, Section 31(4)(5).

427 *MM v Republic,* Criminal Appeal 41 of 2013, Court of Appeal Judgement of 18 July 2014 at Nairobi, eKLR.

428 *MM v Republic,* 5.

429 Sexual Offences Act, Section 31(3).

430 *MM v Republic,* 5.

431 *MM v Republic,* 5.

An intermediary conveys questions between the court and the witness in a manner understandable to them and requests the court for a recess where the witness is fatigued or stressed.[432] The function of an intermediary is quite delicate; they can only act as a medium for communication.[433] When it comes to persons with intellectual and psychosocial disabilities, it is especially important that an appointed intermediary should not be just a close relation, but an individual with a deeper, more nuanced understanding of the person's condition and how to deal with it within the trial environment. Such an intermediary needs training, accreditation and even a code of professional ethics. As the Court of Appeal observed in *MM v Republic*: 'It goes without saying, in view of (their) role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his or her ability the general purport of the evidence.'[434] Doubtless, these techniques are useful in facilitating communication between the court and the person with an intellectual or psychosocial disability.

However, since the Sexual Offences Act intermediary regime focuses primarily on trauma management in facilitating communication, it explicitly restricts the definition of vulnerable witnesses to exclude accused persons,[435] ostensibly seen as perpetrators. This means that, even when considering sexual offences exclusively, accused persons in need of intermediary assistance, such as persons with intellectual and psychosocial disabilities, have no recourse.

While the constitutional provision on intermediaries continues to protect such individuals, the continuing lack of a comprehensive legislative, regulatory and policy framework for intermediaries at trial means that such protection is rarely realised in practice. Fayel Haji of the KAIH discussed the practical effects of this gap when she relayed her experience as an intermediary in Kenya's criminal justice system at the

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432 Sexual Offences Act, Section 31(7).

433 *MM v Republic,* 5.

434 *MM v Republic,* 6.

435 Sexual Offences Act, Section 31(1)(2).

Kabarak University Annual Law Conference held on 6 and 7 September 2021.[436] She disclosed the lack of formal State training and accreditation of intermediaries in Kenya, and that the few training opportunities are usually organised by civil society organisations through the funding of foreign donors. Even for the few trained intermediaries, a framework is lacking for incorporating them into the criminal justice system. Haji narrated that intermediaries are sometimes required to justify their presence in court in the first place.

It is imperative to fill this legal and administrative gap. Already, Haji outlined some of the general principles that bind intermediaries from which some of the basic principles of a new regulatory system for intermediaries could be derived. These include a duty to maintain neutrality, not to contaminate evidence, confidentiality, transparency, and professionalism.

The 'insanity defence' during sentencing and punishment

At the outset, it helps to underscore that uncertainty in the elements of the insanity defence abound such as: when it is to be applied, its nature, its examination, the burden and standard of proof, whether the permanency of the illness is a factor for consideration, and so on. Already, an analysis of the cases decided by Kenyan courts in Chapter 6 of this book shows that the 'insanity defence' has been detrimental for accused persons with intellectual or psychosocial disabilities. This is because of uncertainty about the elements of the defence, particularly the definition of 'insanity', evidentiary questions, and, where the defence is pleaded successfully, the resulting sentence, detention at the pleasure of the President is problematic.

436 Report of the 4th Annual Kabarak Annual Law Conference, Conference on Access to Justice for Persons with Psycho-social and Intellectual Disabilities in the Criminal Justice System in Kenya, 6-7 September 2021, 11.

As Jentrix Wanyama observes, the definition of insanity has been contentious historically - a situation reflected in Kenya.[437] What exactly constitutes a 'disease affecting the mind'? Does it mean the same thing as a 'disease *of* the mind'? The two phrasings are usually used interchangeably by the courts. How, for instance, does epilepsy – a disease of the brain characterised by recurrent seizures leading to the uncontrollable movements of one's body or parts of it – measure up to the selected definition?[438] What then of intellectual 'deficiencies'? Notably, while the law refers to 'idiots' and 'imbeciles',[439] their criminal responsibility is not clear.

The basis for the insanity defence is Section 12 of the Penal Code, which provides:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission [they are] through any *disease affecting [their] mind incapable of understanding what [they are] doing, or of knowing that [they] ought not to do the act or make the omission*; but a person may be criminally responsible for an act or omission, although [their] mind is affected by disease, if such disease does not in fact produce upon [their] mind one or other of the effects above mentioned in reference to that act or omission. [Emphasis added]

If pleaded successfully, the 'insanity defence', could lead to an acquittal or lesser punishment.[440] A successful 'insanity defence' results in a special finding of 'guilty but insane'.[441] Section 166 of the Criminal Procedure Code also provides that:

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437 Jentrix Wanyama, 'A call to strengthen the law on insanity in Kenya', 2 *Strathmore Law Review,* 2017, 7-9.

438 See *Ellis v R* (1965) EACA.

439 Penal Code, Section 146. The same offence is now usually tried under Sexual Offences Act, Section 7 which retains the material elements of the offence but instead speaks in the less derogatory language of 'mental disability' rather than 'mental deficiency' like the latter.

440 See generally Paul H Robinson, 'Criminal law defences: A systematic analysis' 82 *Columbia Law Review,* 2 (1982).

441 Criminal Procedure Code, Section 166(1).

> When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct … The President may order the person to be detained in a 'mental hospital', prison or other suitable place of safe custody.[442]

Ostensibly, the finding of 'guilty but insane' is meant to be lenient. Committal at the President's pleasure, akin to a ward of the state, should take the convict with an intellectual or psychosocial disability out of the prison-punishment route, toward treatment and care. However, the reality is that, when a court makes such a finding and hands the convict into the hands of the President, the age-old bureaucracies, administrative mazes, and inefficiencies check in. As a result, where the 'insanity defence' may have been a balm, in reality, it transforms into a near torturous experience.[443]

The Kenya National Commission on Human Rights (KNCHR) has investigated the intricacies of such detention 'at the pleasure of the President' and its impacts on persons with intellectual and psychosocial disabilities and found that it is complicated by various administrative shortcomings, including the involvement of a complex maze of institutions (courts, prisons, police, mental health institutions and the Office of the President), which cause delays. As the KNCHR reports, it:

> [E]ntails obtaining court proceedings, forwarding them to prison headquarters, and the proceedings being forwarded to the Cabinet Secretary who would then draw a removal instrument to allow the inmate to be transferred to Mathari. There have been situations of inmates waiting for up to six years while being processed.[444]

All persons held in custody or prison are entitled to medical examination, treatment and health care following recommendation by a medical officer.[445] However, due to the ephemeral and uncertain nature

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442 Criminal Procedure Code, Section 166 (2)(3).

443 *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru of 10 May 2016, eKLR.

444 KNCHR, *Draft advisory on the presidential pleasure sentence in Kenya*, para 19.

445 Persons Deprived of Liberty Act, (No 23 of 2014), Section 15.

of the detention of persons with intellectual and psychosocial disabilities in prisons, the provision of specialised care is not always possible, let alone available.

In the event that, while in prison, a medical officer determines that a prisoner is of 'unsound mind', they may recommend their transfer to a 'mental hospital'.[446] However, quality and adequate provision of rehabilitative mental health care is not guaranteed[447] as patients in mental health hospitals are invariably considered, and are often treated, as 'problems' to be managed rather than as persons with rights to be respected and needs to be met. The net result is unduly long periods of detention that could and do traumatise inmates making them feel cast aside and forgotten.[448] Furthermore, such detention is often characterised by discrimination since persons with intellectual and psychosocial disabilities in prison are usually stigmatised, treated as a danger to themselves and others, and set aside from the rest of the prisoners. They are also denied the various rehabilitative programs and activities afforded to other inmates.[449]

Therefore, detention at the pleasure of the President presents unique and even more complicated challenges for convicted persons with intellectual and psychosocial disabilities. It does not help matters that once judgement is delivered and a special finding of 'guilty but insane' entered, the court becomes *functus officio* and, therefore, not accessible easily to address the ensuing stigma, discrimination and trauma. For this reason, courts have called for reforms to the presidential pleasure sentence, and have at times even bypassed it.

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446 Prisons Act (No 49 of 1952), Section 38(1)(4); *PM v Republic,* Criminal Appeal 7 of 2020, Judgement of High Court at Voi on 10 February 2021, eKLR.

447 KNCHR, *State of healthcare for prisoners in Kenya,* Prisoner Series Report, No 1 of 2019, 39-40.

448 KNCHR, *Draft advisory on the presidential pleasure sentence in Kenya*, 6-8.

449 KNCHR, *Draft advisory on the presidential pleasure sentence in Kenya*, para 20.

Republic v SOM[450] is illustrative of the reform advocacy by the Judiciary. In the 2018 decision on sentencing, Justice David Majanja questioned the injustice occasioned by the paradoxical uncertainty and finality of the presidential pleasure sentence in the following terms:

> The vesting of discretion on the President on how the accused is to be treated after conviction is inimical to the fundamental duty of the Judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence.[451]

Consequently, the High Court made orders to the effect that:

> … the provisions of Section 166 of the Criminal Procedure Code are (declared) unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to Article 160 of the Constitution by vesting the discretionary power to the President to determine the nature and extent of the sentence.
>
> Consequently … in order to remedy the constitutional defect the reference to "the President" under section 166 of the Criminal Procedure Code and that the review carried out under that section shall be by the Court.
>
> …the accused … be committed to a 'mental institution' namely Mathari Mental Hospital for a term of fifteen (15) years subject to period review by the court in accordance with Section 166 of the Criminal Procedure Code and in any case before the expiry of every two (2) years.

Moreover, Justice Majanja commented on the relationship between criminal law and mental illness as below:

> Section 166 of the CPC comes under the heading, "Procedure in Lunacy …" which underpins the 18th century foundations of the current law. Modern psychiatry has brought new insights to the human mental condition while human rights standards have influenced the improvement of the conditions and treatment of persons with mental

450 *Republic v SOM,* Criminal Case 6 of 2011, Judgement of the High Court at Kisumu of 30 April 2018, eKLR.

451 *Republic v SOM,* para 11.

> disability in the criminal justice system. I therefore direct that the Deputy Registrar to forward this decision to the National Council on Administration of Justice (NCAJ) Committee on Criminal Justice Reform (NCCJR) appointed by the Chief Justice Vide Gazette Notice No. 5857 of 19th June 2017 to review various aspects of the criminal justice system in order to inform further reforms in this area of law and procedure.[452]

Since this decision, several courts have been inspired to innovate their own sentences for convicted persons who would have been sentenced at the pleasure of the President. For instance, the court in the previously discussed case, *HM v Republic*, sentenced the convicted person to time served.[453] In *Hassan Hussein Yusuf v Republic*,[454] Justice Kiarie Waweru set aside an order for detention and imposed no further punishment. Instead, he ordered that:

> ... the appellant shall be escorted to a medical facility with the capacity to re-evaluate his mental condition. If in the opinion of a psychiatrist, he will not pause [*sic*] any danger to the public and himself he shall be set at liberty and prison authorities shall ensure that he is facilitated to his home. If the opinion is otherwise, he shall be admitted for treatment until such a time it will be safe to release him.[455]

It is this same court that made the observation that 'a sick person's place is at the hospital and not in prison'.[456]

However, as Chapter 6 of this book finds, while judicial officers agree on the problem largely, they differ on the solution leading to inconsistent application of the law especially by the Court of Appeal [as in *Mwachia Wakesho v Republic* (2021)][457] with the result that persons with intellectual and psychosocial disabilities continue to suffer

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452 *Republic v SOM,* para 18.

453 *HM v Republic,* 6.

454 *Hassan Hussein Yusuf v Republic.*

455 *Hassan Hussein Yusuf v Republic.*

456 *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru of 10 May 2016, eKLR, para 24.

457 *Mwachia Wakesho v Republic,* Criminal Appeal 8 of 2016, Judgement of the Court of Appeal of 3 December 2021, para 56.

violations such as the verdict of guilt without *mens rea* and indefinite sentences mostly in deplorable conditions instead of treatment.

Clearly, legislative amendment is necessary to clarify important aspects relating to the treatment of persons with intellectual and psychosocial disabilities. Such reforms should consider that persons with intellectual and psychosocial disabilities cannot simply be let go upon serving their sentence or acquittal; for they continue to need mental health care and monitoring. Reforms to the sentence must also include reforms to the mental health infrastructure to ensure that convicted persons with intellectual and psychosocial disabilities receive the care they require.

Conclusion

This chapter has explored a wide range of concerns on the treatment of persons with intellectual and psychosocial disabilities in the criminal justice system from the offences to arrest to trial, right to sentencing and detention. It has highlighted various provisions of procedural law, their judicial interpretation, and their impact on persons with intellectual and psychosocial disabilities. It has highlighted certain offences that criminalise intellectual or psychosocial disability, underlined the pitfalls in the law regulating arrests, trial, sentencing and institutionalisation of persons with intellectual and psychosocial disability and stressed the areas that need reform. Hopefully, this commentary and advocacy will catch the eye of an agile policy-maker.

Chapter 6

Emerging judicial jurisprudence on mental health in Kenya's criminal justice system

J Osogo Ambani
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Introduction

The mental status of an accused person at the point of commission of an offence and during trial has implications on the legal and administrative procedures applicable, and, by extension, their rights. The resolution of such questions can be resolved by following either of a number of legal options. First, where a court is certain about the guilt of an accused person but is convinced that their judgement was affected by mental illness at the time of committing an offence, it is required to enter a special finding of 'guilty but insane'.

Second, where a court suspects an accused person to have a mental illness, it has a duty to inquire into the matter.[458] If it forms the opinion that the person has a mental illness and, therefore, incapable of making their defence, it has to postpone the proceedings. It may grant bail to the accused person on sufficient security being given that they will be taken care of and prevented from doing injury to themselves or others.[459] Where the court does not grant bail, it is mandated to detain the accused person in a suitable place and transmit the court record to the Cabinet Secretary responsible for prisons for consideration by the President.[460]

458 Criminal Procedure Code (CPC), Section 162(1); see also the procedure in CPC, Section 166.

459 CPC, Section 162(3).

460 CPC, Section 162(4).

The President may order the accused person to be detained in a mental hospital or other suitable place of custody until they make a further order in the matter or until the court, which found them incapable of making their defence, orders them to be brought before it again.[461]

Third, where an accused person cannot understand the case against them, though they have no mental illness, a court may still try and either convict or discharge them based on the evidence available. Where such a person is convicted, the Criminal Procedure Code (CPC) empowers the President to detain them at their pleasure.[462] These procedures entail significant judicial and administrative bureaucracies – operated by judicial officers, prosecutors, officers in charge of mental hospitals and prisons, the Cabinet Secretary responsible for prisons, and the President – which have caused accused persons with intellectual and psychosocial disabilities to suffer indefinite or lengthy institutionalisation, mostly in deplorable conditions.

To remedy the many human wrongs occasioned by the inadequacies of the bureaucracy, High Court judges have explored three main approaches. First, the High Court started the practice of circumventing Government bureaucracy when making orders affecting accused persons with intellectual and psychosocial disabilities. However, the Court of Appeal (CoA) in *Mwangemi Munyasia v Republic* (2015),[463] *Karisa Masha v Republic* (2015)[464] *and Nyawa Mwajowa v Republic* (2016)[465] discouraged the approach and insisted that the solution lay in fidelity to the criminal procedure by the courts and efficient administration by Government bureaucrats. The second approach, first attempted

461 CPC, Section 162(5).

462 CPC, Section 167(1)(b).

463 *Leonard Mwangemi Munyasia v Republic,* Criminal Appeal 112 of 2014, Judgement of the Court of Appeal at Mombasa of 30 September 2015, eKLR.

464 *Karisa Masha v Republic,* Criminal Appeal 78 of 2014, Judgement of the Court of Appeal at Mombasa of 4 December 2015, eKLR, 5.

465 *Nyawa Mwajowa v Republic,* Criminal Appeal 46 of 2015, Judgement of the Court of Appeal at Mombasa of 29 July 2016, eKLR.

in *Hassan Hussein Yusuf v Republic*[466] and built upon in a number of cases, questioned the constitutionality of parts of Sections 166 and 167 of the CPC. This approach challenged the exercise of judicial power by the President, indefinite sentences, and the finding of guilt without *mens rea*, among others, on the basis of constitutional and human rights imperatives like judicial discretion, and the rights to human dignity, freedom from torture, cruel, inhuman and degrading treatment, freedom from discrimination, and fair trial.[467]

Again, this approach encountered real challenges. One, a third and different approach by then High Court Lady Justice, Jessie Lesiit, which read definite judicial sentences into the impugned provisions of CPC for the sake of the human rights of accused or convicted persons with intellectual and psychosocial disabilities, and reconciled the provisions of the CPC and the 2010 Constitution that are considered contradictory. And, two, discord in the decisions of the CoA with the result that there is no longer clarity on the legal position. Despite some judges of the High Court declaring certain provisions of the CPC unconstitutional, their former colleague (Lesiit) applied a different approach, and the CoA proceeded as if oblivious of the earlier developments. Ideally, once a superior court declares sections of the law unconstitutional, the impugned provisions cease to apply unless an order of a higher superior *court or* subsequent legislative enactment overrules it. But even this fundamental constitutional dictate has not earned the respect of all the judges. Without a stable solution, the rights of persons with intellectual and psychosocial in the criminal justice system remain in a state of flux.

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466 *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru on 10 May 2016, eKLR.

467 See for example, *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru on 10 May 2016, eKLR; *Republic v SOM,* Criminal Case 6 of 2011, Judgement of the High Court at Kisumu of 30 April 2018, eKLR.

This chapter is about Kenya's jurisprudential journey on matters mental health and the criminal justice system. Through the lenses of human rights and democratic governance, it offers an in-depth review of case law to discover the jurisprudential trend, the direction of the law, and the influence of the Constitution of Kenya 2010 (2010 Constitution).

Phases of post-2010 judicial jurisprudence

As stated above, to protect the rights of persons with intellectual and psychosocial disabilities in the criminal justice system, the High Court has attempted three approaches under the 2010 Constitution. Initially, it side-stepped Government bureaucracy that it considered ineffective and cumbersome by sentencing affected persons directly. Then, it began to declare parts of Sections 166 and 167 of the CPC unconstitutional. But Justice Lesiit (then of the High Court) had a different approach, which aimed at the best of both worlds – eliminating the inadequacies of Government bureaucracy while maintaining the role of the President in the criminal procedure. Finally, the CoA rendered problematic decisions that have thrown the entire thread into jurisprudential chaos leaving the law uncertain, and with this confusion, continued violations of the rights of persons with intellectual and psychosocial disabilities.

Phase 1: Circumventing Government bureaucracy

This sub-section discusses the practice the High Court had established whereby it would by-pass certain procedures involving Government officials to save persons with mental illness from violations which the bureaucracy would occasion. The discussion is conducted through review of three cases that went all the way to the CoA; *Leonard Mwangemi Munyasia v Republic* (2015), *Karisa Masha v Republic* (2013) (2015) and *Nyawa Mwajowa v Republic* (2016).

Leonard Mwangemi Munyasia v Republic (2013) (2015)

The accused person in *Republic v Leonard Mwangemi Munyasia* (2013) was charged for stabbing a policeman in broad daylight fatally without provocation. Despite having suffered from chronic malaria from

a tender age and having been on treatment for mild psychosis throughout his adulthood, the High Court convicted him to imprisonment for 30 years, arguing that suffering from a mental illness did not mean that he was 'incapable of formulating the *mens rea* necessary for murder'.

The CoA[468] faulted the judgement of the High Court for side-stepping the procedure outlined in CPC Sections 162-164, likening it to the cases of *Grace Nyoroka* and *Julius Wariomba*, which 'short-circuited' the CPC. While appreciating that the rationale of circumventing the legal process was to save time, the CoA ruled that the High Court had no power to commit an accused person to a mental hospital directly. It clarified the procedure to be as follows:

- If in the course of a trial it becomes apparent, after the trial court has inquired into the issue, that the accused person has a mental illness, and is, therefore, not able to understand the proceedings or make their defence, the court is required to adjourn the proceedings.
- The accused person may be released on sufficient security being given that they will be properly taken care of and prevented from doing injury to themselves or any other person and that they will be availed to the court when needed.
- But if the case involved is one which bail may not be taken, or if sufficient security has not been given, the court will order for the detention of the accused person in safe custody in such a place as it may think fit and thereafter transmit the court record or its certified copy to the Cabinet Secretary responsible for prisons, who shall, in turn, transmit it for the President's consideration.
- It is only after the President directs that the accused person be detained in a mental hospital or such other place that the court will issue an order to effect the directive and the

468 *Leonard Mwangemi Munyasia v Republic,* Criminal Appeal 112 of 2014, Judgement of the Court of Appeal at Mombasa of 30 September 2015, eKLR.

accused person shall be so detained until the President makes a further order after being satisfied from the report of the medical officer of the mental hospital or such other place, that the accused person is capable of participating in the trial.

- The Director of Public Prosecution is required to indicate whether or not the State wishes to continue with the case against the accused person.
- Again, where the trial court finds that the accused person had a mental illness when they committed the crime; it has to report the case for the direction of the President, who may then order that the accused person be detained in a mental hospital, prison or other suitable place of safe custody.

On 30 September 2015, having adjudged the procedure and sentence as unlawful, the CoA set aside the imprisonment sentence, substituted it with a special finding of 'guilty but insane', and directed the institutionalisation of the appellant at Shimo La Tewa Prison pending the President's order.

Karisa Masha v Republic (2013) (2015)

In the first instance case, *Republic v Karisa Masha* (2013),[469] the trial court convicted Karisa Masha of murder. The charge was that, in 2008, Karisa slashed a woman on the head and neck with a *panga* and thereafter went to the police and admitted to killing a person. The trial court postponed the proceedings and ordered his detention at Port Reitz Hospital, Mombasa, on the basis that he was of 'unsound mind' and incapable of making his defence.[470] Having found, subsequently, that Karisa had no mental illness but was still incapable of understanding the proceedings; the High Court tried the case and convicted Karisa for the offence of murder.

469 *Republic v Karisa Masha*, H.C.CR.C No. 22 of 2008, Judgement of the High Court at Mombasa of 20 February 2013.

470 As per the Court of Appeal.

On appeal, in *Karisa Masha v Republic* (2015),[471] the CoA took issue with the impropriety surrounding the postponement of proceedings and the conviction, and concluded that the trial judge did not follow the procedures outlined in sections 162 and 167 of the CPC. First, the trial judge ignored the legal requirement to forward the record of the court to the President through the Cabinet Secretary responsible for prisons. Recalling *Grace Nyaroka v Republic*, the CoA noted the emergence of the practice 'of side-stepping the legal requirements involving the Cabinet Secretary and the President', appreciated that the practice was designed to speed up trials by circumventing the delays normally occasioned by the bureaucracy of the two offices, but counselled courts of law to 'discourage emergence of a practice that is contrary to statutory provisions and procedures unless the provisions or procedures are first expressly invalidated by the court, amended or repealed'. The CoA counselled that the solution was in Government bureaucrats discharging their legal duties diligently rather than in the courts by-passing the law.

To forestall future anomalies, the CoA clarified that the CPC anticipates three scenarios, where: i) the accused person's mental status is affected at the time of committing an offence, ii) the accused person's mental status is affected during trial, and iii) the accused person cannot understand the nature of the proceedings. The instant case fell under ii), initially, and iii), subsequently. As a matter under ii), sub-sections 162(2) and (4) of the CPC obligated the trial judge to make an order institutionalising the accused person at a suitable place, and transmit the court record or its certified copy to the Cabinet Secretary responsible for prisons for consideration by the President. As a matter under iii), Section 167(1)(b) of the CPC applied. Under this scenario, the High Court would have been required to try the case and either acquit or convict the accused person depending on the weight of the evidence – although not always – as Asike-Makhandia, Ouko and M'Inoti held below:

> [t]he above provision neither requires nor entitles the trial court, if it is satisfied that the evidence can found a conviction, to convict the

471 *Karisa Masha v Republic,* Criminal Appeal 78 of 2014, Judgement of the Court of Appeal at Mombasa of 4 December 2015, eKLR, 5.

> accused as the trial court did. It must be remembered that the accused person in question does not understand the proceedings and therefore has not taken any meaningful part in his trial or part thereof. Failure of the accused person to understand the proceeding has considerable inhibitive effect on his ability, as in this case, to mount his defence, however strong it may be. To convict such an accused person on the basis of proceedings that he does not understand is clearly a violation of the right to fair trial guaranteed by ***Article 50*** of the ***Constitution***. That is not what Section 167(1)(b) of the Criminal Procedure Code envisages and clearly the trial judge erred in that respect.

Nyawa Mwajowa v Republic (2016)

Nyawa Mwajowa v Republic (2016)[472] reversed the High Court's decision in which the appellant was convicted and imprisoned for murder despite entering a guilty plea after his initial not-guilty plea and the evidence of medical records (ordered by the High Court before the commencement of the trial) indicating that the accused person was suffering from a psychiatric ailment.[473] Notably, another medical report tendered at the High Court during the pre-sentencing stage demonstrated that the accused person started suffering from the psychiatric ailment in primary school and had been subjected to traditional witchdoctors who treated him by turning him into an unpaid child labourer on their farms.

The CoA reiterated its position in *Leonard Mwangemi Munyasia v Republic*[474] and *Karisa Masha v Republic* where it stressed the:

> [c]ritical importance of following strictly the procedure prescribed by the CPC in cases of 'insanity' because those procedures are calculated to ensure that a person suffering a mental disorder, either when he committed the act complained of or at the time of his trial when he cannot competently put forward his defence, is not convicted.

472 *Nyawa Mwajowa v Republic,* Criminal Appeal 46 of 2015, Judgement of the Court of Appeal at Mombasa of 29 July 2016, eKLR.

473 *Nyawa Mwajowa v Republic*, 4.

474 *Nyawa Mwajowa v Republic*, 5.

The CoA held in the *Munyasia* case that where the defence of 'insanity' is raised or where this becomes apparent from the accused person's history, it is the trial court's duty to inquire into the question specifically, and to refrain from ignoring evidence on the record suggestive of the appellant's 'insanity' merely because the defence has not raised it.[475] The CoA, in the present case, critiqued the High Court for failing to adhere to the steps in Section 162 of the CPC on postponing trial as the medical report had indicated that the accused was incapable of defending himself. In addition, the CoA held that the High Court also erred in failing to invoke Section 166 of the CPC, which provides that if an accused person was 'insane' at the time they committed an offence, the special verdict 'guilty but insane' rather than conviction should be preferred. Consequently, the CoA quashed the conviction and sentence of the appellant, substituted them with the special verdict and ordered their detention at Port Reitz Hospital in Mombasa for continued treatment while the special finding was furnished to the President for his order.

Phase 2: Questioning the constitutionality of the CPC

After 2015, the High Court began to question the constitutionality of sections 166 and 167 of the CPC on the grounds that they violate the rights of persons with intellectual and psychosocial disabilities to definite sentences and to freedom from torture, cruel, inhuman and degrading treatment, human dignity, fair trial, and not to be convicted without *mens rea*. As this sub-section shows, the High Court applied this approach in *Hassan Hussein Yusuf v Republic* (2016),[476] *HM v Republic* (2017),[477] and *Republic v SOM* (2018).[478]

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475 *Nyawa Mwajowa v Republic*, 4; *Leonard Mwangemi Munyasia v Republic,* Criminal Appeal 112 of 2014, Judgement of the Court of Appeal at Mombasa of 30 September 2015, eKLR, 4.

476 *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru on 10 May 2016, eKLR.

477 *HM v Republic,* Criminal Appeal 17 of 2017, Judgment of the High Court at Meru on 9 November 2017.

478 *Republic v SOM,* Criminal Case 6 of 2011, Ruling on sentence of the High Court at Kisumu of 30 April 2018, eKLR.

Hassan Hussein Yusuf v Republic (2016)

Hassan Hussein Yusuf v Republic (2016)[479] arose from the conviction before the Magistrate's Court in Isiolo. Hassan Hussein Yusuf (appellant) had on 24 October 2008 at about 11 am entered Ansaar Mosque without removing his shoes as required, stole four Qurans valued at Ksh 2000, and dumped them in a pit latrine. Consequently, the appellant was charged with the offence of breaking into a building and committing a felony. Just before sentencing, the trial court suspected that the accused person was suffering from a mental illness, which was subsequently confirmed by psychiatric examination.[480]

While the trial Magistrate ordered for the appellant's detention at the President's pleasure, the appellate Judge found this to be cruel, inhuman, and degrading treatment as its effect was the appellant's confinement in prison for an indeterminate duration of time.[481] The High Court also found that the trial court did not forward the order on the appellant's detention to the High Court as per Section 167(1) of the CPC. This meant that a copy of the notes of evidence taken at the trial was not forwarded to the Cabinet Secretary responsible for prisons as per Section 167(4) of the CPC. Hence, the High Court took the position that although the trial court did not err in directing the psychiatric examination at a late stage of the trial, the failure to follow the procedure in the CPC was prejudicial to the appellant, who would probably have required a brief period in a health facility.

Further, the High Court ruled that Section 167 of the CPC, which legalises the detention of persons with intellectual and psychosocial disabilities in prisons instead of health facilities, and for indefinite durations, is unconstitutional to the extent that it violates Articles 25 and 29 of the 2010 Constitution on the right to freedom from torture, cruel, inhuman and degrading treatment. Justice Kiarie Waweru's following statements are quotable:

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479 *Hassan Hussein Yusuf v Republic,* Criminal Appeal 59 of 2014, Judgement of the High Court at Meru on 10 May 2016, eKLR.

480 *Hassan Hussein Yusuf v Republic*, 2.

481 *Hassan Hussein Yusuf v Republic*, 3.

> [k]eeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment.
>
> …
>
> The order envisaged under Section 167(1) of the Criminal Procedure Code is a punishment. Any punishment that cannot be determined from the onset is cruel, inhuman and degrading.
>
> …
>
> A sick person's place is at the hospital and not in prison. I find Section 167 of the Criminal Procedure Code discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. This offends Articles 25 and 29(f) of the Constitution.

In the end, the High Court set aside the Magistrate's decision and ordered for the psychiatric re-evaluation of the appellant's mental health in a health facility, where if a conclusion was reached that he did not pose a danger to himself or the society, he would be discharged. If not, he was to be admitted for treatment at a health facility until he was fit for discharge.[482] This decision set the pace for a progressive interpretation of the rights of persons with intellectual and psychosocial disabilities in the criminal justice system.

HM v Republic (2017)

The appellant in *HM v Republic* (2017)[483] had been convicted for defilement of a 15-year-old girl with a mental disability. It was confirmed during trail that the appellant had a mental disability but was fit to plead, and consequently, he was sentenced to serve an indeterminate detention at the President's pleasure. The High Court, hearkening to the decision in *AOO & 6 others v Attorney General & another (2015)*,[484] stated:

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482 *Hassan Hussein Yusuf v Republic,* 4.

483 *HM v Republic,* Criminal Appeal 17 of 2017, Judgment of the High Court at Meru on 9 November 2017.

484 *AOO & 6 others v Attorney General & another,* Petition 570 of 2015, Judgement of the High Court at Nairobi of 12 May 2017, eKLR.

> The law provides that one who is 'guilty but insane' is to be detained at the President's pleasure just like one who is sentenced to death but is under the age of 18 years. The lengthy incarceration of such convicts erodes their human dignity provided under Article 28 of the Constitution. The appellant did not know that he ought not to have committed the act. He was mentally sick and the law acknowledges that mental status. Having the appellant detained for a period which might be longer than the minimum sentence under Section 7 of the Sexual Offences Act is unlawful. The sentence is now indefinite and all what the appellant has to do is to entertain the faint hope that the presidential pleasure will be exercised before the expiry of 10 years. One serving such a sentence cannot be held to be serving a proper sentence. The sentence is indefinite. It can be more or less than 10 years prescribed period. That situation erodes the appellant's dignity.[485]

Accordingly, Justices Juma Chitembwe (as he then was) and Alfred Mabeya held that being detained at the President's pleasure for an indeterminate period is an excessive sentence that contravenes Article 28 of the 2010 Constitution.

AOO & 6 others v Attorney General & another (2015)[486] declared sub-sections 25(2) and 25(3) of the Penal Code, which empower courts to sentence children convicted of capital offences at the pleasure of the President in lieu of death sentence, unconstitutional. The High Court reasoned that sentencing children to detention at the President's pleasure subjected them to executive (rather than judicial) discretion, and breach of their rights to freedom from cruel, inhumane, and degrading treatment. Pertinently, by finding indeterminate sentences unconstitutional, this holding added to *Hassan Hussein Yusuf v Republic* to inspire the many questions that followed on the constitutionality of Sections 166 and 167 of the CPC such as the present case.

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485 *HM v Republic.*

486 *AOO & 6 others v Attorney General & another,* Petition 570 of 2015, Judgement of the High Court at Nairobi of 12 May 2017, eKLR.

Republic v SOM (2018)

In *Republic v SOM*,[487] the High Court invalidated Section 166 of the CPC because it took away discretion from the courts, contrary to Article 160 of the 2010 Constitution, and imposed an indeterminate sentence contrary to the right to freedom from torture, cruel, inhuman and degrading treatment.[488] According to the High Court, the mandatory wording of Section 166 of the CPC denied a court the discretion to make a favourable decision depending on the nature of an accused person's mental health condition. Instead, discretion vested on the President to determine the conditions for an accused person to serve their sentence in prison or mental health institution.[489]

This finding was informed by the 2017 ground-breaking decision of *Francis Karioko Muruatetu and another v Republic*[490] where the Supreme Court held that 'it is the judicial duty to impose a sentence that meets the facts and circumstances of the case.'[491] High Court Justice, David Majanja, understood this to suggest that a law that leaves the length of the sentence to another authority violates the rights of an

487 *Republic v SOM,* Criminal Case 6 of 2011, Ruling on sentence of the High Court at Kisumu of 30 April 2018, eKLR.

488 *Republic v SOM*, para 10. Other judges, such as Justice Chitembwe in *HM v Republic,* High Court Criminal Appeal (HCCrA) 17 of 2017, Judgement of the High Court at Meru on 9 November 2017, eKLR, have concluded that indefinite sentences excessive and violates the dignity of the accused person. Justice Mativo in *AOO & 6 others v Attorney General & another,* Constitutional and human rights petition 570 of 2015, Judgement of the High Court at Nairobi on 12 May 2017, eKLR, found that detention at the president's pleasure vested judicial powers into the Executive to determine the duration of an individual's sentence and thus is in breach of the doctrine of separation of powers.

489 *Republic v SOM*, para 5.

490 *Republic v SOM*, para 5; *Francis Karioko Muruatetu and Another v Republic,* Petition 15 & 16 of 2015, Judgement of the Supreme Court of 14 December 2017, eKLR. However, it is worth noting that the 2021 *Muruatetu* decision (*Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others,* Petition 15 & 16 of 2015, Supreme Court Directions of 6 July 2021, eKLR, para 18(vi)) by the Supreme Court restricted the application of its 2017 dictum to only murder cases in Kenya.

491 See Majanja in *Republic v SOM*, para 16.

accused person.[492] However, in a different context, the CoA hinted that this position may no longer be tenable as the Supreme Court has since clarified that the *Francis Muruatetu* case 'does not espouse a principle of general application and is specific to Section 203 of the Penal Code'.[493]

Phase 3: The Lady Justice Lesiit School

Phase 3 is about the approach developed by then High Court Justice, Lesiit. The Justice Lesiit School balances matters to avoid human rights violations and legal absurdities. It refines the law to accommodate definite judicial sentences to protect persons with mental illness from indefinite and lengthy institutionalisation, and reconciles statutory and constitutional provisions for legal sanctity. Consequently, it eliminates the inadequacies of Government bureaucracy, and maintains the role of the President in criminal procedure. However, it is instructive that Justice Lesiit appeared incoherent in *Republic v Edwin Njihia Waweru* (2019),[494] gained some clarity in *Republic v Ibrahim Kamau Irungu* (2019),[495] and maintained it in *Republic v Anthony Wainaina Ng'ang'a* (2021).[496]

Republic v Edwin Njihia Waweru (2019)

In *Republic v Edwin Njihia Waweru* (2019),[497] Edwin Njihia Waweru was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. In 2015 at a shop in Nairobi, Edwin had an altercation with the murder victim, a carpenter at the shop. Edwin, who was taking coffee nearby, complained to the deceased that

492 Paragraph 16.

493 As per the Court of Appeal in *Wakesho v Republic*, Criminal Appeal 8 of 2016, [2021] KECA 223 (KLR) (3 December 2021), para 54.

494 *Republic v Edwin Njihia Waweru*, Criminal Case 78 of 2015, Judgement at the High Court in Nairobi on 16 May 2019, eKLR.

495 *Republic v Ibrahim Kamau Irungu*, Criminal Case 7 of 2018, Ruling on Sentence of High Court at Nairobi on 25 July 2019, eKLR.

496 *Republic v Anthony Wainaina Ng'ang'a,* Criminal Case 60 of 2014, Ruling on Sentence of the High Court at Nairobi on 7 May 2021, eKLR.

497 *Republic v Edwin Njihia Waweru*, Criminal Case 78 of 2015, Judgement at the High Court in Nairobi on 16 May 2019, eKLR.

his carpentry work was raising dust, which was getting into his coffee. The deceased then suggested that Edwin could enjoy his coffee in another room at the shop. This confrontation escalated to Edwin hitting the deceased on the head with a hammer, which caused the death.

At the High Court, both the prosecution and defence adduced evidence that the case merited the special finding that Edwin was 'guilty but insane'. For instance, medical examinations prior to and after the murder demonstrated that Edwin had a history of addiction to *cannabis sativa* and alcohol, that he was socially withdrawn, violent, rude and unstable. He had been diagnosed with substance-induced psychosis and anti-social personality disorder. He had also been admitted to psychiatric units and placed on medication. Edwin had also admitted to killing the deceased.

In light of the evidence above, Justice Lesiit found that the 'insanity defence' was available to Edwin and agreed with both counsels to enter a special finding of 'guilty but insane' under Section 166 of the CPC but kept silent on the sentence. This is glaring, as a significant body of jurisprudence on detention at the pleasure of the President had accumulated by 16 May 2019 when the present case was decided; and it was incumbent upon the judge to consider the development.

Republic v Ibrahim Kamau Irungu (2019)

In *Republic v Ibrahim Kamau Irungu* (2019),[498] the accused person was charged with the murder of his mother, arraigned before the High Court – which found him not fit to plead and admitted him to Mathari National Mental Teaching and Referral Hospital for in-patient treatment – and subsequently convicted under the special verdict as per Section 166(1) of the CPC. A medical report from the in-patient treatment confirmed that the accused person suffered from a mental illness occasioned by 'prolonged substance abuse' during his childhood when he lived in the streets.

498 *Republic v Ibrahim Kamau Irungu*, Criminal Case 7 of 2018, Ruling on Sentence of High Court at Nairobi on 25 July 2019, eKLR.

Persuaded by *AOO & 6 others v Attorney General & another (2015), Republic v SOM*, and even *Republic v Edwin Njihia Waweru* that 'awarding indeterminate sentences and leaving it upon the Executive to determine the nature of sentence to be served by a convicted person was an interference with a judicial function and wholly undesirable,'[499] and convinced that a court should award a definite sentence after reaching a verdict of guilty to actualise the accused person's right to fair trial,[500] Justice Lesiit sentenced Ibrahim Kamau to imprisonment for 10 years from the date he was arraigned in court in January 2018; but yet still ordered for the record of the court to be typed and its certified copy transmitted to the Cabinet Secretary responsible for prisons for consideration by the President.

The judge gave a determinate sentence, *perhaps*, to reclaim judicial discretion, guarantee certainty and eliminate the delays that normally result from the inefficiencies of Government bureaucracy, and forwarded the court record for the President's attention to leave the possibility of clemency hence killing two birds with a single stone. At the same time, she reconciled Section 166 of the CPC[501] with Article 133 of the 2010 Constitution by justifying the role of the President in the trial of persons with intellectual and psychosocial disabilities as an Executive function related to the power of mercy, distinguishable from sentencing, which she explain to be a judicial function.[502]

Unlike in *Republic v Edwin Njihia Waweru* (2019), where Justice Lesiit ignored the developments on the subject, in the present case, she recognised both the challenges and the responses of the other High Court judges. However, she failed to reckon that Section 166 had already been declared unconstitutional, hence, inoperative.

499 Para. 30
500 See para 28 and 31.
501 Particularly CPC, Section 166(5).
502 See para 19 and 20.

Republic v Anthony Wainaina Ng'ang'a (2021)

In this ruling on sentence,[503] Anthony Wainaina Ng'ang'a had been arraigned in the High Court in 2014 and charged with the murder of his brother contrary to sections 203 and 204 of the Penal Code. The accused person was found not fit to plead and the High Court ordered his detention at Mathari National Teaching and Referral Hospital for in-patient treatment. Upon treatment, the accused person was found fit to plead and it was further recommended that he be put on regular medication and follow-up medical visits. The accused pleaded not guilty to the charges.[504] Eventually, the High Court arrived at the special finding under Section 166(1) of the CPC.

During sentencing, the High Court, considered that Antony was aged 59 years, had been in remand since 2014, had been diagnosed with schizophrenia and placed on medication since 1995, and further that he had been in and out of Mathari National Teaching and Referral Hospital. The High Court also took into account the family-centred nature of the crime, as Anthony had murdered his brother who was attending to him at their family home and supervising his medication uptake. Further, the High Court noted that in the course of the trial, there were several adjournments owing to Anthony's illness. Ultimately, the High Court sentenced Anthony to imprisonment for 20 years calculated from his arraignment in 2014, ordered that Anthony should remain under the security, care, and treatment of Mathari National Teaching and Referral Hospital, to be released from custody into the hands of a family member subject to an order of the President upon completion of the sentence.[505]

By giving a definite sentence, and leaving latitude for an order of the President, Justice Lesiit was following her own jurisprudence in *Republic v Ibrahim Kamau Irungu* (2019) above. As already noted, this approach has the merits of addressing violations such as indefinite

503 *Republic v Anthony Wainaina Ng'ang'a,* Criminal Case 60 of 2014, Ruling on Sentence of the High Court at Nairobi on 7 May 2021, eKLR.

504 *Republic v Anthony Wainaina Ng'ang'a*, 1 & 2.

505 *Republic v Anthony Wainaina Ng'ang'a*, 4.

sentences and delays occasioned by inefficiencies of Government, while maintaining the presidential function in the criminal trials. On the flipside, the approach ignores earlier progressive decisions that declared the impugned sections of the CPC unconstitutional, in the process entrenching jurisprudential chaos.

Phase 4: Higher jurisprudential chaos

It is in *Mwachia Wakesho v Republic* (2021)[506] where the CoA expressed itself on the treatment of persons with intellectual and psychosocial disabilities in the criminal justice system. The decision followed the High Court conviction and sentencing of Mwachia Wakesho (appellant) for the murder of his mother contrary to Sections 203 and 208 of the Penal Code. Aggrieved by the death sentence, Mwachia Wakesho appealed to the CoA on grounds that the conviction was based on insufficient circumstantial evidence; that the trial court failed to consider his defence of provocation and temporary 'insanity'.

In the course of its judgement, the CoA acknowledged the divided jurisprudence on the constitutionality of Section 166 of the CPC,[507] and agreed with the High Court decisions discussed earlier that Section 166 of the CPC is 'unsatisfactory and in dire need of reform'. The CoA based this finding on two main reasons. First, it considered the special finding of 'guilty but insane' a 'legal paradox' since the criminal liability requirements of voluntary action and a blameworthy mind cannot be established in such a scenario. Thus, it recommended that a verdict of 'not guilty for reason of insanity' would be more appropriate where an accused person suffered a defect of reason at the time of commission of an offence, and that courts should have 'the discretion to impose appropriate measures according to the circumstances of each case'.[508] Second, the CoA interpreted the right to fair trial under Article 50(2) of the 2010 Constitution to require an accused person to be fully informed,

506 *Mwachia Wakesho v Republic,* Criminal Appeal 8 of 2016, Judgement of the Court of Appeal of 3 December 2021, para 56.

507 *Mwachia Wakesho v Republic,* Criminal Appeal 8 of 2016, Judgement of the Court of Appeal of 3 December 2021, para 56.

508 *Mwachia Wakesho v Republic,* para 57.

to understand, and participate in a criminal trial effectively.[509] It explained that an accused person who suffers from mental illness during trial cannot appreciate the various aspects of a trial, and, therefore, their conviction would violate the right to fair trial.[510] To ensure the recommendations were heard, the CoA directed its Registrar to send a copy of the judgement for the attention of the Attorney General.

Having made these solid observations, the final orders were confusing at best; at worst a mockery of the entire journey since *Hassan Hussein Yusuf v Republic* (2016). To begin with, by calling for reforms, the superior court was ignoring that the High Court had already declared the impugned sections unconstitutional, and further that the orders had the effect of rendering the relevant sections invalid especially since they had not been vacated by a superior court. Although the question of the constitutionality of Section 166 of the CPC was not raised during appeal, nonetheless, the CoA, recognised three High Court decisions that had dealt with the matter – *Hassan Hussein Yusuf v Republic* (2016), *Republic v SOM* (2018) and *Republic v Edwin Njihia Waweru* (2019) – only to ignore their import when making orders. Thus, in total disregard of constitutional principles, the CoA entered a special finding of 'guilty but insane' under Section 166 of the CPC – the very provision, which the High Court had invalidated.[511]

Finally, the CoA considered the fact that the appellant had been in custody for about nine and half years and ordered their institutionalisation at a mental hospital for medical treatment until a psychiatrist in charge of the hospital certified that he was no longer a danger to society or to himself; and not at the pleasure of the President as Section 166 requires. The CoA applied Section 166 at conviction, but ignored its provision on detention at the President's pleasure without giving the reasons, adding confusion to the entire jurisprudential trail.

509 Constitution of Kenya, Article 50(2).

510 *Wakesho v Republic*, para 58.

511 *Wakesho v Republic,* para 59.

Conclusion

From the review of judicial decisions above, a number of contradictions have emerged. Although the CPC articulates certain internal mechanisms for addressing the unique challenges of persons with intellectual and psychosocial disabilities in the criminal justice system, these measures have themselves proven to be inadequate and outdated, and are the main causes for violations of the human rights of the vulnerable group, including torture, cruel, inhuman and degrading treatment, discrimination, and unfair trial. While most judicial officers agree that there are serious gaps both in the law and its implementation, they disagree on the solution. None of the four main approaches judicial officers have attempted has garnered consensus. The CoA discouraged the clever practice whereby the High Court would side-step the inefficiencies of Government bureaucracy; Lady Justice Lesiit invented an approach that attempted to keep human rights violations at bay while preserving the law instead of upholding the decisions of her then colleagues, which had declared sections 166 and 167 of the CPC unconstitutional; and the CoA returned to agree with the others on the areas of future reform, only to ignore the earlier voices when it came to conviction and sentencing.

In addition to precipitating a crisis of law and exacerbating an already sorry human rights situation, the stalemate continues to enable the President to prescribe sentences, the Judiciary to outsource this mandate, and persons with intellectual and psychosocial disabilities to suffer the verdict of guilt without *mens rea* and indefinite sentences mostly in deplorable conditions instead of treatment, among other problematic governance questions. All these can change; but only when the various harmonies sync.

Chapter 7

Selected African judicial jurisprudence on mental health and the criminal justice system

Justus Otiso
Kevin Kipchirchir

Introduction

Chapter 3 of this book established that persons with intellectual or psychosocial disabilities have significant international normative cover even in the context of the criminal justice system. The normative framework guarantees the vulnerable group legal capacity, the due process of the law, and that their disabilities shall not justify deprivation of liberty.[512] This alone means that declarations of unfitness to stand trial or incapacity to be found responsible criminally and detention of persons merely on the basis of disability or on their perceived danger on self or others may be challenged on the strength of instruments like the Convention on the Rights of Persons with Disabilities.[513] Where institutionalisation is necessary, the international normative framework also requires states to take steps to ensure that places of detention are in good living conditions, accessible to persons with disability,[514] staffed with qualified medical personnel and equipped with specialised

512 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,' para 6.

513 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,' para 16.

514 CRPD Committee, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities' para 17.

facilities.[515] Additionally, the normative framework recommends social and psychiatric treatment, including after a person's release.[516]

Chapters 2, 4, 5 and 6 of this book (on Kenya) accentuate what may be true for many African countries. Indeed, the criminal justice systems, which the colonists bequeathed to Africa at independence, delivered the exact opposite of the normative framework above even where the intention was different. Invariably, persons with intellectual or psychosocial disabilities had no legal capacity, were not entitled to the due process of the law, and their disability was the basis for forceful deprivation of liberty. Places of detention were often neglected, inaccessible to persons with disabilities, deplorable, and were ill-equipped and understaffed. Additionally, most post-colonial criminal justice systems had cumbersome legal procedures (drafted in derogatory language) that incorporated members of the executive in judicial decision-making affecting persons with intellectual or psychosocial disabilities. This often led to delays and lengthy and indefinite institutionalisation of the persons affected. As a follow up to Chapter 6 of this book, which reviews Kenya's response to these post-colonial challenges through the eyes of case law, this chapter explores judicial jurisprudence from Namibia, South Africa, Uganda and Zimbabwe to learn their approaches and probably discover some best practices.

Selected African case studies

Namibia

Section 85(2) of Namibia's Criminal Procedure Act provides that where, in the course of the proceedings, it appears that an accused person is unable to understand the proceedings due to 'mental illness' or 'mental defect', then the court ought to direct an inquiry into the matter.[517] This question formed the legal contestation in *State v Frederick*.[518]

515 UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA Resolution 70/175, annex, on 17 December 2015, Rule 30 & 31.

516 Nelson Mandela Rules, Rule 110.

517 Criminal Procedure Act, 2004 (Act No 25 of 2004), Section 85(2).

518 *S v Frederick*, (CR 76/2020) [2020] NAHCMD 459, 6 October 2020.

***State v Frederick* (2020)**

In *State v Frederick*,[519] the accused person was charged with assault with intent to cause grievous bodily harm, having thrown her child, an infant, to the ground. The accused person pleaded not guilty, was tried, convicted and the trial magistrate sentenced her to imprisonment for 18 months but suspended ten months of that sentence, taking into account the seven months already served. During the ten months, the accused person applied for review of the judgment at the High Court, where the trial magistrate took long to reply to the High Court's queries on some aspects of the trial, with the result that by the time the High Court heard and determined the review, the accused had served her full sentence. [520]

Notwithstanding the delay, the High Court examined the Namibian statutes dealing with the court's duty to examine the suitability of a person with an intellectual or psychosocial disability to stand trial, and, consequently, overturned both the conviction and the sentence. The High Court found that the trial magistrate failed to order the examination of the accused person's mental health on the basis that they did not raise it as defence during trial. The High Court ruled that even when an accused person does not raise the defence, this does not preclude the trial court from playing its role once aware of a reasonable possibility of a 'mental disturbance' on the part of the accused person. The High Court held that it was incumbent upon the trial court to make a 'mental enquiry' into the mental health of an accused person.[521] Besides, it emerged from the trial court record that the accused person had suffered from a 'mental disturbance' from her childhood, which her community was aware of. However, the prosecutor and trial judge ruled out this claim as a rumour.[522]

This case shows the injustices, which accused persons with intellectual and psychosocial disabilities are likely to face where the prosecutor or the judicial officer does not enquire about the mental

519 *S v Frederick*, (CR 76/2020) [2020] NAHCMD 459, 6 October 2020.

520 *S v Frederick*, 3 & 11.

521 *S v Frederick*, para 15.

522 *S v Frederick*, paras 12, 15 & 19.

health of an accused person. Regretting that the accused had served her full sentence by the time the High Court review order was issued, the judgment recommended that 'measures should be put in place to ensure that magistrates treat the answering of review queries as urgent and that instances such as the present are not repeated'.[523]

South Africa

Chapter 13 of South Africa's Criminal Procedure Act (Section 77(6)) lays down the procedure for the court where an accused person is incapable of understanding the proceedings and, therefore, unable to mount a proper defence.[524] Prior to the Constitutional Court directions in *De Vos NO and Others v Minister of Justice and Constitutional Development and Others*,[525] where a court found an accused person to be incapable of appreciating the nature of the charges before them, it was required to order their detention in a psychiatric hospital or prison pending the decision of a judge in instances where the accused person was charged with murder, culpable homicide, rape or compelled rape,[526] or another charge involving serious violence, or if the court considered it to be necessary in the public interest.[527] If an accused person was charged with any offence other than the above, they would be detained as an involuntary mental health care user in an institution which the judge recommended, and not in a prison or psychiatric hospital.[528] Clearly, the law provided for unconditional institutionalisation of accused persons with intellectual or psychosocial disabilities.

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523 *S v Frederick*, para 33.

524 Criminal Procedure Act [South Africa], Section 77(6)(a).

525 *De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others* (CCT 150/14) [2015] ZACC 21.

526 For provisions on these offences see, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 [South Africa], Sections 3 or 4.

527 Criminal Procedure Act [South Africa], Section 77(6)(a)(ii) (aa); Criminal Procedure Act, Section 77(6)(a)(i); Mental Health Care Act [South Africa], 2002, Section 47.

528 Criminal Procedure Act [South Africa], Section 77(6)(a)(ii). For provisions on involuntary mental health care, see, the Mental Health Care Act [South Africa], 2002, Section 47.

De Vos NO and others v Minister of Justice and Constitutional Development and others

The bone of contention in *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* was, firstly, whether Section 77(6)(a)(i) of the Criminal Procedure Act of South Africa was constitutional given that it prescribed compulsory imprisonment of adult accused persons as well as compulsory hospitalisation or imprisonment of children; and, secondly, whether the provision was constitution given that it denied the courts the discretion to release accused persons conditionally or unconditionally.[529] The Constitutional Court of South Africa found that Section 77(6)(a)(i) was unconstitutional but suspended the declaration of invalidity for 24 months from the date of its judgment to allow Parliament to correct its defects.

In addressing the fact that Section 77(6)(a)(ii) of the Criminal Procedure Act did not provide for either the conditional or unconditional release of accused persons with intellectual and psychosocial disabilities, the Constitutional Court concluded that the deprivation of liberty in Section 77(6)(a)(ii) was inconsistent with Section 12 of the South African Constitution which prohibits arbitrary detention.[530] Although the Constitutional Court conceded that it may be necessary to institutionalise accused persons with intellectual and psychosocial disabilities in some circumstances, it directed that judicial officers must arrive at such decisions without constrain. Thus, the Constitutional Court held that Section 77(6)(a)(ii) of the Criminal Procedure Act was unconstitutional and required to include the options of conditional and unconditional release of accused persons to comply with the constitutional dictates.[531]

Uganda

The law applicable in Uganda is the Trial on Indictment Act (TIA),[532] which provides that if an accused person committed an offence

529 *De Vos*, para 2. See, Criminal Procedure Act [South Africa], Section 77(6)(a)(ii).

530 *De Vos*, para 58.

531 *De Vos*, para 67.

532 Trial on Indictments Act, 1971.

but was 'insane' at the time, the trial court should enter a special finding to the effect that the accused is not guilty of the act or omission for reason of 'insanity'.[533]

Before *Bushoborozi Eric v Uganda*,[534] where a court established that a person was 'not guilty due to insanity', it was required to report the matter to a minister who would issue an order for the confinement of the person in prison, mental hospital or other place of safe custody.[535] Pending the issuance of such order, the accused person would be detained at a place determined by the court as a 'criminal lunatic', which often resulted in prolonged detention.[536]

Bushoborozi Eric v Uganda

In *Bushoborozi Eric v Uganda,*[537] the accused person was charged for the murder of his child by cutting off his head claiming that he was killing a snake. The High Court returned a 'not guilty but insane' verdict where upon he was remanded in 2006 pending the Minister's order as to where he should be referred according to Section 48 of the TIA. Despite 'gaining mental stability', his release from detention could not be secured without the Minister's intervention. But the Minister was unresponsive. Consequently, in 2015, Bushoborozi filed a special application before the High Court under Section 39 of the Judicature Act, which stipulates: 'where in any case no procedure is laid down for the High Court by any written law or by practice, the court may, in its discretion, adopt a procedure justifiable by the circumstances of the case'. Bushoborozi submitted that as of the date of filing the special application in 2015, the Minister had not yet issued an order, and that by virtue of the unspecified law or procedure for release of prisoners pending such order, 'or the failure of the Minister to make the order, prisoners could not lawfully regain their freedom'.

533 Trial on Indictments Act, Section 48.
534 *Bushoborozi Eric v Uganda*, HCT-01-CV-MC-0011 of 2015.
535 Trial on Indictments Act, Section 48(3).
536 Trial on Indictments Act, Section 48(2).
537 *Bushoborozi Eric v Uganda*, HCT-01-CV-MC-0011 of 2015.

In its ruling, the High Court expressed its displeasure with Section 48 of the TIA, which vested in a minister – a politician – judicial powers without providing for their oversight.[538] Further, the High Court noted that where the Minister failed to exercise such discretion, the person against whom the order was made had no judicial recourse.

During the trial proceedings, the State expressed its position on the matter as follows:

> … much as the prisoner had been on remand since his arrest in 2002, court cannot release such a dangerous mental case to the unsuspecting public. [The Senior State Attorney] advised that the best procedure is for the applicant to apply for orders of mandamus to force the Minister to make the orders. [The Senior State Attorney] further submitted that if the applicant is released, court will have set a bad precedent where ministers and public officers who disobey court orders are not forced to obey and will continue to disobey with impunity.[539]

In remedying the misappropriated discretion by the Minister, the High Court, while exercising its powers under Section 39 of the Judicature Act, relied on Article 126 of the Constitution of Uganda of 1995, which provides that judicial power belongs to the people and is exercised by the courts – and not ministers. To this end, the High Court found that to hold that a non-judicial officer had a mandate to exercise such power was outdated and inappropriate in light of the 1995 Constitution of Uganda.[540]

The High Court reiterated that TIA had to be construed with modifications, adaptations, qualifications and exceptions to bring it in conformity with the 1995 constitutional provisions on judicial powers and the right to fair and speedy trial before an independent and impartial court established by law. The High Court was convinced that the Constitution of Uganda allows judicial officers to give the law the most correct interpretations to result in substantive justice, and that existing

538 *Bushoborozi Eric v Uganda*, 4.
539 *Bushoborozi Eric v Uganda*, 4.
540 *Bushoborozi Eric v Uganda*, 6.

laws did not tie the court's hands. Therefore, such cases justify the High Court's exercise of judicial activism to breathe life into regressive laws.[541]

In addition, the High Court highlighted other cases where persons with intellectual or psychosocial disabilities had suffered long detentions unnecessarily. First, in the 1999 decision of *Uganda v Tesimana Rosemary*,[542] the High Court of Uganda released an individual who had been on remand for nine years because she was suffering from a mental illness at the time. Notably, the High Court implicated the Director of Public Prosecutions for neglecting the matter, yet they had the duty to decide whether or not to prosecute within three years. Second, in the 1999 decision, *Shabahuria Matia v Uganda*,[543] the High Court at Masaka ruled that it was vested with inherent powers to prevent the abuse of the court's processes by reducing delays to guarantee justice.[544] Additionally, the High Court pronounced that persons with intellectual and psychosocial disabilities are entitled to impartial and expeditious resolution of their cases and appropriate psychological assistance. The High Court held further that 'dumping' such persons in prison for years without resolving their cases is cruel, inhuman and degrading treatment contrary to Article 24 of the Constitution of Uganda.[545]

The High Court in *Bushoborozi* concluded by holding that a trial court which arrives at a finding of 'not guilty due to insanity' ought to make special orders as to the discharge or continued incarceration of the convict in an appropriate place, without having to wait for the Minister's order. According to the High Court, entrusting the Minister with such discretionary judicial powers violated the principle of judicial independence.[546] In its final order, the High Court found that detaining

541 *Bushoborozi Eric v Uganda*, 6.

542 *Uganda v Tesimana Rosemary*, Criminal Revision Cause No. 0013 of 1999.

543 *Shabahuria Matia v Uganda* (MSK-00-CR 5 of 1999) [1999] UGHC 1 (30 June 1999).

544 *Shabahuria Matia v Uganda*, paras 52-55.

545 *Bushoborozi Eric v Uganda*, 7. Article 24 of the 1995 Constitution guarantees the right to respect for human dignity of all persons.

546 *Bushoborozi Eric v Uganda*, 8.

the applicant for an unjustified period of 14 years was a violation of his rights and, thus, set him free unconditionally.[547]

Zimbabwe

The Criminal Law (Codification and Reform) Act[548] provides for crimes together with the elements of criminal liability and for defences and mitigating factors relating to the mental state of an accused person against criminal liability.[549] Particularly important is the defence of 'mental disorder' at the time of committing a crime,[550] defined as 'mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind'.[551] Accordingly, the legislation exempts an accused person from criminal liability where, at the time of committing a crime, they were incapable of appreciating the nature or unlawfulness of their conduct, or where, even with such appreciation, they were incapable of acting under the appreciation.[552] However, the defence does not apply to 'mental disorder' that is neither permanent nor long-lasting.[553] On the same note, the fact that a person is 'mentally disordered' at the time of trial cannot be used as a defence to the charge. The defence is only applicable in cases where the accused person was 'mentally disordered' at the time of commission of the offence.[554]

The Zimbabwe Mental Health Act complements the above provisions of the Criminal Law (Codification and Reform) Act by regulating the treatment of persons with intellectual and psychosocial disabilities in the criminal justice system.[555] Where, in the case of certain classes of offences, a court has reason to believe that a person charged

547 *Bushoborozi Eric v Uganda*, 10.
548 Criminal Law (Codification and Reform) Act, Act 23/2004.
549 Criminal Law (Codification and Reform) Act, Chapter XIV, Division B.
550 Criminal Law (Codification and Reform) Act, Section 227.
551 Criminal Law (Codification and Reform) Act, Section 226.
552 Criminal Law (Codification and Reform) Act, Section 227 (1) (a) and (b).
553 Criminal Law (Codification and Reform) Act, Section 227 (3).
554 Criminal Law (Codification and Reform) Act, Section 228.
555 Mental Health Act [Zimbabwe], Act 15/1996, Part III.

with committing an offence in the said class is 'mentally disabled', the court may stay the proceedings and order the person to be examined and, or to be treated in an institution, that is, a gazetted 'mental hospital'.[556]

In terms of custody, following postponement of trial proceedings and where medical reports indicate that the person concerned is 'mentally disordered', and is of suicidal tendency, has committed or attempted to commit any offence, is excessively dependent on alcohol or prohibited drugs, has no fixed abode, or needs to be detained in the case of a psychopathic disorder, then the court may direct that the person be detained in an institution or alone in a private dwelling-house.[557] The stay of proceedings in such circumstances operates until either: the end of a specified period; any examination or treatment so ordered has been completed; the magistrate revokes it; or until the Mental Health Review Tribunal, a creation of the Zimbabwe Mental Health Act, sets it aside.[558]

Similar procedures apply to persons who are found to have mental disabilities while in detention.[559] The Act requires them to be examined, and if found to have a 'mental disorder' or to be unfit to understand the nature of any criminal proceedings, to be detained in an institution for treatment.[560]

Where, in the course of a criminal trial, the court finds, based on medical evidence, that an accused person committed an offence and was 'mentally disordered' or 'intellectually handicapped' at the time they committed it, the court is required to enter a special verdict of 'not guilty because of insanity'.[561] This verdict may be followed by an order to have the accused person returned to prison in order to be transferred to an institution for examination or treatment.[562] Where the court is satisfied that the accused person is fit to be discharged because they are

556 Mental Health Act [Zimbabwe], Sections 26 (2)(i), 28 and 2.
557 Mental Health Act [Zimbabwe], Section 26(4).
558 Mental Health Act [Zimbabwe], Section 26 (5).
559 Mental Health Act [Zimbabwe], Section 27.
560 Mental Health Act [Zimbabwe], Section 27(2-7).
561 Mental Health Act [Zimbabwe], Section 29(2).
562 Mental Health Act [Zimbabwe], Section 29(2) (a) and (b).

no longer 'mentally disordered' or for other reasons, it may order them to be discharged and released from custody.[563]

The Mental Health Review Tribunal has the mandate of hearing applications and appeals by or on behalf of persons with intellectual or psychosocial disabilities detained in institutions, and directing the release of patients detained under the Act where it deems that the patients have recovered or have otherwise become fit to be discharged.[564] It also has the mandate to seek expert opinions on the state of an individual's mental health.[565]

The following cases elaborate the approach taken by Zimbabwean courts in addressing the challenges of persons with intellectual and psychosocial disabilities in the criminal justice system.

State v Zviiteyi Chimanikire

The accused person in *State v Zviiteyi Chimanikire*[566] was charged with murder contrary to Section 47 of the Criminal Law (Codification and Reform) Act at the Mutare High Court.[567] During the trial, a psychiatrist tendered evidence confirming that the accused person suffered from a psychotic disorder since 2008 and was still under treatment as at 2018 when the High Court determined the case.[568]

The High Court acknowledged that the offence required both *mens rea* and *actus reus* to establish guilt. In this regard, the accused person could not have had the requisite *mens rea* (intention) to commit the crime of murder under Section 47 of the Criminal Law (Codification and Reform) Act and Section 29 of the Mental Health Act.[569] Consequently,

563 Mental Health Act [Zimbabwe], Section 29(2) (c).

564 Mental Health Act [Zimbabwe], Sections 75, 76(a) and (b).

565 Sinqobile Patience Ncube-Sibanda, Virginia Dube-Mawerewere, 'Mental health and the justice system in Zimbabwe: An interpretative phenomenological analysis' (2019) 9 *International Journal of Nursing Science* 12 < http://article.sapub.org/10.5923.j.nursing.20190901.02.html#Sec14> accessed 31 August 2021.

566 *S v Chimanikire* (HMT 8-18, CRB 14/18) [2018] ZWMTHC 8 (18 July 2018).

567 *S v Chimanikire* (HMT 8-18, CRB 14/18) [2018] ZWMTHC 8 (18 July 2018).

568 *S v Chimanikire*, 1.

569 *S v Chimanikire*, 2.

the High Court entered the special verdict of 'not guilty because of insanity'.[570] The High Court's decision was reinforced by reliance on a 2013 decision of the High Court at Harare, *S v Pretty Matunga*, where, in almost similar circumstances, the accused person, who was suffering from a psychiatric disorder/condition at the time of committing the crime, killed her relative, and the High Court ruled that she could not be responsible for the murder due to the mental illness.[571]

The High Court then turned its attention to the fate of the accused person after the special verdict. The High Court was convinced that she needed further treatment and management for herself, her child and community. It recommended administrative institutionalisation as the best course of action for the benefit of the accused person and the community on the understanding that she would receive constant medical attention and be released in due time by a tribunal. The High Court ordered her return to Chikurubi psychiatric unit where she had been committed, or any other such institution until release by a competent body or health tribunal.[572]

State v Upenyu Zhou

The accused person in *State v Upenyu Zhou* was charged with murder under Section 47 of the Criminal Law (Codification and Reform) Act.[573] As a defence, counsel for the accused person invoked Section 29 of the Zimbabwe Mental Health Act and stated that the accused had a mental disorder at the time of committing the crime. A psychiatrist tendered evidence to the effect that the accused was suffering from mental retardation and temporal lobe epilepsy to the extent that he did not appreciate the wrongfulness of his action. However, the psychiatrist's report also indicated that the accused person had since become fit to stand trial.[574] In light of the evidence, the High Court held

570 *State v Zviiteyi Chimanikire*, 2.

571 *S v Matunga* (CRB 07/12) [2013] ZWHHC 23 (24 January 2013), 2.

572 *State v Zviiteyi Chimanikire*, 2.

573 *State v Upenyu Zhou*, (HB 91-21, HC (CRB) 119/20) [2021] ZWBHC 91 (17 May 2021).

574 *State v Upenyu Zhou*, 3.

that the accused person was 'not guilty because of insanity' and ordered his detention pending transfer to a special institution for further examination and treatment.[575]

Zimbabwe's law[576] provides expressly that the existence of an intellectual or psychosocial disability at the time a crime is committed is a defence and that such mental disability may be proved by evidence, including medical evidence. In addition to the defence, the law provides for the special verdict of 'not guilty because of insanity' and for the release or treatment of the accused person as appropriate. To this extent, the Zimbabwean criminal law system incorporates fair procedures in the treatment of accused persons with intellectual and psychosocial disabilities.

Conclusion

This chapter has attempted a journey beyond Kenya to sample the law and judicial practice related to the treatment of persons with intellectual or psychosocial disabilities in the criminal justice system. The journey has confirmed that the African countries grapple with nearly the same criminal justice challenges as Kenya – restated at the introduction of this chapter. However, as the selected cases have shown, the Africans are attempting new paradigms. Courts are decolonising the criminal justice systems. They are reclaiming the judicial space as in Uganda where the High Court emphasised that only courts are custodians of judicial power donated to them by people, and that entrusting the Executive with judicial power violates judicial independence. Courts are also proclaiming human rights in the criminal justice systems. These include the rights to fair and speedy trial before independent and impartial tribunals, freedom from torture, cruel, inhuman and degrading treatment and liberty. Courts are rejecting compulsory institutionalisation; they are freeing people. They are also emphasising treatment rather than incarceration. Most importantly, as in South Africa, they are declaring retrogressive procedures unconstitutional.

575 *State v Upenyu Zhou*.

576 For instance, Section 29 of the Zimbabwe Mental Health Act.

There are other laudable innovations such as Zimbabwe's Mental Health Review Tribunal, which offers a mechanism for persons trapped in the criminal justice system due to mental illness to wriggle their way out, for constant review of the institutionalised cases, and Uganda's inherent power of courts to prevent abuse of its process by curtailing delays,[577] which the High Court has used creatively to liberate a person with mental illness. Although the special verdict of 'not guilty due to insanity' such as practiced in Zimbabwe may not sit well with the normative requirements for legal capacity and criminal responsibility, it could prove to have a better chance of securing the liberty and related rights of affected persons than its counterpart 'guilty but insane' applied in Kenya (discussed in Chapter 5). Things are changing.

But more can be done. It is time serious thought was placed on the right to legal capacity for persons with intellectual or psychosocial disabilities and the accommodations necessary for the realisation of these ends, for example the use of intermediaries to communicate in court. Much more efforts should be invested to improve the living conditions of places of detention like prisons and mental hospitals.

577 Under Section 39 of the Judicature Act.