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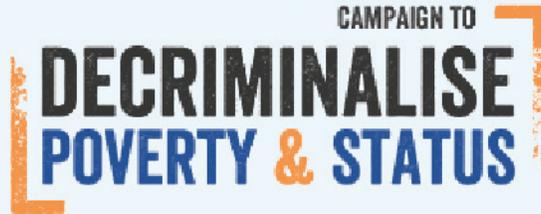


**ACHIEVING GENDER EQUALITY
AND EMPOWERMENT OF ALL WOMEN
AND GIRLS THROUGH DECRIMINALISING
PETTY OFFENCES**



ABOUT ICJ KENYA

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit, and member-based organisation. Established in 1959, ICJ Kenya is a premier Human Rights organisation whose Vision is to promote a just, free, and equitable society.



About Campaign to Decriminalise Poverty and Status

The Campaign to Decriminalise Poverty and Status is a coalition of organisations from across the world that advocate for the repeal of laws that target people based on poverty, status or for their activism.

ICJ Kenya has been at the forefront of National, Regional and Global campaigns calling for the decriminalization and reclassification of petty offences.

ACHIEVING GENDER EQUALITY AND EMPOWERMENT OF ALL WOMEN AND GIRLS THROUGH DECRIMINALISING PETTY OFFENCES

By Julie Wayua Matheka and Mondekazi Ntshela¹

INTRODUCTION

It has been eight years (8) since the adoption of a global call for Gender Equality and Empowerment-Sustainable Development Goals Agenda 2030.² The United Nations appreciates the importance of addressing systemic oppressions and inequalities faced by women and girls, particularly those exacerbated by poverty. One of the significant aspects of this cause is the need to decriminalise petty offences and address the systemic oppressions within the community and criminal justice system that disproportionately affect women and girls.

As per this year's theme for UN-Women, Commission on the Status of Women, this paper intends to explore the challenges women and girls face in the Kenyan criminal justice system due to the criminalisation of petty offences and other systemic oppressions within the community. This will be structured by looking at the background of the Principle on Decriminalisation of petty offences and the intersectionality between poverty, criminal justice, and women's rights, and the experiences of women in criminal justice. Lastly, provide recommendations that seek to shape the institutional systems to be gender-sensitive to matters concerning criminal justice.

Background context of the principles on Decriminalisation of petty offences in Kenya

The Principle on the Decriminalisation of petty offences was adopted in 2017 by the African Commission on Human and Peoples Rights ('African Commission') as a new legal standard for all African Countries to consider when dealing with challenges that arise in Africa at the intersectionality between poverty, justice, and human rights especially in matters concerning access to criminal justice.³

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² Sustainable Development Goals Report 2023, Goal 5: Achieve Gender Equality and Empower all Women and Girls, <https://www.un.org/sustainabledevelopment/gender-equality>.

³ African Commission on Human and Peoples Rights: Principles on the Decriminalisation of Petty Offence in Africa, 2018, October 25, <https://achpr.au.int/en/node/846#:~:text=In%202017%2C%20the%20Principles%20on,matters%20of%20access%20to%20justice> (Accessed on 05 March 2024)

This Principle is the result of the enactment and enforcement of criminal laws in relation to petty offences that have the effect of discrimination against marginalised groups. The African Commission and the African Union recognise the importance of human rights protection, especially in matters concerning criminal justice.

In Kenya, the enforcement of petty offences has become the weapon law enforcement officers use to target marginalised groups. Women and girls are often disproportionately affected by laws that criminalise poverty or social issues. For example, women who are homeless or living in poverty may be arrested for loitering or sleeping in public spaces. Similarly, women who are victims of domestic violence may be charged with disorderly conduct when they try to defend themselves. These laws not only criminalise poverty but also exacerbate the vulnerabilities of women and girls who are already marginalised.

Literature shows that in Kenya, women and girls who come into contact with the criminal justice due to committing petty offences are particularly vulnerable. When women and girls get arrested and imprisoned, they become exposed to discrimination and gross human violations. One of the key factors that exacerbate the vulnerability of women and girls is their socio-economic status.

The Social and economic status of women to commit petty offences

Numerous intersectional or cross-cutting issues fundamentally cause women to be convicted of petty offences. These include poverty, unemployment, gender, and income levels. Firstly, poverty is said to be a huge contributing factor for Kenyan women to commit petty offences. Penal Reform International Women suggests that “Offences committed by women are closely linked to poverty and often a means of survival to support their family and children”.⁴

Data and research support the assertion that several women are in prison primarily due to committing petty offences. These offences include activities such as loitering with the intent to engage in sex work, idle and disorderly conduct and selling/vending/hawking on the streets. While these may seem like minor offences, they can have severe consequences for women and girls who find themselves at the end of socio-economic injustices.

The Clean Start Kenya and ICJ Kenya Report 2022 on “Re-thinking the Bars” suggests the following:

“the majority of women who commit petty offences in Kenya are illiterate or semi-illiterate with a low social status.⁵ This indicates that these women are from poor backgrounds which increases their vulnerability and likelihood of committing petty offences”.⁶

⁴ Penal Reform International “Promoting Fair and Effective Criminal Justice: Discrimination of Women in Criminal Justice systems”, 2012, <https://cdn.penalreform.org/wp-content/BRIEFING-Discrimination-women-criminal-justice.pdf>

⁵ ICJ-Kenya, Report of A Study in Kenya: Access and Administration of Justice for Women who commit petty offences “Re-thinking The Bars”, page 10, 2022, July

⁶ Ibid 3

Secondly, unemployment contributes immensely to women committing petty offences. According to the Global Gender Gap Report 2023, women have consistently faced higher unemployment rates than men.⁷ In Kenya, many women work in the informal sector and are likely to bear gross violations of human rights and the greatest brunt of the enforcement of petty offences.

Lastly, the income levels of women arrested for petty offences are significantly low and, as such, cannot afford the bail and bond, fines and legal representation once charged. The challenges women face do not end when they are convicted for committing petty offences but continue behind bars, through the processes of pre-trial detention, prosecution and sentencing. Women who are arrested with their children are often separated from their children, which is traumatic in itself and subjects the family unit to human rights violations.

The challenges faced by women in the Criminal Justice system, at the intersectionality of socio-economic status.

Generally, in many African societies, gender inequality and discrimination have deeply ingrained gender disparity that places women at a disadvantage. This can manifest in the criminal justice system through treatment provided to them. In Kenya, the challenges women face in the criminal justice system can be numerous and complex, reflecting broader societal issues.

The criminal justice system is meant to be a pillar of fairness and justice, protecting the rights of all individuals, regardless of gender and economic status. However, this is not the absolute case for women and girls in detention for committing minor and other capital offences. In the Criminal Justice system, some laws discriminate against women. Women find difficulties in accessing justice. Some of the ill-treatment they face in prison is perpetuated by gender disparity. This is often due to gender biases within the system, such as the perception that women are less deserving of leniency or rehabilitation because the offences they have committed do not have a severe impact on them and are categorised as “Minor offences”. Women often experience dehumanising experiences and invasion of privacy when they come into contact with the police and law enforcement officials.

For instance, testimonials that were conducted during the report study on Access and Administration of Justice for Women who Commit Petty Offences provide proof that the conditions women bear in detention or prison are dissatisfying.⁸

Participant 3 in that meeting shared the following experience:

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

⁷ World Economic Forum, Global Gender Gap Report, 2023, <https://www.weforum.org/publications/global-gender-gap-report-2023/in-full/gender-gaps-in-the-workforce/employed>.

⁸ ICJ-Kenya, Report of A Study in Kenya: Access and Administration of Justice for Women who commit petty offences, Re-thinking The Bars, 2021, July.

Detention facilities in Kenya are often overcrowded, poorly maintained, and lack proper prenatal and postnatal care and treatment.

Another participant also shared lived experience as follows:

“I went to the main cells holding up to 70 women mostly with children. Again, no privacy, noisy place, and a harsh environment for the children”.

Although the Kenyan Constitution, the Universal Declaration of Human Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners, and the Preferential Treatment of Pregnant Women (The Nelson Mandela Rules)⁹ guarantee the right to dignity and privacy, the testimonials show that the conditions the participants lived under while in detention were inconsistent with such principles.

The criminal justice system itself can exacerbate these inequalities. Women and girls who are arrested for petty offences often face discrimination and violence while in police custody. These women are victims of excessive detention, where their human rights are often violated. After serving their sentences, women may struggle to reintegrate into society due to stigma and discrimination. There is often a lack of support services to help them rebuild their lives.

Women do not have access to adequate legal representation can result in unfair trials and disproportionate sentencing. Sexual violence against women, including rape and harassment, is pervasive in prisons. Women who report these crimes may face victim-blaming, and the perpetrators may not face adequate consequences.

Technical problems in Criminal Justice Systems and Petty Offences

The term “minor offence” also suggests that the offenders in prison do not require sufficient attention as a result their specific needs have remained unacknowledged and unaddressed by the criminal justice system. Even in the cases where they remain in detention, they tend to become the victims of ill-treatment and are exposed to other internal prejudices. For instance, women are often unable to pay bail charges and fines due to financial constraints and poor backgrounds.

In addition, the enactment and implementation of petty offences do not in any manner sensitise gender disparity that is caused by traditional gender biases, and cultural norms. When lawmakers decide to criminalise petty offences, they do not critically assess the type of people who are highly likely to commit petty offences. They fail to determine the contributing factors for women to be minor offenders nor anticipate the possible gross violations such as humiliation, recurring physical abuse, and mental illnesses that these women bear in the prisons.

Police officials in Kenya use their powers to abuse vulnerable groups who are unable to comprehend with legal knowledge and in matters of criminal justice.

⁹ United Nations Standard Minimum Rules for the Treatment Prisoners (The Nelson Mandela Rules) of 2015, provides for the guidelines for searches of prisoners and cells. Rule 28 prescribe special accommodation for all necessary prenatal and postnatal care and treatment.

Recommendations

To achieve gender equality and empowerment for all women and girls in the criminal justice system, it is first essential to recognise this group's vulnerability. To appreciate the historical injustices that continue to affect women and girls negatively.

- There is a need for comprehensive legal and policy reforms that recognise and address the unique challenges faced by women and girls in prisons. This includes reviewing and revising laws that perpetuate gender-based discrimination and inequality such as petty offences, as well as implementing policies and practices that promote gender equality and protect the rights of women and girls.
- Police officers and law enforcement must be empowered and educated about the depth of human rights violations, including privacy and human dignity. There is a need to sensitise police officers and law enforcement on issues that perpetuate gender inequality in criminal justice, including gender-sensitive training and education for all criminal justice professionals.
- Prosecutors should apply the diversion policy to ensure that petty offenders, including women and girls, are diverted from the criminal justice system.
- Pre-trial detention policies should be gender-responsive and should also consider the principle that petty offenders ought not to be subjected to custodial sentences unless it is a measure of last resort.
- Legal aid and representation mechanisms should be strengthened and promoted to ensure access to justice.
- The criminal justice system should adopt and promote Alternative Justice Systems in handling petty offences.
- The courts should impose lenient alternative sanctions on women who have committed petty offences. The courts must ensure that the offenders comprehend the consequences of repeating/failing to comply with the instructions to curb recidivism.
- The Judiciary should apply a gendered lens when handling matters affecting women, girls and children to promote human rights, ensure the best interest of the parties, and ensure the use of the Sentencing policy when dealing with petty offenders.
- There is a need to engage the Probation and After Care services and the Children's services in managing petty offenders to ensure that vulnerable communities are protected.
- County governments ought to develop laws that are in accordance with national laws to ensure that when laws are decriminalised at the National level, they are not reintroduced at the County Level.
- African countries, including Kenya, ought to adopt the principles of decriminalisation of petty offences.



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