



# HUMAN RIGHTS REPORT

**The Impact of County By-Laws on  
Prisons and Pre-Trial Remand Facilities  
in Nairobi and Nakuru Counties**

 **THE OPEN SOCIETY INITIATIVE  
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Prisons and Pre-Trial Remand Facilities  
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The Kenyan Section of the  
International Commission of Jurists  
Vihiga Road, Kileleshwa.  
P. O. Box 59743 – 00200, City Square,  
Nairobi – Kenya  
Tel: +254 20 387 5981/ 675 0996  
Mobile: +254 720 491 549/ 733 491 549  
Fax: +254 20 387 5982  
Email: [Info@icj-kenya.org](mailto:Info@icj-kenya.org)  
Website: [www.icj-kenya.org](http://www.icj-kenya.org)

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# Table of Contents

Acknowledgements	4
Acronyms And Abbreviations	5
Executive Summary	6
1. Introduction	8
1.1 Rationale For The Research	8
2. Research Framework	12
2.1 Objectives Of The Research	13
2.2 Research Design	14
2.3 Ethics And Approvals	16
3 Methodology	17
3.1 Methods Of Data Collection	17
3.2 Research Questions	17
3.3 Methods Of Data Analysis	18
3.4 Study Limitations	18
4 Review Of Laws And Policies	19
4.1 Legal Framework	19
4.2 Policy Framework	23
5 Research Findings	24
5.1 Offenders	24
5.2 Offence	26
5.3 Arrest	27
5.4 Arraignment In Court	28
5.5 Prosecution Of Cases	29
5.6 Sentencing	30
5.7 Experience In Prison	30
5.8 Impact Of Imprisonment On The Offenders	31
5.9 Capacity	32
5.10 Role Of Arresting Officers	35
5.11 Prosecution Of Cases	35
5.12 Substance Of The Law	36
5.13 Prisons	37
5.14 Challenges	37
6 Recommendations	39
6.1 Arrest	39
6.2 Prosecution And Sentencing	40
6.3 Prison Conditions	41
6.4 Capacity Of Law Enforcement Personnel	41
6.5 Legal Frameworks	42
6.6 Awareness/General	42
6.7 Conclusion	43
Annexes	44

# Acknowledgements

The introduction of county governments by Constitution of Kenya resulted in the abolishment of the local authorities, established under the repealed Local Government Act. The local authorities had broad powers to make by-Laws for the regulation of affairs in their jurisdictions. Unfortunately, the enforcement of the by-Laws often led to gross human rights violations such as the use of excessive force and unlawful detention. At the same time, it created an avenue for corruption and extortion.

ICJ Kenya in line with its mandate of promoting human rights and the rule of law conducted this research to investigate the claims resulting from the enforcement of the by-Laws with a view to highlighting their impact and to make recommendations for enhancing access to justice within the counties.

It is our firm conviction that the mission of a reputable criminal justice system must be to efficiently deliver outcomes that are fair and accessible to all in accordance with the constitution. Therefore, we hope that this publication will provide a useful account of the situation at hand, and generate demand for reform of the criminal justice system in Kenya.

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) would like to thank all the individuals who contributed towards the successful production of this publication. We wish to thank Mrs. Carole Ageng'o and her team for providing the expertise in undertaking this research.

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Lastly, this publication was made possible through the generous support of the Open Society Initiative for Eastern Africa (OSIEA), to whom ICJ Kenya is most grateful.



**George Kegoro**

Executive Director



# Acronyms and Abbreviations

<b>A2J</b>	Access to Justice
<b>ADR</b>	Alternative Dispute Resolution mechanism
<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>AU</b>	African Union
<b>CA</b>	County Assemblies
<b>CCTV</b>	Closed Circuit Television
<b>CSO</b>	Civil Society Organizations
<b>FSO</b>	Force Standing Orders
<b>HRP</b>	ICJ Human Rights Protection Programme
<b>ICF</b>	Informed Consent Form
<b>ICJ Kenya</b>	Kenyan Section of the International Commission of Jurists
<b>JTF</b>	Judiciary Transformation Framework
<b>KPS</b>	Kenya Prison Service
<b>KRA</b>	Key Result Area
<b>MCA</b>	Member of the County Assembly
<b>NALEAP</b>	National Legal Aid and Awareness Program
<b>NPS</b>	National Police Service
<b>OCS</b>	Officer Commanding Station
<b>OCPD</b>	Officer Commanding Police Division
<b>REC</b>	Regional Economic Communities
<b>SSO</b>	Service Standing Orders
<b>SPSS</b>	Statistical Package for the Social Sciences

# Executive Summary

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) commissioned this research into the implementation of county by-laws with the objective of determining the extent to which the practices of enforcement agencies charged with the implementation of by-laws in Nairobi and Nakuru counties are working in conformity with established practices of criminal justice on dealing with petty offences. It also seeks to examine the operations of these agencies and to establish the extent to which the current enforcement practices impact pre-trial detention, and contribute to overall prison<sup>1</sup> overcrowding in the country.

This report contains the findings of the research undertaken between October 2013 and February 2014 which was beyond the time originally allocated for this research. The extension of the timelines was occasioned by the unavailability of respondents especially in Nairobi owing to various competing engagements. The report has been developed in seven sections.

An analysis of the situation of the application of municipal law in the introduction is a reflection of the multi-layered legal framework that cuts across the national and county levels. The laws and policies are reviewed from the national and county perspective with the Constitution of Kenya 2010 serving as a foundational law. Section Two outlines the research design while Section Three describes the methodology of the research.

In addition to the desk review, the research was undertaken through interviews with 21 offenders in Nakuru and 14 in Nairobi; 2 judicial officers in Nakuru and 3 in Nairobi; 3 prison officials in Nakuru and 1 in Nairobi, one county executive in Nairobi; 10 municipal law enforcement officers in Nakuru and one representative of the inspectorate in Nakuru. ICJ Kenya is aware that this is not a fully representative sample group. However, as described in the methodology section, ICJ Kenya considers that it provides a limited but sufficient overview of Nakuru and Nairobi to draw general conclusions on the enforcement of by laws in those counties. Section Four contains the desk review of the laws and policies on the substance and process of criminal justice in Kenya from the point of arrest, through arraignment in court, prosecution, sentencing and incarceration of offenders.

Following the research, the findings were presented to a Stakeholders Forum on the Enforcement of County by Laws that was held in Nakuru from 10-11 April 2014. The forum participants were drawn from the county law enforcement departments of Nairobi and Nakuru Counties, the National Police Service in Nairobi and Nakuru from the regular and administration police units, members of the Nakuru County Assembly, prisons officials, probation officials, prosecution

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<sup>1</sup> The term prison is used here to refer to all institutions in which offenders are detained upon arrest, pretrial, during trial and after sentencing

counsel drawn both from the county prosecution and the Office of the Director of Public Prosecutions.

The findings of the research are analysed in the two parts that make up Section Five of the report. Part One contains the perspectives of the violators of by laws. It profiles the offenders on the basis of age, level of education, gender and whether or not they are repeat offenders. This provides the basis for further analysis of their level of appreciation of the processes of arrest, arraignment in court and sentencing, and in particular the extent of their participation in the court proceedings. It also allows for the interrogation of whether or not the criminal justice process serves to deter them from repeating the offences and in so doing contributes to the maintenance of law and order in the two counties.

Part Two of this section addresses itself to the views of the law enforcement, judicial and prison officers with regards to the arrest, prosecution and sentencing of offenders. It also analyses the capacity of these officers and the suitability of the legal framework to achieve the objectives of maintaining law and order. Additionally, it discusses the implementation of these laws. To conclude, Section Six reports the recommendations of the various respondents and those of the research team based on the findings of the research. This section also contains the views of the participants from the Stakeholders' Forum.

The recommendations touch on arrest, prosecution and sentencing, prison conditions, capacity of law enforcement personnel, legal frameworks and awareness. Among the recommendations are the need for training for county law enforcement agencies to address the lapses in human rights protection at arrest and prosecution, and increased non-custodial sentences to reduce the congestion in prisons that would be based on clear policy guidelines following a review of the existing laws. The implementation of these recommendations will require the commitment of all the actors in the criminal justice system at national and county levels.



# 1. Introduction

The Local Government Act, Cap 265 Laws of Kenya (now repealed), gave broad powers to municipal officers to make by-laws for the regulation of matters touching on the maintenance of health, safety and well-being of the inhabitants in the respective municipalities. The law further enabled municipal officers to promote good rule and government within the areas of the municipalities and to prevent and suppress nuisance.

The main aim of this law was to enable local authorities to create order within their jurisdictions so as to favour growth in business and thereby enable the dwellers in the respective municipalities to enjoy favourable living conditions. The implementation of this law however raised the vulnerability of citizens to violent arrests that at times lead to pre-trial detention in cases of violation or perceived violations. This is particularly true in the case of violations of the laws on general nuisance and health. In several instances, the enforcers of the municipal laws have been reported to use excessive force on citizens, who are for the most part not aware of the substance of these laws. In other instances there are unlawful arrests even where the arrestees have not violated any law.

The by-laws created under the Local Government Act proscribe several actions which are not illegal under the Penal Code Cap 63 of the Laws of Kenya or indeed any other law. The by-laws impose sanctions that are seen to be excessively harsh and often include fines that are inordinately high. As a result, a majority of the offenders are not able to pay the fines and end up in jail for very minor offences.

Under the Constitution of Kenya 2010, the devolved governments in the form of counties have taken over the management of municipalities within their respective jurisdictions. This is in line with the County Governments Act and the Transition to Devolved Government Act which effectively repealed the Cap 265. The county governments also exercise legislative authority through their County Assemblies (CA), which now have the responsibility of enacting the by-laws for the maintenance of law and order in the counties. The violations contained in the erstwhile municipal laws still stand in the county law systems whose legislative functions are just beginning to develop.

## 1.1 Rationale for the Research

Several gaps are discernible from the implementation of these by-laws. These are substantive and procedural with regards to arrest, prosecution and sentencing of offenders when violations occur. The range of anomalies and abuses in the by-law system can be summarized as denial to

the right to a fair trial; assault and mistreatment during arrest and detention; false and unlawful arrest; unfair sentencing practices; irregular fines; extortion; profiling and discrimination and unfair bail terms.

The Kenyan Section of the International Commission of Jurists (ICJ Kenya), commissioned this research to investigate the enforcement of the by-laws as they stand, to identify the gaps in the laws, measure the impact of the implementation of the by-laws on the prisons and pre-trial detention facilities and to make recommendations for enhancing access to justice within the county jurisdictions. It is expected that the outcome will inform the administration of justice with regards to policing by authorities outside the National Police Service.

Case backlog and congestion in pre-trial detention facilities are some of the key challenges to the effective operation of the criminal justice system. The main contributors to congestion in the courts are the agencies and institutions involved in the criminal justice processes of which the courts and the prosecutors stand out for their preference of imprisonment to supervised non-custodial community sentences. The pre-trial facilities at police stations and prison remand homes are also congested. Below is a table indicating the extent of congestion in prisons and pre-trial detention facilities as at 2012.<sup>2</sup>

**Table 1: Kenya Prison Composition**

Kenya Prison Composition			
Year	Pre-trial	Convicted	Total
2009	19,636	29,032	49,554
2010	15,092	33,259	48,351
2012	20,140	36,040	53,000

According to Clement Okech, since prisons only have a capacity of 22,000, the above figures indicate that prisons are currently at 240% occupancy at 53000, of which 38% is persons whose cases are in the pre-trial stage, up from 31% in 2010 but down from 39% in 2009.

The argument for non-custodial sentences have been advanced before and Vyas notes that these cover the aims of criminal sanctions that are either punitive, rehabilitative or restitutionary sanctions. Punitive noncustodial sanctions include fines, forfeiture, disqualification, and deportation while rehabilitative sentences include conditional and absolute discharge, probation, posting of a bond for good behaviour, and police supervision. Restitutionary sanctions include compensation, restitution, payment of court costs, extramural penal employment, and

<sup>2</sup> Overview of Probation Service in Kenya a paper presented by Clement Okech of the Probation and After Care Service Kenya at the African Correctional Service Association conference in Kampala, Uganda. See: <http://ppja.org/countries/kenya/probation-services-in-kenya-reduce-congestion>

reconciliation. As noted by Vyas, Kenyan courts make little use of non-custodial sanctions. Settlement, restitution, and similar approaches should become routine for all minor offenses. The indigenous traditions of community-based dispute resolution should also be reviewed and integrated into the statutory structure.

Despite these challenges, little attention has been directed to the contribution of the county authorities and the local authorities before them in the congestion of prisons and pre-trial holding centres. Similarly, there is little attention in ensuring that the implementation of the by-laws conforms to the Constitution and the Criminal Procedure Code. Although these by-laws were created by the County Councils which have now been succeeded by County Assemblies, their enforcement is often at variance with the substance and process of national statutes.

The Local Government Act gave authority to officers in local government to enforce the by-laws. This authority covered the arrest and detention of persons contravening by-laws even though detention was envisaged in the short term before these offenders were handed over to the police for prosecution under the Penal Code. In practice however, the municipal officers have in their actions been seen and known to blatantly violate the rights of arrested persons, often going outside their scope of authority. For instance municipal law enforcement officers carry out raids in city streets, rounding up persons and arraigning them in the City Court, often on flimsy and tramped up charges.

The persons arrested are at times detained in municipal vehicles and cells for periods longer than the constitutionally sanctioned twenty four hours before arraignment in court. There are several media reports that would suggest that arrested persons are at times subjected to cruel inhuman treatment, sexual abuse and extortion in exchange for their freedom. Article 51 of the Constitution of Kenya 2010 requires parliament to legislate on the protection of the rights of persons detained, whether they are held in custody pending trial or imprisoned upon conviction. This provision envisages a situation where all persons detained are treated in a humane manner in accordance with the Constitution and the human rights standards advanced in other relevant international instruments to which Kenya is party.

The National Police Service has Force Standing Orders (FSO) that governs their operations including the manner of arrest and treatment of detained persons. As the police are currently revising its FSO, it is important that the County governments engage in law enforcement activities in conformity with the existing standing orders with the view to eventually aligning their laws to conform to the revised standing orders. It is also important to ensure that the county by laws are well aligned to the Bill of Rights in the Constitution especially as regards criminal liability and the processes to follow in case of violation.

While the implementation of the Constitution through legislative action continues, there is need to interrogate the by-laws of the various counties against the provisions of the Constitution

and to make recommendations for addressing the gaps that exist between the constitutional aspirations and the actual implementation of the same.

The findings of this research will inform the reforms in the administration of justice in the counties and particularly help in formulating appropriate guidelines which may be used in the development of instruments to manage and guide policing in the county governments. It will be used in advocacy initiatives towards the development of operating guidelines for arresting officers; developing alternatives to custodial sentences in the criminal justice system and ultimately the decriminalization of petty offences by county by laws. At a secondary level, the research will assist in the decongestion of prisons and in the redefinition of laws and policies to create the law and order that was originally intended by the Local Government Act.

## 2. Research Framework

The Constitution of Kenya 2010 contains a comprehensive Bill of Rights that if implemented would elevate the status of human rights in the country and facilitate a true democracy. In addition, the Constitution brought along with it several institutional changes that are currently being implemented including the establishment of a Supreme Court of Kenya and the institutionalization of the vetting of serving judges and magistrates.

ICJ Kenya's Human Rights Protection Program<sup>4</sup> advocates for the promotion, protection and respect for human rights in Kenya. ICJ Kenya monitors the implementation of the recommendations accepted by Kenya during the Universal Periodic Review; advocate for ratification of selected international human rights instruments; supports litigation initiatives on the realization of economic and social rights; retains an educational approach with regard to enforcement of human rights; and advocate and lobbies for institutional reform that is inclusive of human rights.

The principal means of delivering civil and criminal justice is through the formal courts of law. In Kenya A2J is hindered by a number of factors. Kenya has 332 judges and magistrates serving a population of 38 million people, which is less than the maximum number of judges and magistrates prescribed by law. ICJ Kenya is engaged in advocacy to address this gap in human resource capacity in the judiciary.

Additionally, ICJ Kenya's advocacy focuses on the enactment and implementation of legislation that promotes access to justice. This includes efforts towards the establishment of a small claims court and a state-funded legal aid service as means to increase and diversify access to justice. Combined, these initiatives could result in the reduction of the cost of accessing legal services and hence remove a longstanding barrier to access to justice in Kenya. ICJ Kenya's work in strengthening access to justice also includes awareness activities targeted at the legal profession and the larger public, and support for the implementation of court-annexed mediation, so as to address case backlog in the judiciary.

At the same time, ICJ Kenya is building the capacity of communities in six areas namely, Transmara, Laikipia, Meru, Kitui, Taita Taveta and Kwale. This is done through its network of nearly 360 paralegals who are trained to provide basic legal services and advice free of charge in their communities in order to facilitate the right to access to justice in the rural communities of Kenya.

ICJ Kenya's contribution to improving access to justice and governance in Africa also includes litigation interventions in the tribunals and courts of justice formed under the African Union (AU)

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<sup>4</sup> <http://www.icj-kenya.org/index.php/icj-programmes/human-rights-protection>

human rights system and Regional Economic Communities (REC), based on the African Charter on Human and Peoples' Rights (ACHPR).

It is within this context that ICJ Kenya has commissioned this research to examine the enforcement of county by laws in Nairobi and Nakuru counties and the resultant effects on persons and institutions.

## 2.1 Objectives of the Research

### 2.1.1 Overall Objective of the Research

The overall objective of the research is to determine the extent to which the practices of enforcement agencies charged with the implementation of by-laws in Nairobi and Nakuru counties are working in conformity with established criminal justice practices on dealing with petty offences. It also seeks to examine the operations of these agencies and to establish the extent to which the current enforcement practices impact pre-trial detention and contribute to overall prison<sup>5</sup> overcrowding in the country.

### 2.1.2 Specific Objectives

The specific objectives of the research are as follows:

- a) To review the laws, policies and other instruments related to the enforcement of the by-laws in Nairobi and Nakuru counties so as to determine incongruence with the relevant statutes;
- b) To examine the conduct and behaviour of arresting officers in relation to their mandates and expected competencies and the extent to which their behaviour impacts the final sentencing of offenders ;
- c) To identify challenges faced by the arrestees and the effects of prosecution and incarceration resulting from such arrest;
- d) To gauge the state of pre-trial detention and the sentences meted out on violators of the by-laws in the Nairobi and Nakuru;
- e) To document the views of key stakeholders on the mode of operations of the enforcers of the by-laws with relation to custodial sentencing; and,
- f) To make recommendations for policy advocacy for the decriminalization of petty offences under the by-laws in the target counties.

### 2.1.3 Expected Outcomes of the Research

The findings of this study are expected to contribute to the advancement of knowledge in the execution of the by-laws in the county government structure generally and in the target counties in particular. Limited studies have so far been undertaken in this regard. Further, the findings

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<sup>5</sup> The term prison is used here to refer to all institutions in which offenders are detained upon arrest, pretrial, during trial and after sentencing

are expected to enhance the administration of justice at the county level and to contribute to resolving the problem of the burgeoning prison remand population. The findings will also contribute to enhancing the protection of the rights of those who infringe the by-laws.

## 2.2 Research Design

The study applied both quantitative and qualitative methods of inquiry with the underlying aim of:

- a) Determining the gaps between the stipulated by-laws and the action of the enforcers;
- b) Establishing the effect of the actions of county law enforcement officers on those arrested; and,
- c) Determining the spill-over effects of the actions of the law enforcement officers on case backlog and congestion in the holdings cells for those awaiting trial or pre-trial detention.

A descriptive sample social survey was adopted for the reason that it would help gauge the degree of congruence between the provisions of the existing penal laws and the by-laws, and the application of the by-laws.

The research measured several variables touching on the demographics of the arrested persons in custody, the reasons for their arrest and incarceration, and the effect of such arrest and incarceration on the offenders and the other actors in the criminal justice system. A quantitative method of investigation was deemed suitable and manageable within the time allocated for the research.

The other consideration in the design was the generality of the problem as hypothesized in the formulation of the research project. The excessive force used in the enforcement of the municipal by-laws and the seemingly blatant disregard for the law and procedure across several municipalities, have gained public notoriety as evidenced in the media coverage of these issues. A quantitative method would enable the finding to be generalized to other municipalities. Lastly, the use of a descriptive sampling method would minimize the resultant statistical errors that may occur should the entire population be covered. The qualitative method of inquiry was also used as it enabled the key informants contribute to the research topic from an analytical perspective of the policy framework.

### 2.2.1 Scope of the Work

The research adopted a representative approach with activities in the two counties of Nairobi and Nakuru. In Nairobi, the research sites were the Central Police Station, the Nairobi Remand and Allocation Prison, the Lang'ata Women Prison, the City Court, the Probation Offices and the County Executive Offices. In Nakuru, the research sites were the Central Police Station, the Nakuru Remand Prison, the County Government Offices, the Law Courts and the Probation

Offices. These sites were chosen as they are the primary areas of arrest and interaction with the violators of the by-laws, and also serve as holding areas for these offenders. The research therefore targeted the offenders, law enforcement and judicial officers and officials in the Prisons Department.

In order to generate the required information, the following was done:

- a) A comprehensive desk review that included the examination of the by-laws of Nairobi and Nakuru and their enforcement with a view to understanding the legal and procedural parameters of the by-laws as viewed against the national laws.
- b) Conducting interviews with persons arrested/accused for contravening the by-laws.
- c) Carrying out key informant interviews and discussions with stakeholders at the Governor's Office in Nairobi, National Police Service, Independent Police Oversight Authority, Judiciary, Kenya Prison Service and Probation service.
- d) Assessing the holding grounds of the arrested persons where permissible, including the courts from which they are sentenced as a means of comparing the extent to which the county and the national courts are populating the prisons and holding centres.
- e) Collation and analysis of the data and information collected from the research.
- f) A research report with recommendations for policy action on transforming the criminal justice role of the county governments to correspond to the national penal laws and adhere to the Bill of Rights in the Constitution.

### **2.2.2 Study Population**

The population types considered in this study were as follows:

- a) Arrested persons, persons remanded in custody and persons serving prison sentences from whom data was collected using a combined qualitative and quantitative method. The arrested persons were reached in police stations and prison remand homes in the two study locations.
- b) County law enforcement officers ('askaris') from whom data was collected using a combined qualitative and quantitative method. The county 'askaris' are employees of the government and are deployed to enforce by-laws.
- c) The key informants (magistrates in the City Courts in Nairobi and the Chief Magistrate in Nakuru, the Officers Commanding Station(OCS) at the Central Police Stations in Nairobi and Nakuru, Officer Commanding Police Division(OCPD) Central Police Station and Nakuru Town, Director of City Inspectorate, Chief Prosecutors in the City Court and the Magistrates' Courts in Nairobi and Nakuru respectively , officers in charge of Prisons in Nairobi and Nakuru and the chief Probation Officers in Nairobi and Nakuru. The OCS and the OCPD provide the immediate custody after arrest while the magistrates adjudicate the cases.



### 2.2.3 Sample Size and Procedures

From each of study sites, a sample of 25 violators/arrestees or remandees, 15 law enforcement officers and their chiefs and 2 magistrates respectively were targeted as a means to help minimize the sample error. All the categories of respondents had a sampling frame upon which the actual sample was drawn.

A random sampling method was used for the arrestees and the askaris from a sampling frame while a purposive sampling method was applied on the key informants. The law violators and the askaris were interviewed as homogenous while the key informants were seen as having varied inputs. Quality control measures were incorporated to ensure that sampling techniques are adhered to.

## 2.3 Ethics and Approvals

For the success of this study contact was had with the following to facilitate access to the target population and this was done through introductory letters to the respective target persons by ICJ Kenya.

- a) Department of Justice
- b) The Judiciary
- c) Directorate of City Inspection
- d) Nairobi City County
- e) Nakuru County
- f) Police headquarters
- g) Prison headquarters
- h) Probation Service in Nairobi
- i) Probation Service Nakuru

All participants were interviewed in such a way as to ensure that their rights were respected and that their participation was from a position of full knowledge and information. Of particular importance were the ethical considerations in obtaining and treating the information to include consent and confidentiality. All the information obtained is for the purposes of this research and may only be shared where the life or security of the respondent is at stake.

### 2.3.1 Informed Consent

A prototype informed consent form (ICF) was developed for the respondents in English and Kiswahili and was administered to the respondents in a language that they felt comfortable with. Each of the distinct respondent sample populations had an appropriate consent form to allow them to make the decision to participate in the research from a position of knowledge and information.

## 3. Methodology

### 3.1 Methods of Data Collection

Two types of data collection methods were employed. Primary data was collected from the interviews with the respective respondents while the secondary data was derived from desk review of the by-laws, official records and statistics, enforcement documents and any other relevant literature.

The primary data was obtained by use of questionnaires most of which were close ended. Questionnaires were considered to be a most versatile tool in measuring social variables, individual characteristics, facts and events and useful in the avoidance of ambiguity in responses. The questionnaires were administered directly to the respondents by way of an intermediary, the research assistant.

Two separate sets of quantitative questionnaires were developed for the by-law violators and askaris, while pillar guide questions were developed for the key informants. The instruments (questionnaires) were designed in a simple language that a majority of respondents would find easy to understand. The questionnaires were written in English and were translated to a language best understood by the respondents at the time of the interviews.

Even though it was intended that the questionnaires would first be tested on a pilot basis to gauge their suitability before rolling it out, this was not possible given the time constraints of the research. A pre-test would have assisted in the identification of strengths and weaknesses of the questionnaires before they were administered. A provision for triangulation was however made in the questionnaires to simultaneously capture the common issues among the units of study so as to help at the point of analysis and the comparisons between the specific target areas. Five research assistants who are knowledgeable in the issues were enlisted and trained before the data collection commenced. The questionnaires were administered by these research assistants. Two assistants carried out the interviews in Nairobi and three in Nakuru.

### 3.2 Research Questions

In order to meet the set objectives, the research questions were developed around the following issues:-

- a) The extent to which the by-laws and the implementation procedures are in conflict with the statutes.

- b) Whether there is misconduct and incompetence on the part of the enforcers of the by-laws and whether they violate the rights of the persons arrested.
- c) Who bears the responsibility for the violation of the rights of the persons arrested?
- d) What are the effects of the arrests are on the arrestees and their impact on the capacity of the holding facilities?
- e) What advocacy, policy and statutory remedial action may be plausible and appropriate in the circumstances?
- f) The legality of and gaps in the processes of arrest, prosecution and sentencing.

### 3.3 Methods of Data Analysis

The data obtained in the research has been analysed using an appropriate Statistical Package for Social Sciences (SPSS) package, for frequency distribution while cross tabulation has been used to compare the relationships between the variables. Simple descriptive statistical tables have been adopted to illuminate on the findings. The data from the respective respondents have been analysed separately. However, inference from all will be drawn for discussion on the findings.

Qualitative data has been analysed thematically and used to corroborate generated quantitative data.

### 3.4 Study Limitations

This section highlights some of the limitations of the study. Firstly, the scope of the research was limited due to time and budget limitations. Consequently, the study had a relatively small sample size which represents a small proportion of the entire population of the two counties. Owing to the bureaucracies present in the management of detention facilities, the researchers had challenges in getting feedback from some respondents, accessing recent records and other useful information such as statistics regarding detainees. However, despite these limitations, the findings of the report still form a useful indicator of the impact of the implementation of by-laws in Nairobi and Nakuru counties.

## 4. Review of Laws and Policies

### 4.1 Legal Framework

There exists a broad spectrum of laws and policies that govern the substance and process of managing the violations of criminal law from arrest through prosecution and incarceration. The Constitution of Kenya 2010 provides a strong foundation for these laws and policies that is anchored in its Bill of Rights. Below are the national and county laws and policies that govern the criminal processes in Kenya

#### 4.1.1 The Constitution of Kenya 2010

Article 19 of the Constitution recognizes and protects human rights and fundamental freedoms with a view to preserving the dignity of individuals and promoting social justice and the realization of the potential of all human beings. This protection is envisaged at all levels irrespective of the law enforcement mechanism in question.

Article 25 guarantees the right to a fair trial and protects citizens from torture, cruel, inhuman or degrading treatment and punishment. The right to a fair trial is further guaranteed by Art. 48 while Art. 49 (1) protects the rights of arrested persons to information upon arrest and to representation by an advocate whose assistance is needed. This Article further provides that an arrested person has the right to be held separately from persons who are serving a sentence.

Under Art 49(2) a person shall not be remanded in custody for an offence that is punishable by a fine only or by imprisonment of not more than six months. Article 50 guarantees the right to a fair trial and sets forth a raft of rights under this that include the right to be heard without undue delay; the right to prepare for hearing; to be represented by an advocate and to be informed of this right promptly; to be informed of the evidence that the prosecution seeks to adduce; and to be allowed to challenge the prosecution evidence.

#### 4.1.2 The Penal Code (Cap 63) Laws of Kenya

Section 7 of the Penal Code provides that ignorance of the law is not a defence unless the knowledge of the law is expressly declared as an element of the offence. This section has found express and tacit application in many a case as several offenders plead ignorance, which is promptly used against them.

Section 9 addresses the element of criminal responsibility while section 20 speaks to criminal responsibility. Joint offences are envisaged under section 21 and relate to the planning and execution of offences by one or more persons. The incidence of several offenders being charged jointly for one violation is particularly common in the context of maintenance of law and order in municipalities through by laws on general nuisance offences.

The different kinds of punishment are set out under section 24 and elaborated upon under sections 26 and 28. These include the imposition of fines, imprisonment and probation or community service under the Community Service Orders Act of 1998.

#### **4.1.3 The Criminal Procedure Code 2009 (Cap 75) Laws of Kenya**

According to this Act, any court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless during the period specified by the court (hereinafter called the “operational period”) the offender commits another offence, whether that offence is punishable by imprisonment, corporal punishment or by a fine<sup>6</sup>. This Section applies to a majority of the cases that come up under county by laws. This law also provides that only a police officer can arrest without a warrant. A police officer is defined in the Act to refer to an officer of the National Police Service or the administration police<sup>7</sup>.

It further sets forth the procedure to be followed where the accused person pleads not guilty, and notes that in such an instance, the case is allowed to proceed and the accused person is allowed to question the evidence adduced against him, and also provide his own defence.<sup>8</sup> It further provides that all accused persons have a right to be defended by an advocate<sup>9</sup>.

Under Section 21(2), the Act provides that the police may use force to effect an arrest where a person resists arrest but notes in subsection 3 that it does not in any way justify the use of greater force than was reasonable in the particular circumstance. In Section 27, it also makes note of the fact that all searches on women must be conducted by women officers who must ensure that strict regard is had to decency, circumstances in which it was employed or and whether it was necessary for the apprehension of the offender.

#### **4.1.4 The Probation of Offenders Act (Cap 64) Laws of Kenya**

This law stipulates that a person charged with an offence which is triable by a subordinate court which holds that the charge is proved but is of the opinion that, having regard to certain mitigating circumstances such as youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may convict the offender and make a probation order; or make a probation order without proceeding to conviction.

Such probation orders have conditions attached that must be adhered to by the accused persons. These conditions are explained to the accused person at the time that the order is

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<sup>6</sup> Criminal Procedure Code, Chapter 75 of the Laws of Kenya, s.15(1)

<sup>7</sup> Ibid, s. 29

<sup>8</sup> Ibid, s. 208

<sup>9</sup> Ibid, s. 193

made. Under Section 5, such probation orders are for durations of between 6 months and 3 years and are supervised by probation officers as defined by the same law. The Act also provides for the variation or cancellation of probation orders if the probationer fails to comply with the terms of the order or commits an offence while the order is in force.

#### **4.1.5 The Community Service Order Act (No. 10 of 1998) Laws of Kenya**

The Act provides that a person convicted of an offence punishable with imprisonment for not more than three years with or without the option of a fine; or imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine to be appropriate, may instead be ordered to perform community service by way of a community service order of the court.<sup>10</sup>

The section notes that community service shall comprise unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the court would have sentenced the offender, and lists a range of activities that constitute public work to include construction or maintenance work in the public domain to also include environmental and water conservation and control.

It also includes rendering specialist or professional services in the community and for the benefit of the community. Community service orders are made pursuant to the court's investigation of the circumstances of the case and with certain conditions attaching to the implementation of the orders, reporting and supervision once the order is made. Before the order is made, the convicted offender is informed and explained to the terms of the order. Section 5 of the Act addresses the breach of community service orders which may be revoked under the law as the court deems appropriate. The orders may also be reviewed under Section 6, depending on the prevailing circumstances of the case.

This law provides that probation officers appointed under the Probation Act, serve as community service officers while the management and enforcement of community service orders is done by the National Community Service Orders Committee appointed under Part III of the Act.

#### **4.1.6 The Prisons Act (Cap 90) Laws of Kenya**

Within the meaning of its interpretation clause read together with Section 24, a prison is any designated place under this law for holding those committed by a court of law or under the operation of the penal laws. The Act provides that the prisons shall hold those convicted of offences by a competent court of law<sup>11</sup>, those in remand<sup>12</sup> while awaiting trial and those arrested<sup>13</sup> while awaiting arraignment in court.

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<sup>10</sup> Community Service Order Act (No 10 of 1998) Laws of Kenya, s.3

<sup>11</sup> Prisons Act, Chapter 90, Laws of Kenya Section 30

<sup>12</sup> Ibid, Section 31

<sup>13</sup> Ibid, Section 32

#### 4.1.7 The Borstal Institutions (Act Cap 92)

This law provides in Section 5 for the committal of youthful offenders to borstal institutions upon consideration of the nature of the case and the character of the offenders. Under Section 3, a borstal institution incorporates the training of the offenders so committed through the provision of adequate facilities for such training to take place.

The maximum period of incarceration in the borstal institution is given as 3 years.<sup>14</sup> The committal to a borstal institution may also emanate from the officer in charge of a prison in the case of a convicted person who is under 18 years and where the circumstances of the case as presented by the officer in charge of the prison, are aligned to section 5 of this Act.<sup>15</sup>

#### 4.1.8 The Children Act No. 8 of 2001

This law stipulates that no child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty<sup>16</sup>. It adds that no child shall be subjected to capital punishment or to life imprisonment and further that a child offender shall be separated from adults in custody<sup>18</sup>. It also provides that a child who is arrested and detained shall be accorded legal and other assistance by the Government including contact with his family<sup>19</sup>. The Act also presupposes the creation of children's remand homes<sup>20</sup> that are run and managed under rules set out by the Minister for the time being in charge of children's issues. A child within the meaning of this Act is any person under the age of 18 years<sup>21</sup>.

#### 4.1.9 County Governments Act 2012

This Act gives effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes. This Act gives effect to Article 174 and 175 of the Constitution and so doing furthers the objects of devolution that are outlined in these sections to include the promotion of development, good governance and democracy that must be underpinned on an efficient and effective system of maintaining law and order. The maintenance of law and order flows from the responsibilities previously under the direct operation of the now repealed Local Government Act (Cap 265) as already discussed above.

#### 4.1.10 Transition to Devolved Government Act

Similar to the County Governments Act 2012, the Transition to Devolved Government Act provides a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution.

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<sup>14</sup> Borstal Institutions Act, Chapter 92 Laws of Kenya, Section 6

<sup>15</sup> Ibid, Section 7

<sup>16</sup> Children Act No 8 of 2001, Section 18(1)

<sup>17</sup> Ibid, Section 18(2)

<sup>18</sup> Ibid, Section 18(3)

<sup>19</sup> Ibid, Section 18(4)

<sup>20</sup> Ibid Section 50(1)

<sup>21</sup> Ibid, Section 2

## 4.2 Policy Framework

### 4.2.1 Judiciary Transformation Framework (JTF)

The JTF acknowledges that the Judiciary has been plagued by several challenges that have served as an impediment to accessing justice for a majority of Kenyans. Some of these challenges have been a weak institutional structure, the lack of confidence of Kenyans in the Judiciary, a lack of professionalism among judicial staff, and corruption.<sup>22</sup>

Anchored on Four Pillars the JTF seeks to address some of these challenges through ten key result areas (KRA). Under the Pillar One: People Focused Delivery of Justice, one of the key result areas is Access to and Expeditious Delivery of Justice. This KRA envisages the speedy delivery of justice without undue recourse to technicalities and delay. The overall strategies proposed in the JTF include awareness creation for the populations, the use of small claims courts and the use of alternate dispute resolution mechanisms.

These are all important in resolving the case backlog that currently is choking the Judiciary. The JTF however falls short in failing to address itself to the related actors who are important cogs in the wheels of justice. These include the investigation and prosecution components that when not well managed result in weak cases that drag through the court system. Of relevance to this study is the fact that poorly investigated cases and the corresponding weaknesses in prosecution of these cases leads to a gross miscarriage of justice that is often manifest in the inordinately long periods of time that the offenders are incarcerated before and during trial. This leads to overcrowding in prisons caused by those who should not be in prison in the first place. The inclusion of a Small Claims Court mechanism is another way of addressing the delays in the prosecution of these cases as it will lead to the speedy resolution of cases.

The county by laws for Nakuru and Nairobi are annexed to this report and cover a broad range of issues from general nuisance to construction and obstruction that overlap with the penal laws on trespass, fraud and traffic offences under the Traffic Act.

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<sup>22</sup> Judiciary Transformation Framework, 2012-2016 ,p7



# 5. Research Findings

The research findings are presented in two parts. The first part addresses itself to the perspectives of the offenders and analyses the profile of the offenders, the nature of the offences, the arrest processes, arraignment in court, the prosecution of the cases and the sentencing. The second part focuses on the findings from the interviews with the law enforcement officers and interrogates their role and what they see as the gaps and opportunities for enhancing access to justice in their various capacities.

## PART I

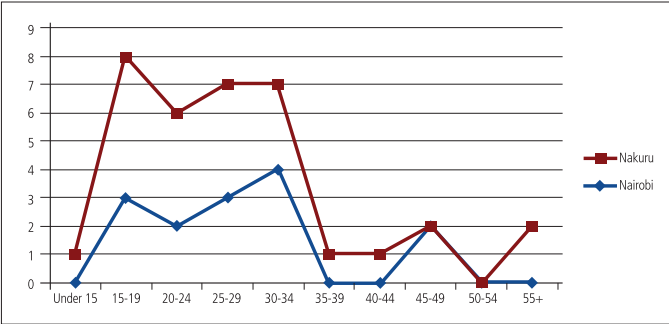
### 5.1 Offenders

#### 5.1.2 Age of offender

In both study sites, the majority of offenders fall within the age bracket of 15-34. This represents a fairly youthful age group and going by the nature of offences noted under paragraph 5.2.1 below, it would mean that the offenders are at the time of the arrest engaging in income generating activities that then give rise to these offences.

Alternatively, it would mean that their activities actually constitute offences. A majority of these offenders indicate in paragraph 5.8 that they would repeat the same offences as in any case they were “simply doing their work” and did not violate any law. This then begs the question, are the violations unreasonably defined or are the law enforcement officials arresting citizens wrongly? Do these officials understand the laws and is there a gap between the national laws and the county laws that give rise to these violations? These questions are addressed to some extent in part two in the interviews with the law enforcement officials.

Table 2: Age of Offenders



5.1.2 Gender of Offenders

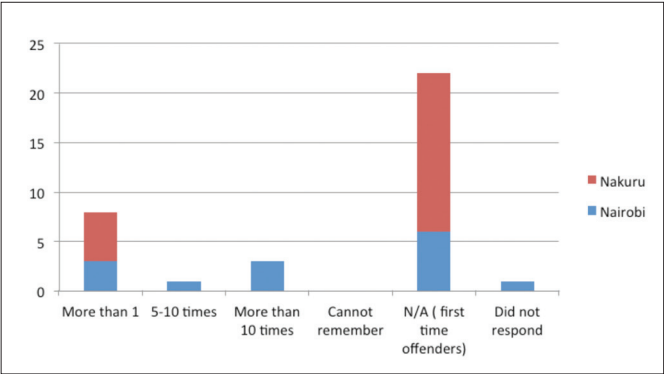
In Nairobi, 14 male respondents were interviewed while there was no female offender as the research team did not get access to the women’s prison. In Nakuru, 16 male and 5 female offenders were interviewed. This is a reflection of paragraph 5.1.1 above on the age of offenders who it is noted consider themselves as simply engaging in their income generating activities and paragraph 5.2 below which describes the nature of offences. Indeed, a majority of activities giving rise to the offences under paragraph 5.2.1 are for the most part undertaken by men.

5.1.3 Criminal History of Offenders

Table 3 below shows the criminal history of the offenders with the first time offenders forming the majority in both study sites. This can be attributed to various reasons including the lack of knowledge of the system by the first time offenders as opposed to the habitual offenders who know how to engage the criminal justice processes to either avoid arrest or argue their cases successfully.

To illustrate this, several respondents noted they pleaded guilty thinking that this would earn them a quick ticket out of prison which is often the case as they were then not able to plead in mitigation or even adduce evidence in support of their cases. The court process that was largely alien to them, was in their view over before it even started only for them to realize later on that they had been convicted for an offence which in their view they did not commit hence their claim to innocence.

Table3: Criminal History of the Offenders

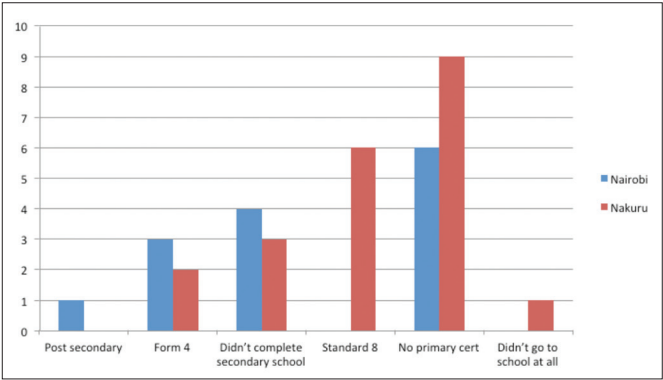


5.14 Education Level of Offenders

From the table below it is clear that those with lower qualifications in terms of formal education are more predisposed to violating the by-laws or perhaps getting arrested and charged for violations that they had nothing to do with as has been indicated in paragraphs 4.6, 4.7 and 4.8 where the respondents maintain their innocence despite the convictions and sentences

handed down to them. From those interviewed there was a clear disconnect between their understanding of the offences for which they were convicted and the substance and process of the law in question. This could be attributable to a lack of understanding of the court processes.

Table 4: Highest level of education

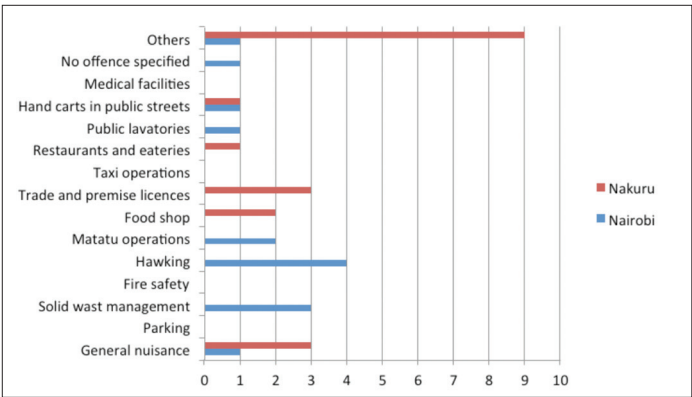


## 5.2 Offence

### 5.2.1 Types of Offences

The offences for which the respondents are charged cut across those contained in the Penal Code Cap 63 of the Laws of Kenya and the county by laws in Nairobi and Nakuru. This shows a lack of delineation between the two sets of laws but does not necessarily mean that there is a convergence in terms of substance or process including the prosecution and sentencing under both laws. This is clearly demonstrated in paragraph 5.6 where there seems to be no rhyme or rhythm in terms of the violations and the respective sentences under the two regimes of laws.

Table 5: Types of offences



Under the general nuisance offences, one respondent was charged with fighting. Under the public lavatories offences, the offender interviewed in Nairobi was charged with urinating in public. In Nairobi, the offender listed under types of offenses marked "other" was charged with housebreaking while of those under the same category in Nakuru, two were charged with drunkenness, one with trespassing in a public place, one with failing to obey police instructions, one with malicious damage to property and four with traffic offences related to boda boda motorcycles and bicycles.

## 5.3 Arrest

In Nairobi as in Nakuru 7 and 17 respondents respectively were arrested while at work going by the nature of the offences that form part of income generating activities such as touting, not having licenses, and driving without a helmet. In Nairobi one was assaulted during arrest and 6 were asked for a bribe at the time of arrest. A common theme in the arrests in Nairobi and Nakuru is the harassment of offenders which is at times accompanied by the confiscation of property.

Three respondents were asked for money to secure their release and of these one had the partial amount demanded which the arresting officers took and still arrested him. One respondent had his property taken by the police at the time of arrest. In Nakuru, thirteen respondents reported having been assaulted at the time of the arrest. This is in contravention of the Constitution that guarantees the protection of citizens from harassment and physical abuse<sup>23</sup>. This provision places an obligation on the arresting officers to treat the offenders with respect at all times.

In Nairobi, 11 of the respondents were aware that their rights had been infringed while three were not aware of any rights being infringed. One noted however that he was with a colleague who explained to him that his rights had indeed been violated at the time of the arrest. In Nakuru, 8 respondents indicated that no rights were violated as they were arraigned in court immediately after the arrest.

### 5.3.1 Gender Responsiveness of Officers At The Time Of Arrest

In this study gender responsiveness of the arresting officer interrogates the attitude of the officers to the offenders in terms of sensitivities to offenders of the same or opposite sex particularly with regards to body searches and physical handling at the time of arrest. In Nairobi all the offenders were male and even where there was a female officer arresting, the respondents note that there was general sensitivity to the offenders of the opposite gender.

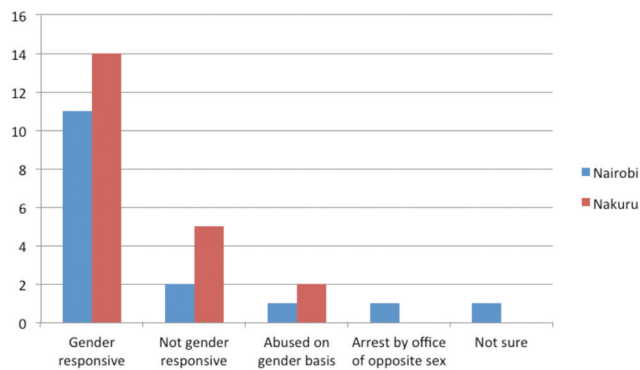
There was no case in Nakuru where an offender was arrested by an officer of the opposite sex while the cases of abuse on the basis of gender were minimal in Nakuru as in Nairobi. In

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<sup>23</sup> The Constitution of Kenya 2010, Article 25b

Nakuru, one female respondent noted having been arrested by a male officer who used force at the time of arrest. She however did not describe the type or extent of force. Still in Nakuru one male respondent noted that he was arrested by a female officer who promptly handed him over to her male colleagues for further action.

**Table 6: Gender Responsiveness of Officers at the Time of the Arrest**



### 5.3.2 Number of Persons Arrested At the Same Time as the Offender

The majority of arrests in both cities happened in groups with 9 of the respondents in Nairobi and 8 in Nakuru noting that they were arrested as part of a group. In Nairobi, four<sup>24</sup> respondents noted that they were arrested alone while 9 were arrested alone in Nakuru. One respondent in Nairobi and two in Nakuru respectively were arrested with one other person. The group arrests are recounted as swoops or raids where the law enforcement officials do not follow any systematic method of identifying specific offenders. This may be the reason for a large number of respondents saying in paragraph 5.8 that they did not commit any crime or were simply passing by the place of arrest when they were arrested. Such arrests would amount to unlawful detention within the meaning of the Constitution.

## 5.4 Arraignment in Court

### 5.4.1 Length of time held before arraignment in court

The length of time that the offenders were held before being arraigned in court varied between a few hours to more than 24 hours in some instances. The latter is in clear contravention of the Constitutional provision that requires that a person is brought to court as soon as is reasonably possible but not later than 24 hours after arrest or if the arrest happens on a day that the court

<sup>24</sup> Of these four arrested alone, two were placed in vehicles that had several other people in them

is not sitting, then the arrested person must be brought to court at the next court day.<sup>25</sup>

In Nairobi 3 offenders were brought to court within a few hours, 9 in less than 24 hours and 2 in more than 24 hours. Nakuru had 9 offenders brought to court within a few hours, 5 in less than 24 hours, 5 in more than 24 hours while 2 did not respond to the question. It is clear then that the constitutional threshold was respected for a majority of the respondents in both study sites.

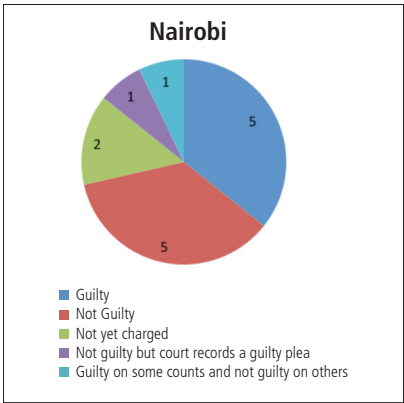
## 5.5 Prosecution of Cases

### 5.5.1 Whether the Charges Were Explained To Accused Persons in a Language S/He Understood

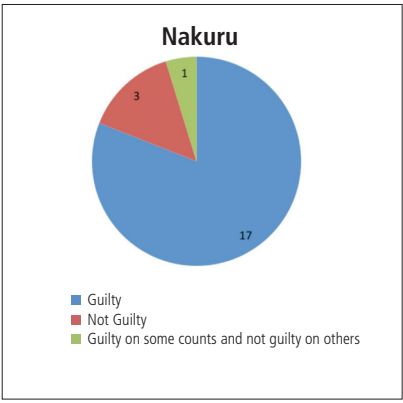
In both study sites, the majority of the respondents noted that the charges were explained to them in a language that they understood with the figures standing at 8 in Nairobi and 17 in Nakuru. Four respondents in Nairobi noted that even though the charges were explained to them in a language that they understood, they did not get the clarifications that they needed. Despite asking for such clarifications, only one respondent in Nairobi as compared to four in Nakuru did not have the charges explained in a language that they understood. This demonstrates adherence to Article 49(1)(a) and (b) of the Constitution that sets forth this requirement.

### 5.5.2 Plea

**Table 7a How the offenders pleaded**



**Table 7b How the offenders pleaded**



Of those who pleaded guilty three indicated that they did so to get a fine as a quick fix to enable them move on with their lives.

### 5.5.3 Speed with which the cases are dispensed with

Eight respondents in Nairobi and eighteen in Nakuru noted that their cases were dispensed

<sup>25</sup> The Constitution of Kenya 2010, Article 49 (1) (f)

with on day one of their arraignment in court. In Nairobi, one respondent noted that he was remanded in custody on the day that the case came up in court.

## 5.6 Sentencing

All the respondents interviewed were in prison or in remand awaiting the hearing of their cases. Of those whose cases had been finalized, 12 in Nairobi and 9 in Nakuru indicated that they were not happy with the way that their cases were handled especially at sentencing. The reasons for these were varied and included the fact that the arresting officers demanded money, which in the view of the respondents meant that they did not investigate the alleged offences well. They also cited very harsh sentences and steep fines that were not commensurate with the offences with which they were charged. Some noted the fact that they were not given a chance to defend themselves and were therefore sentenced unheard.

One respondent in Nairobi noted that the sentence was in order even though he felt that he was falsely charged. In Nakuru a larger number of respondents, ten, were of the view that the sentence was in order with one noting that he was advised well throughout the proceedings in a language that he understood. One noted that he was charged with the correct offence while 5 stated that even though they pleaded guilty to charges of offences that they did not commit, the sentences were sufficient for these offences. Nine respondents in Nakuru were of the view that the handling of the cases and hence the sentencing was not appropriate and cited the same reasons as those advanced by the respondents in Nairobi.

Four respondents were jailed for one week while six were jailed for three weeks. One was jailed for ten days, one for fourteen days and one for twenty eight days with the option of a fine of Kshs 8000/- worked out at the rate of Kshs 2000/- per count. In Nakuru, eight respondents were each jailed for varying periods ranging from 30 to 60 days with the option of fines ranging from Kshs.2000/- to Kshs 5000/- . Another nine respondents received sentences that ranged from two weeks to six months with fines ranging from Kshs. 2000/- to Kshs. 60,000/-. One respondent noted that he was jailed for a period he was not aware of and did not understand why he was jailed. All the respondents were not able to pay the fine and hence were serving time in jail.

## 5.7 Experience in Prison

The experiences of the respondents were very varied. Twelve of the fourteen respondents in Nairobi were held in a police cell and two in the court cells. In Nakuru eighteen respondents were held in a cell while two were not held in any cell before the hearing. In Nairobi 11 respondents noted that the conditions in the cells were deplorable citing congestion and the fact that they slept on the floor. Those held up at the Central Police Station noted that they were not given dinner but got tea and bread for breakfast. One respondent said that he was held for about 5

hours but the cell was clean even though he was held in the dark for the most part. In Nakuru two respondents noted that the conditions were fair with 17 saying that the conditions were very bad. One respondent was not held in a cell.

Five respondents in Nairobi and thirteen in Nakuru had no response or comment on their experiences in prison or remand. In Nairobi three respondents insisted that they had not broken any law and were therefore wrongly in prison. One respondent noted that like him, many people in prison are not guilty of the offences for which they have been imprisoned. One respondent stated that there should be alternatives to imprisonment. In Nakuru, two respondents said that they had not learned any lessons with one saying that after all he was still in prison. Four decried the terrible conditions in the prison that was bad for their health. Only one prisoner in Nakuru spoke of friendly inmates having made his time in the prison a good experience.

In Nairobi, ten respondents noted that they had not gained anything from their time in prison while eight respondents in Nakuru were of even view. One respondent each in Nairobi and Nakuru felt that they had gained something from the prison term with the respondent in Nakuru, a 14 year old former primary school drop- out<sup>26</sup> noting that he now goes to school.

The work in prison included the following: collecting rubbish and sweeping (7 respondents in Nairobi cleaning various installations and objects ranging from office blocks to toilets to churches to cars and gates (Nairobi 4, Nakuru 4), collecting water and cutting grass (one respondent each in Nairobi) preparing tea and washing clothes for officers (2 respondents in Nakuru) and farm work and tending tree nurseries (5 respondents in Nakuru). Six respondents in Nakuru noted that they had no work allocated to them yet.

## 5.8 Impact of Imprisonment on the Offenders

As can be seen in paragraph 4.5.3, the cases are dispensed with speedily. However, the sentences are for the most part inordinate and do not conform with the spirit of the Probation of Offenders Act Cap 64 of the Laws of Kenya that envisages non-custodial sentences for petty offences.

When asked whether they would repeat the violation of the by-laws, 6 respondents in Nairobi noted that they would as they were simply taking part in their day to day activities at the time that they were arrested and charged. Five respondents were clear that they would not repeat the offences. One respondent was categorical that he did not commit any crime while one who had been charged with assault noted that instead of fighting back, he would report the matter to the police to take action. One respondent did not respond to this question.

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<sup>26</sup> The age of this respondent raises concern around the process that led to his incarceration and the question begs why the officials in the criminal justice chain did not take cognizance of his age and therefore process his case under the Children's Act and the Borstal Institutions Act.



Comparatively in Nakuru, one respondent noted that he would probably violate the by-laws again as he had been accused of riding without a helmet yet he felt that he did not need one. Eighteen respondents in Nakuru were of the view that they would not violate the by-laws under which they had been charged while two did not respond to the question. This goes to show that at the end of the day, the enforcement of the by-laws had no effect whatsoever on six respondents in Nairobi which translates to a worrying 43% as compared to Nakuru where the implementation of the by-laws can be said to have had an impact on 86% of the respondents.

Three other respondents noted that they would not repeat the offences while one said that he had learned no lesson from the imprisonment as he would continue plying his trade which got him arrested in the first place.

## PART II

This section contains the views of the law enforcement and judicial officers. The law enforcement officials interviewed were arresting officers from the National Police Service and the County inspectorate offices, prosecutors, magistrates, prison and probation officers, and a representative of the Nairobi County Executive.

### 5.9 Capacity

According to the OCPD Nakuru<sup>27</sup>, the municipal council has no capacity to for prosecution. Similarly, the council does not have the authority to hold suspects and therefore relies on the police to undertake the prosecutorial services and to detain those arrested for violating the by- laws.

Despite this clarity on the role of the police and that of the inspectorate, the OCPD was not able to tell how many offenders are booked for violation of by-laws. He said that this was for the Council to know. This statement points to a weak collaboration mechanism between the two law enforcement agencies that is unlikely to be resolved as he was of the further view that the police should not get involved in the enforcement of by- laws. This can also be seen from his assertion that the police do all the hard work. He was clear in his view that the police are superior to the municipal law enforcement officials.

Added to this, his assertion that the council law enforcement agencies are ill equipped to effectively undertake their duties points to an attitude of the police right from the top that would hardly facilitate any collaboration between these two agencies.

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<sup>27</sup> Interview with the OCPD Nakuru on 6 November 2013 at the Nakuru Police Headquarters

The municipal inspectorate in Nakuru<sup>28</sup> however sees no conflict between the two agencies and is of the view that the two are working well together. In the view of the respondent from the inspectorate, the only concern is that of the inadequacy of personnel to undertake the work of the law enforcement agencies.

In the Stakeholders' Forum in Nakuru one county enforcement officer explained that there is a big distinction between the police and county law enforcement in terms of their mandate and so there are usually no conflicts between the two institutions thus reiterating the view of the municipal inspectorate in Nakuru.

In the same light, it was suggested that the allegation of the police feeling that they are superior to the county law enforcers and having more authority is erroneous and needs to be corrected because the working relationship between the two institutions is very good especially in Nairobi County where the police are very cautious on the issue of giving free bond to offenders such as hawkers due to the flight risk involved.

Further to this, it was stated that the roles of the police and county enforcement officers are complementary to each other because police are also authorized to arrest offenders of by-laws and are also usually involved in prosecution of these offences in case the prosecution counsel at the county courts is not available. The view of the OCPD Nakuru was reiterated by one participant at the Stakeholders' Forum who attributed this to the lack of remand facilities for county law enforcement officers. The Forum also noted that there is a general feeling that the County Officers do not have rights to use the police cells to remand the offenders that are arrested under the municipal law enforcement mechanisms and processes.

It is important to note that there is recognition of the role that the law enforcement and judicial officers play in the implementation of the laws. All the officials noted that their career progression is instigated not through their application for promotion to higher levels but by the recommendation of their superiors. The work load is however still considered to be too heavy by all the actors. The heavy workload hampers the speed with which cases are dispensed with on the one hand and the quality of service on the other.

At the lower ranks there is a general low level of capacity. Of the 10 officers interviewed in Nakuru, only one was undertaking tertiary level education and was studying human resource management. Two had primary level education while the rest had secondary level education and had undergone varying levels of "on the job training". At these levels, it is difficult to impart knowledge on the Constitution and other complex human rights instruments.

To the credit of these officers however, 8 knew of the difference between the content of the by-laws and the Penal laws with the challenge emerging around implementation and the seeming

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28 Interview with John Kiarie of the Inspectorate Nakuru on 6 November 2013

overlapping roles as already alluded to above. Additionally, as noted in the Nakuru Stakeholders' Forum, there is no common curriculum for training of these law enforcement agents.

The capacity challenges are also extended to the knowledge of the law by some of the law enforcement officers. The capacity challenges are compounded by the lack of discipline among some of the law enforcement officers and in some instances duplication of duties leading to a lack of accountability. The law enforcement officers also do not have standard operation guidelines at the county levels.

During the Stakeholders Forum in Nakuru, one participant noted that there is a child protection committee in case any violations occur during the handling of children in the criminal process. It was explained that such violations are usually reported to the protection committee which also constitutes of children courts magistrates. Further to this, it was noted that investigations are usually done with the assistance of prison officers who help to establish what violations were committed and who was responsible for the same. It was also noted that once established, the perpetrators of such violations are usually charged accordingly.

In Nairobi, Mr Karisa Iha for the governor noted that the county has taken cognizance of the challenges of capacity and the legislative inadequacies of the by-laws and was to this end undertaking the training of officials at the inspectorate training school in Dagoretti. He also noted that the courts are at a national level and the county just provides the space. This points at a lack of clarity in terms of the role of the City Court in the Judicial Transformation Framework. Clarity is needed here to enable the magistrates assigned to the City Court address the issues specific to the County better. He also noted the challenge of the county legislature to effectively draft the new by-laws to respond to the Constitution while having regard to the existing legislative frameworks.

The issue of the capacity of law enforcement officials to undertake their work is addressed in a baseline survey undertaken by the Independent Police Oversight Authority (IPOA). In the survey, several factors are noted as affecting police performance including low pay, limited resources to fight crime, corruption, discrimination, ethnicity and nepotism. It also includes in this list the lack of information, communication and technology and lack of proper training. This resonates well with the views of the offenders and law enforcement officers alike.

Linked to the capacity gaps is the issue of public confidence in the police which from the survey is given as 62% with another 61.2% noting that the police have the necessary skills to undertake their work while 42.3% consider the resources available to the police as adequate to undertake their work. It is however important to point out that the IPOA survey was focused on the perceptions of Kenyans on policing services and the factors affecting effective policing in the country, The thrust of the survey however leans very heavily towards the role of the police in

arresting and prosecuting felonies which is very different from the role of the law enforcement agencies including the police, concerned with the implementation of county by laws

## 5.10 Role of Arresting Officers

The lack of clarity in the role of the police and the municipal officers has already been alluded to by the offenders who spoke to the confusion in the identification of officials at the time of their arrest. Kiarie notes that the lack of training of the personnel who in addition do not have the necessary tools to effect arrests, coupled with resistance from the offenders leads to the violence that has been witnessed on the part of the municipal inspectorate staff. He effectively admitted to the Inspectorate using force despite asserting that the Inspectorate has made all effort to adhere to Article 49 of the Constitution.

The fact that the inspectorate staff is not armed is therefore a good thing given their relatively lower levels of education and the lack of training on their part. From the interviews with the offenders, a call for arms by the police as tools for arrest would raise concern as they are, unarmed, already very violent when arresting offenders. These findings could possibly inform more detailed research to gauge the suitability of arming inspectorate staff in the country.

The issues of unlawful arrest, use of excessive force and the failure of the law enforcement officers to inform the arrested persons of their rights and the reasons for arrest were also raised as a key concern in the Nakuru Stakeholders' Forum. Yet the Forum noted that the issues of proper decorum including the provision of proper information to the arrested persons is included in the forces standing order and is expected to be adhered to by all officers.

On the other hand, the Forum noted in justification of the violence meted out on offenders at the time of arrest that the arresting officers at times risk injury from the offenders who are at times seasoned criminals. At times in cases of maintaining public order in case of a riot, there have been cases where police officers have been injured in the ensuing stampedes and some have even lost property belonging to the police force. In such instances the police officers have no protection even from the public.

## 5.11 Prosecution of Cases

The Prosecutor<sup>29</sup> in Nakuru is of the view that the magistrates are overworked and not trained to handle the specific details of the cases under the Penal Code and those under the County by laws. The prosecutors in Nakuru and Nairobi<sup>30</sup> both noted that they are overworked and not adequately remunerated for the extra hours that they put in. The heavy work load coupled with

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<sup>29</sup> Interview with the Prosecutor Nakuru on 6 November 2013

<sup>30</sup> Interview with Prosecutor City Court on 20 January 2014

no special training on the job leads to poor prosecution of cases and ultimately a miscarriage of justice in a majority of cases.

They also point to a lack of awareness of the law especially in the area of general nuisance and this lack of awareness cuts across the public domain is present among law enforcement officials and judicial officials. Where the accused persons plead guilty to charges for offences they did not commit, the magistrates hand down sentences that are often misaligned to the offences and yet the prosecution appears to have no power to intervene. In other instances the guilty pleas save the prosecutors from having to proceed with potentially weak cases that are not well investigated and which lack the evidentiary backing from the point of arrest. This then points to a generally faulty judicial system, and it then matters very little the point in the pipeline that the cracks emerge.

On her part, the Senior Principal Magistrate in the City Court Nairobi decried the lack of professionalism of the arresting officers leading to violation of the Constitution as these officers use force and at times arrest children in contravention of the Constitution. This then clouds the prosecution of the cases as the court has to address itself to the violations complained of by the accused. It is clear that the violations complained of are not addressed in the prosecution process in such cases.

At the Nakuru Stakeholders' Forum, it was noted that there is mechanism in place for recalling, reviewing and or revising some of the cases that have been decided, separate from the appeals process. This would target some of these cases that have had prosecutorial challenges and for which there are persons serving jail term which they should not be serving and which in turn adds to the already existing problem of congestion of the prison facilities. Under this mechanism judicial officers would on their own motion refer that file to the High Court for review of the sentence when they feel that they have made a wrong decision in a case.

The Forum also noted that the prosecutors are for the most part skilled but unqualified and hence the challenges that have been noted with regards to prosecution. The criminal justice process is also at best very slow leading to the loss of key evidence in certain cases yet the prosecution and law enforcement agencies are not capacitated with the means to preserve the evidence or meet the steep financial costs of following up on evidence where there have been delays. With regards to sentencing, the Forum decried the very lenient sentences that are times handed down to the offenders some of who are seasoned criminals.

## 5.12 Substance of the Law

The inspectorate in Nakuru is clear that the mandate as defined in the Local Government Act would be adopted by the Members of the County Assembly (MCA) in Nakuru to retain arrest and prosecution in case of violation of the county by laws.

## 5.13 Prisons

According to James Sawe,<sup>31</sup> the Officer in Charge of the Nakuru prison, at least 40 people are booked into his facility on any day of which 10 are convicted while 30 await trial. This leads to congestion in the prison with the resultant problems of disease, malnutrition, homosexuality and the mixing of offenders which hampers rehabilitation of the offenders. Yet rehabilitation remains a key objective of the prisons department. Sawe also noted that one third of the staff of the prisons is directly involved in the implementation of the county by laws.

Also interviewed were the Superintendent of the hospital Dismas Mangoli and George Wanjau the Officer in Charge of Documentation who shared Mr Sawe's views. In the women's prison, the deputy officer in charge of the prison<sup>32</sup> noted that there is an average of two convicted offenders brought to the facility per day. According to the Officer in Charge of Documentation at the Nakuru Prison the delays lead to overcrowding and currently the prison with a capacity of 800 had 1800 remandees.

At the Stakeholders' Forum it was noted that in addition to the overcrowding, there is general lack of funding for the prisons department leading to a myriad of problems including lack of interview rooms for probation officers leading to poor case development for probation, are outdated training programs for prison officials, lack of fare for prisoners who have been released leading to their continued stay in the prisons.

Despite the overcrowding, the officers endeavour to abide by the rules that govern the operations of prisons including the Kenya Prison Service (KPS) Standing Orders, the Commissioner's directives, the Station Standing Orders, the Prisons Act and the county by-laws. This plethora of laws and policies also poses a problem as they are not always harmonized.

## 5.14 Challenges

The law enforcement, judicial and county officials noted several challenges that they encounter in the course of their duties and these include:-

- a) Offenders resisting arrest calling for the use of force
- b) Harassment of officers by members of the public during arrests
- c) Shortage of personnel
- d) Political interference
- e) Lack of training
- f) Lack of adequate working tools

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<sup>31</sup> Interview with James Sawe on 5 November 2013

<sup>32</sup> Interview with Rosemary, Deputy Officer in Charge of the women's prison on 5 November 2013

- g) Weak laws that are not well aligned to the Constitution, compounded by relatively weak legislative and legal drafting capacities in the nascent counties
- h) High rates of absconding by those placed on community service coupled with a negative societal attitude to probation
- i) Inadequate funding of the probation service leading to poor engagement before and during trial by probation officials with the resultant weak profiling for eligibility of offenders to probation. In some instances judicial officers give double or faulty orders on non- custodial sentences leading to the incarceration of the offenders in the long run
- j) Difficulty in accessing criminal records of accused persons by prison / probation officers. Additionally, the probation officials are not fully facilitated to enable them undertake proper case studies since they have to make repeated visits to the prisons and the homes of the offenders.
- k) Inordinate delays in the criminal justice process

## 6. Recommendations

The research findings bring to the fore three levels of concern. In the first instance there is lack of harmony between the county by laws and the national laws. It is not clear to a majority of citizens which of the two levels of law should be followed, or is in place. Secondly, there is lack of creativity on the part of the judicial officers in the manner in which they handle the cases. This is compounded by the seeming conflict between the two bodies of law at the national and county levels. The result is that several persons are apparently in prison for wrongful convictions or are serving custodial sentences for petty offences that would be better punished using non-custodial means as provided for under the law. There is blatant disregard for the law in the arrest and prosecution of offenders.

To address these concerns the following recommendations are advanced from the study:-

### 6.1 Arrest

1. The need to respect the human rights of the arrestees and prisoners and this can be done through training on the rights and responsibilities of the arresting officers and offenders.
2. All the arresting offices should wear uniform and identify themselves to those that they are arresting. In addition they should be given proper tools to enable them effectively undertake their duties. These include handcuffs and the writing materials for recording the offences. The arresting officers need to be guided by a well-defined and identifiable set of rules.
3. The arresting officers should not act like thugs by violating the rights of the arrestees who should be treated humanely and not subjected to violence.
4. There needs to be a change of attitude of the arresting officers which would lead to a change in the way that they approach the arrests. This can be achieved through enhanced training and better terms of service for the police
5. Monitoring devices including CCTVs should be installed in all major towns and municipalities to assist in building evidence and curbing the violence that is meted out to the arrestees by the arresting officers.
6. There needs to be an overhaul of traffic police in order to curb corruption and this can be done institutionally and operationally through vetting of existing officers including undertaking skills audits and training identified officers.
7. Programs should be initiated to encourage a change of attitude towards arrestees by enforcement officers. One of the first issues will be on listening to complaints raised by arrestees.
8. The 24 hour rule for arraignment in court should be enlarged to allow for investigation.



## 6.2 Prosecution and Sentencing

1. The judicial officers should raise the threshold of evidence from the prosecution rather than shifting the burden of proof to the accused persons who should in any case be given a chance to be heard fairly.
2. Several offences for which there are convicted prisoners serving time are punishable by non-custodial sentences. There is opportunity here to gear up the advocacy for the speedy establishment of the small claims courts and the related petty offences courts in the criminal system. The outcome of such advocacy should also include a clear policy guideline to complement the existing laws by categorizing the offences for separate trials and indicating those that attract community service without leaving it to the discretion of the judicial officers.
3. There is need to enhance the use of the probation laws as these allow for non-custodial sentences and still enable the rehabilitation and retribution intended by custodial sentences to take place. The funding to the probation service should be increased to enable it effectively undertake its investigative, recommendation and supervisory roles.
4. Given that the majority of the actors in the criminal justice system to wit the offenders , arresting officers and prosecutors indicate that they have minimal education qualifications, the proceedings should of necessity be conducted in simplified language and where possible in local languages. Admittedly, the latter is generally done in several instances. The guidelines for these are not evident to a majority of actors in the pipeline of justice especially as concerns the violation of county by laws. The court process is therefore very foreign to the actors participating in it with the exception of the judicial officers in most cases.
5. Court Users Committees need to be approached with issues faced by prisoners who feel their trial and conviction was unfair so that the courts can employ better policies while handling such cases to avoid a repeat of the same.
6. In addition, there is need to form a committee inclusive of all stakeholders involved in protection of children such as the children's department and the judiciary among others. There is need for Kenyans to utilize the Child Protection Unit set aside to deal with children's cases at police stations.
7. The "Poor Box" should be reinstated in the magistrate's courts to help facilitate transport costs of persons released on probation. This is a common problem that is usually borne by probation officers.
8. There is need for creation of a database of criminal records which should be decentralized for easier access to all law enforcement officers in the country
9. Judicial officers need training on how to issue proper orders to reduce the cases of faulty orders/ double-sentencing
10. Judiciary needs to speed up listening and determination of appeals through the implementation of effective case management strategies especially at the level of the courts of first instance.

## 6.3 Prison Conditions

1. The prisons need to have the basic facilities including toilets and to increase the physical space available to cater to the increased number of prisoners. A separate facility should be set up for remanding petty offences to ensure that there is easier monitoring of movement of these offences separate from more serious offences. Separation of offenders also curbs the spread of diseases.
2. The number of prisoners per cell should be reduced and in the broader perspective, fewer persons should be handed custodial sentences to reduce congestion.
3. All prisoners should be enabled to resume their lives after the sentence through vocational and skills training. At the moment, it would appear that those serving short term sentences do not benefit from this kind of training.
4. An audit of the prisons population should be undertaken and those serving short sentences for petty offences released as a means to decongesting the prisons.
5. As part of the strategies for decongesting prisons, the judicial officers should issue increase the orders for community service in favour of custodial sentences. Additionally there should be more sensitization to increase the use of Alternative Dispute Resolution Mechanisms. In addition, instant ticketing fines in cases of traffic offences should be used to avoid overcrowding the courts and prison cells with such offenders.
6. There is need for stakeholders to take advantage of the Decongestion Programme which is already in place. This process is done once or twice in a year with the last one conducted late last year and is usually initiated by the Officers in the Committee of Prisons who liaise with the Courts.
7. The engagement of stakeholders such as NALEAP and other civil society organizations who are active in providing legal aid services should be utilized to assist prisoners seeking presidential pardon. In addition to this, civil society organizations who have been working closely with NALEAP should step up their efforts to push for the Legal Aid Bill to be passed which will help many indigent persons in society to access justice.
8. Supervision of sentences should be addressed to avoid confusion for example fines and community service
9. Parole system should be revived

## 6.4 Capacity of Law Enforcement Personnel

1. There is need for training of the judicial officers using a rights based approach to ensure that they respect the provisions of the constitution. Opportunity exists in the Judiciary Training Institute for such training. The law enforcers of the by- laws should be trained on arrest procedures so that this are in conformity with the Constitution. This would lead to less brutality and would also help them in defending themselves from the public at the time of

arrest. Additionally there should be county colleges for law enforcement officers in each county.

2. There should be sensitization of officials on the new by laws as soon as these are passed. In addition , they should be given a copy of the force standing orders
3. There is need to increase the number of officers in order to increase the effectiveness as the officers work long hours with little or no rest. An increased capacity in numbers will allow for rest and ultimately lead to a change in attitude.
4. The terms of service for the law enforcement agencies at the county levels (previously municipal askaris) should be revised in order to meet the human rights minimums in the Constitution.

## 6.5 Legal frameworks

1. The county governments need to review their licensing policies to provide for clarity and avoid punishing day to day activities that citizens engage that might not ideally need for a license.
2. The county by laws should be reviewed to ensure that petty offences are managed out of the judicial system and where they have to be prosecuted, the offenders are handed non-custodial sentences. This would then address the problem of overcrowding in prisons and courts.
3. The laws emanating from the county legislative processes must of necessity be audited for conformity with the Constitution of Kenya 2010 and in particular the Bill of Rights and other laws.

## 6.6 Awareness/General

1. All county by laws should be published and made available to the general population. These by laws should be applied in strict compliance with the Constitution of Kenya 2010 and in conformity with the national laws on similar matters. It is to be noted that there has been a deliberate effort to popularize the Constitution through translated and simplified versions. The same ought to be done for the County by laws that get their reason for being from the Constitution.
2. Closer working relationships should be nurtured within the framework of the National Council on the Administration of Justice (NCAJ) and indeed between all the players of the criminal justice system. This would address some challenges such as the instances where offenders end up being locked up for 3 days yet if the proper information was relayed by the probation officers to the magistrate, this could be avoided. The reasons for this have been given as for example where the court is waiting for reports to be compiled by probation officers rather than listen to their report in the courtroom.

3. County law enforcement officers need to put up public notices prohibiting commission of certain activities by members of the public to help deal with ignorance of by-laws amongst the persons. The public should also be encouraged to participate in the formulation of the by-laws in the ongoing county legislative processes.
4. The judiciary and prison should consider introducing public forums or community meetings whereby probation officers can interview family members of prisoners who are being considered for release to cut down on the expenses incurred by the probation officers.

## 6.7 Conclusion

The research into the enforcement of by laws in Nakuru and Nairobi counties and the impact of such implementation on the pre-trial holding and prison facilities has established that there is indeed a fairly straightforward system cutting across the two sets of law at the national and county levels that is complicated by the non-alignment of the processes surrounding the implementation of these laws.

There are on-going legislative processes in these counties that will build on the by- laws and possibly review some of these laws to ensure that law and order is maintained in the counties. In addition to developing the substance of these laws, there is need to develop complementary procedural rules that will serve to merge the two levels of law for effective implementation. Such convergence in the laws will address some of the challenges in capacity and the very glaring procedural gaps that have resulted in the implementation of the by- laws in contradiction of the Constitution in several instances.

It will also address some of the administrative issues that touch on the capacity of the officers charged with the implementation of these laws through collaborative action and consultation across the various institutions of implementation at the two levels. The recommendations advanced in Chapter 6 will go a long way in achieving this.

# Annexes

## 1. Categories of Respondents

### A. Offenders

	Nairobi	Nakuru
Male	14	16
Female	0	5
<b>Total</b>	<b>14</b>	<b>21</b>

### B. County Law Enforcement Officials

Rank	Number
Sergeant	5
Corporal	2
Senior Sergeant	1
Constable	1
MCA	1
<b>Total</b>	<b>10</b>

### C. Prison Officers/Probation Officials

Rank	Number
Superintendent	1
OIC Documentation	1
OIC Prisons	1
OIC Women's Prison	1
Snr. Probation Officer	1
Assistant Commissioner of Prisons	1
<b>Total</b>	<b>6</b>

### D. Police Officers

Rank	Number
OCPD	1
County Law Enforcement	1
<b>Total</b>	<b>2</b>

### E. Judicial Officers / Prosecution

Rank	Number
County Public Prosecutor	1
Principal Magistrate	1
Snr Principal Magistrate	1
Snr. Principal Magistrate (National Coordinator Community Service Orders)	1
Prosecution Counsel	1
<b>Total</b>	<b>5</b>

### F. County Executive Officials

RANK	Number
Head of Training and Human Resource	1
County Executive official	1
<b>Total</b>	<b>2</b>

## 2 List of Questionnaires

### a) Law Enforcement Officials

1. Name (Optional) \_\_\_\_\_
2. Age \_\_\_\_\_
3. Position/station \_\_\_\_\_
4. Date of employment \_\_\_\_\_
5. Previous employment and duration \_\_\_\_\_
6. What in your education qualified you to get the job? Are you currently in school and if so, what are you studying?
7. How long have you held your current position?
8. On employment were you trained to do the current job?
9. Have you had any other training? How often have the trainings been?
10. Describe your work week? Do you work longer hours sometimes?
11. Why do you have to work longer hours? Are you paid extra for working longer hours?
12. When was the last time you were promoted?
13. Did you apply for the promotion?
14. Is there any other way you can get a promotion?
15. Do you get regular pay increments and bonuses? When was the last one?
16. Have you seen the current FSO? Do you own a copy?
17. Are you looking for other work? What are your plans on retirement?
18. Has this changed since the new constitution was enacted? What else has changed?
19. What is the typical period from arrest to trial?
20. What offences are those arrested mostly charged with?
21. What are the conditions in the remand cells?
22. Is there awareness on the by-laws?
23. Is the court process clear to you? And to those arrested?
24. What is the difference between the by-laws and the penal laws?
25. What are the sentences that are normally handed to the offenders?

### b) Judicial Officers

1. Name (Optional) \_\_\_\_\_
2. Age \_\_\_\_\_
3. Position \_\_\_\_\_
4. When were you employed? Where did you work before?
5. How long have you held your current position?
6. Did you go for training? Have you had any other training? How often?
7. Describe your work week?
8. Describe your work week? Do you work longer hours sometimes?

9. Why do you have to work longer hours? Are you paid extra for working longer hours?
10. When was the last time you were promoted?
11. Did you apply for the promotion?
12. Is there any other way you can get a promotion?
13. Do you get regular pay increments and bonuses? When was the last one?
14. How would you describe your conditions of work?
15. What is your case load?
16. What are your typical cases brought before you?
17. What are the prescribed sentences?
18. Are the accused ever represented by a lawyer?
19. What do you typically consider when giving sentence?
20. What are some of the stronger mitigation arguments?
21. Which are some of the weaker ones?
22. What are the processes of appeal and how many cases are taken on appeal?
23. How well equipped is the court for its tasks?
24. What changes would you like to see in that would enhance the standards of service delivery and access to justice for those who violate the by-laws of the county?
25. Do you ever handle appeal cases?

#### **c) Pillar Guide Questions for the By-laws Enforcement Key Informant (Inspectorate)**

1. What is the current structure of the city inspectorate and how effective is it?
2. Who qualifies to be employed as a bylaws enforcer and what is the nature and effectiveness of their training?
3. What are some of the challenges experienced by the department in enforcing the bylaws and how could the same be addressed?
4. The handling of bylaws violators by the officers has at times been criticized as not being sensitive to the suspects and being violent. What could be the problem?
5. What is your view on Article 49 of the constitution on the rights of an accused person and to what extent do you adhere to the same?
6. Do you think the bylaws that you enforce are at times in conflict with the national statutes?
7. What is your comment on the punishments being meted out by the courts for violators?
8. What is the effect of the incarceration of bylaws violators on pre-trial detention and is it necessary?
9. How can the relationship between the concern parties be improved? (Bylaws violators, police, prison, courts etc)

#### d) Questionnaire For Violators Of By-Laws/Arrestees

1. Name (Optional) \_\_\_\_\_
2. Age \_\_\_\_\_
3. Gender \_\_\_\_\_
4. County/Town \_\_\_\_\_
5. Occupation \_\_\_\_\_
6. Highest level of academic qualification \_\_\_\_\_
7. When were you arrested/ what is the date that you encountered the by law enforcers?
8. How did you know that they were law enforcement officers?
9. Was this your first encounter and arrest with the by-laws enforcers?
  - a) Yes
  - b) No.
10. If not, how many times there before had you been held in conflict with the by-laws?
  - a) More than once but less than five times
  - b) More than five times but less than ten times
  - c) I cannot remember
11. Were you handled by an officer of your gender or would you say that the manner of arrest was gender responsive?
  - a) Yes
  - b) No
12. What was the infringement on the Bylaws in the last encounter with the enforcers?
  - a) General nuisance offences
  - b) Parking offences
  - c) Solid waste management offences
  - d) Fire safety offences
  - e) Hawking offences
  - f) Matatu operations offences
  - g) Foods shops offences
  - h) Licensing of premises and trades
  - i) Taxi operations
  - j) Restaurants, and eateries offences
  - k) Public lavatories
  - l) Hand carts in public streets
  - m) Medical facilities
  - n) Others specify \_\_\_\_\_
13. Before arrest, were you aware or knowledgeable about the Bylaws you were alleged to have infringed?
  - a) Yes
  - b) No



14. Can you describe the manner in which you were apprehended and taken to police custody of court? \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
15. Were you held in a police/court cell and if so what was the general conditions of the place of confinement?  
 a) Yes (explain) \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 b) No
16. How many of you were arrested?  
 a) I was arrested alone  
 b) We were two  
 c) We were in a group
17. Were you or anyone injured during the arrest?
18. Did you or any of the others resist arrest? Elaborate
19. If you were held in custody, for how long were you confined  
 a) A few hours?  
 b) Less than 24 hours  
 c) More than 24r hours (specify \_\_\_\_\_ )
20. At the time of arrest and confinement if at all, would you say that your rights were infringed? Explain \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
21. Upon arrangement in the court in all the instances if more than once, were you explained in a language you understand, the charges you were facing?  
 a) Yes  
 b) No
22. How did you plead?
23. Did you have a lawyer? Were you given an opportunity to appoint a lawyer?
24. How was your case dealt with in court on the first day of appearance?  
 a) Released on cash bail (sum) \_\_\_\_\_  
 b) Fined(amount) \_\_\_\_\_

- c) Remanded in custody(how long) \_\_\_\_\_
- d) Imprisoned (how Long) \_\_\_\_\_
25. Considering the case and the manner in which it was concluded would you say you were happy with it? Give reasons \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
26. For those who were subsequently incarcerated, what was your experience in prison and did you learn from the punishment \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
27. What work are (were) you subjected to or engaged in while serving term and do (did) you gain from it? \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
28. Looking at the offence(s) you were charged with in retrospect, would you knowingly and willingly still violate the by laws
- a) Yes (Explain) \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- b) b) No
29. Considering your rights and experiences and If you were to recommend change in the manner in which the Bylaw enforcers go about their work, what would you recommend? \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

# Summary Of Issues Covered By Nairobi By Laws<sup>33</sup>

## 1. General Nuisance

### Offenses

- Making any kind of noise on the streets
- Causing any risk to users through destruction of a building or road
- Causing risk of users through inadequate fenced or unfenced land, lack of repair, protection, removal or enclosure; leaving things around that may make one to fall or and discharge a missile in or near a street.
- Destroy the surface of a public street.
- Willfully blocking a free passage or removal/displacement of any council property.
- Cutting down a tree without a permit from the council
- Playing any game, riding or driving or propelling on a foot path
- Defacing any building by writing signs or grafting
- Depositing any type of material or waste on the streets
- Spitting on any foot path or blowing the nose aimlessly other than into any suitable cloth or tissue.
- Committing any act contrary to public decency.
- Loitering, importuning or attempting to procure a female/male for prostitution purpose
- Defecating or urinating on a street or any other space.
- Conveyance of open food in a manner likely to cause contamination.
- Keeping any animal or poultry which cause a nuisance to any resident in the neighborhood
- Washing, repairing or dismantling any vehicle in a prohibited area except in the case of emergency.
- Touting for passengers
- Failure to observe traffic lights or zebra crossing.
- Driving or permitting to be driven in any overloaded vehicles such that its contents are spilling.
- Allowing hedges and trees to encroach and pose a danger to traffic movement.

### Rules and regulations

- All tree hedges or other growth should be chopped, trimmed or removed.
- All meat poultry for sale should be inspected.
- Every building should be painted at least once every year.
- A landlord should ensure that the frontage of a building is kept clean, in a good condition and well repairs.
- A building owner should ensure installation of security lights in the front of the building.

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33 [http://www.nairobi.go.ke/index.php?option=com\\_content&view=article&id=163&Itemid=302](http://www.nairobi.go.ke/index.php?option=com_content&view=article&id=163&Itemid=302) accessed 15 April 2014

## 2. Parking

### Offenses

- Placing a sign post or reserving a parking space without authority in the council.
- Parking in a designated parking space without payment of fees
- Parking on a pavement or on Council gardens.
- Signaling guiding or directing a driver of a vehicle into or out of a parking place.
- Using a parking space for advertising or business.
- Interfering with writing or marking on a parking ticket.
- Using parking space for advertisement or business.
- Damaging a vehicle clamp, removing or attempting to remove the same.
- Obstructing an officer in enforcing these by-laws.
- Knocking down an electricity pole, will lead to the owner paying for the restoration if the pole.

### Rules and Regulations

Non-payment parking fee will lead to clamping and towing of the vehicle. Any vehicle clamped must pay clamping fees to the council.

- Failure to pay towing fees and other expenses incurred by the council within 60 days, may lead to disposal of the vehicle through the public notice auction.
- The parking ticket must be displayed on the front windscreen. Non displays will mean non payment of the same.
- Parking attendants shall at all times put on a uniform, carry and have with them a proper identification badge issued by the council.
- You need a council permit to run a commercial private parking place.
- Vehicles must be parked within the space indicated by lines or any other mark provided by the council.
- The council will not be responsible for damage or loss incurred during clamping or removal of the offending vehicle.
- Parking is free from 2.00 pm on Saturdays, whole day Sundays and Public Holiday.

## 3. Solid Waste Management

- It is the city council's duty to regulate waste and its management within the city.
- The council may revoke/cancel a waste operator's permit in the breach of given conditions.
- Waste operators permit is not transferable without the consent of the council.
- The council must provide a place to dispose waste before it is transferable to a final disposal.
- The council should issue directions for different collections charges at different places.
- Any duly authorized officer may inspect a residential dwelling or trade premises at any time.
- Disturbing a waste disposal site or container approved by the council is wrong.
- Organized groups will be given designed for small scale resource recovery.
- Any person, who produces, carries, keeps, treat, disposes of waste e.t.c with an exception to

domestic household waste is made to authorized persons.

- Occupiers/tenants of any building/trade premises must have a sizeable container with a good lid in which the daily domestic waste should be kept.
- Domestic and trade premises occupiers and owners shall separate recyclable waste and place in a different container provided/approved by the council.
- Premises owners/occupiers of the premises should ensure hazardous/clinical waste is managed to the satisfaction of the council.
- Burning, throwing away e.t.c of a waste in an appropriate place is an offense.

## 4. Fire Brigade

### Offenses

- Entering any premises which are on fire without authorization from the senior officer.
- Obscuring molesting or interfering with any member of the fire brigade when on duty.
- Giving false fire alarm to the bridge.
- Making or causing fire.
- Denying entry to obstructing an officer from inspecting or getting any information from any premise.
- Using premises without obtaining a fire prevention clearance certificate from the Chief Fire Officer.
- It is the duty of the senior fire officer present at the scene of any fire to control all the operations.
- The chief fire officer may permit the owner or occupier of any building to contact an automatic fire system to the brigade premises.
- The senior fire officer may enter or break into any premises within the city which appears to be on fire without consent from any person.
- A senior officer may temporarily close any street, passage or thoroughfare in or near which a fire exists.
- During the flight, a senior fire officer has the power to use any supply of water whether on public or private property.
- The council may at any time instruct person to remove any material that is most likely to cause fire.
- Owner should pay for firefighting services whether the owner requested for the attendance or not.
- The chief fire officer will inspect premises to ensure they comply with fire safety.

### What to do in case of fire:-

- Do not panic
- Sound the alarm (electronic or shout "fire")
- Fight the fire if safe to do so.

- Call the fire brigade (2222181/2), giving the fire correct physical address (road/building name telephone numbers and contacts).
- Evacuate using acceptable route.
- Close windows and doors behind you (do not lock doors).
- Do not use lifts.
- Proceed to the assembly for head count.
- Do not re-enter until told to do so.

## 5. Hawking

- One can apply for a permit to the Town Clerk for authority to conduct hawking, giving particulars of goods and place of hawking.
- A hawker's assistant permit may be issued to a person employed to assist the permit holder who hawks refreshments and is physically disable or has loss of limbs.
- The permit is not transferable to another person.
- Any person without a valid permit or hawks in an undesignated area risks having their goods impounded.
- Each person engaging in hawking must have a badge and wears it at conspicuous place.
- Council officers have a right to inspect any goods/articles being hawked. Blocking an officer from performing that duty is an offence.

## 6. Matatu Terminus

- Application of parking permit should be made Town Clerk. The permit expires on 31st of December of the year it is issued.
- Parking permit must be displayed conspicuously on the matatu on which it is issued.
- Parking of any vehicle other than a matatu at a matatu terminus is an offence.
- The permit is not transferable to another vehicle.
- One needs a written authority of the Town Clerk to establish a private matatu terminus.
- Matatu should only be parked at a matatu terminus and will only stop to pick or drop passengers at a designated bus stop.
- All matatus at terminus should be under direction of an enforcement official.
- One should not drive more than 10km/hr into the terminus
- Importuning for passengers on the streets or terminus is an offence.
- A matatu abandoned at the terminus without adhering to the by-laws may be removed by an enforcement officer.
- If fees and expenses incurred in the removal of the matatu are not paid within 60 days from day of removal, the council may dispose it to cover outstanding fees and expenses.
- Six or more persons waiting to enter a matatu at a terminus or designated stopping place must form a queue. Hawking of goods at a matatu terminus without a permit of the council is illegal.

- All persons in a matatu terminus must follow directions and instructions of e enforcement or police offices.

### **No person in a matatu terminus should do the following:**

- Obstruct a person from entering and alighting from a matatu
- Enter the matatu through elsewhere apart from the door.
- Obstruct a conductor or a driver from performing their duties
- Behave in a disorderly manner.
- Urinate in a public place.
- Interfere or molest anyone
- Cause any verbal disturbance or any abusive language.
- Litter or spit
- Damage council equipment

## **7. Food Shops And Stores**

- One can apply for a permit to the Town Clark giving sufficient particulars of the shop.
- The permit expires on 31st December of the year it is issued.
- The Town Clark shall not issue a new permit if;
  - The applicant is not a city resident.
  - The shop or store does not comply with the council by-laws
- A person working in a food shop or store must have a valid medical certificate.
- Any person in the city should not trade in food unless he is in possession of appropriate license or permit.
- Any health inspector has a right to inspect a registered food shop or store at any time.
- Blocking an office from doing that duty is an offense.

## **8. Licensing Of Premises And Trades**

- No person shall engage in any business at any premises within the jurisdiction of the Council unless such premises are permitted for the purpose.
- Business permits shall not be issued for businesses being carried out in a building where land and ground rent are owing.
- The council may issue or refuse a permit
- A permit fee shall be paid to the council which maybe revised from time to time.
- The amount of permit fees shall be paid to the council by charitable organization maybe exempted or reduced
- A permit maybe transferred by the holder to any person with prior concept of the council, accompanied by a fee which is subjected to revision
- Any person authorize by the town clerk may enter your premises at any time to inspect or inquire if the condition attached to this permit are being observed. Anyone who interferes

shall be guilty of an offense.

- Every applicant for a single business permit shall produce a certificate for proof of payment or rates of the council.
- If any permit contravenes any of the conditions set out under section 165 of the Local Government or the Council, the council may refuse to grant or renew it.
- Consolidated permits will be issued to traders who conduct different businesses within the same premises
- The Council shall levy fees and charges for the use of way leaves, that is, land use for overhead, underground and ground level service lines for power lines, telephone lines etc
- Fees and charges for quarrying shall be levied by the Council, and the person undertaking such activities will accept conditions set about reclamation, reinstatement and alternative use
- Any person carrying out business must obtain a business permit by the 31st march of current trading year or maybe guilty of an offense
- A person doing kiosk business shall not sleep overnight in the business premises.
- A cyber café shall be limited to a certain number of computer monitors determined by the Council depending on whether it is a small, medium or large business center

## 9. Taxi Cab

- The Town Clerk shall receive the application form at least a month before the date on which the permit is intended to take effect.
- The Town Clerk shall issue, in addition to the permit in respect of which the application is made. In the case of a taxi cab permit, a permit bearing the number of the permit issued and the number of passengers and owners photograph.
- In the case of a taxi cab driver's permit, a badge bearing the permit, and issued and his photograph.
- Requires all taxi-cab drivers to wear the prescribed uniform when on duty.
- The Town Clerk shall refuse to issue and the Council may at any time cancel a permit if:
- In the case of a taxi permit:-
  - The ownership is not a Kenyan or is undercharged bankrupt.
  - The issue of the permit is prohibited by these by laws.
  - The applicant fails to satisfy the Town Clerk that he is fit and proper to hold such a permit.
- A taxi cab driver's license may not be issued if the applicant has been convicted for an offence against the traffic act.
- No permit shall be transferred so as to apply for a vehicle other than that in respect of which the original application was made and the permit issued.
- Where a permit is surrendered on or before the 30th of June in any year, a refund half the fee thereof shall be made.
- Owners of the taxi cab shall be expected to take his vehicle for inspections after three months.



- Every taxi cab shall be provided with a taxi meter of a type approved by the City Engineer.
- The taxi meter and all fittings shall be so sealed that it shall not be practicable for any person to tamper with them except by breaking, damaging or permanently displacing the seals.
- All taxi drivers shall be required to behave in a civil and orderly manner and ensure the safety of all persons entering into or alighting from the vehicle.
- The council may from time to time by resolution designate an area to be a taxi rank.
- Any person who parks a vehicle other than a taxi cabin in an area prescribed as a taxi rank shall be guilty of an offence.

## 10. Restaurant, Eating House And Snack Bar

- Application for new permit or license should be delivered to the Town Clerk not less than 30 days before the date the trading period begins.  
The permit expires on 31st of the year it is issued
- In case of death, bankruptcy or unsound of mind of a permit holder, the widow or the widower or the trustee or any other person approved by the Town Clerk in writing is to carry on the business without any transfer of permit
- The restaurant kitchen design structure should be approved by the City Council.
- Adequate refrigeration should be provided for maintenance of stored food.
- Every employer in the premises should:
  - Keep him or herself clean always
  - Refrain from spitting and smoking while cooking.
  - Should cover any cut or bruise on an exposed part with a clean water proof dressing.
- A permit holder should maintain the premises to the satisfaction of the customers.
- Any permit holder of a permit which does not correspond to the premises he is conducting his business from becomes guilty of an offence
- A council officer has a right to inspect other premises. Blocking an Officer to do so is an offence
- Every permit holder should place his permit at a conspicuous position in the premises.
- A permit should not allow any indecent behavior on the permitted premises.
- A permit holder should not sell any food which is not sound or wholesome.
- Every open air eating place should operate under the following requirements;-
- The Council should approve its design structure and should contain adequate sanitary facilities.
- All persons carrying or handling the food must have medical certificates.
- The permit holder should provide adequate fire lighting facilities located strategically within the structure

## 11. Public Lavatories

- A permit for operation is issued by the Town Clerk upon payment of suggested fees as may be gazetted by the City Council.

- The Council may partner with any person to provide public lavatory services at an agreed fee or enter into lease agreement in mutually agreed terms for the management of public conveniences
- An agreement under the above shall be reviewed after every 3years, and may have among its conditions:-
- A requirement that the person managing the conveniences' pay the utility bills involved in such management
- A requirement that he pay to the Council a fee in amount as maybe agreed with the Council
- A person managing a convenience shall keep such convenience clean and hygienic
- A person who enters a convenience shall not;
- Enter any such convenience without first paying any fee which the Council may charge for its use.
- Willfully annoy or interfere any anyway with the privacy of any other person using the convenience.
- Willfully and improperly soil any part of the inconvenience.
- Write on, mark or otherwise change or damage any part of the convenience
- Interfere with any other officer or any other person authorized to manage the convenience in the execution of his duties
- The disposal of liquid waste from a mobile toilet should be hygienic and disposed as directed by the Council.

## **11. Hamali Carts And Handcarts In Public Streets**

- The City Council of Nairobi may from time to time control the traffic of Hamali carts in the streets.
- A person authorized by the Council to propel a Hamali or hand carts shall observe all traffic rules and these by laws.
- A person who uses a Hamali or hand cart and causes or permits such cart to be used in contravention of the gazette schedule is guilty of an offense.

## **13. Medical Facilities**

- No person, shall within the city, operate a maternity home, nursing home or other medical facility unless he is in possessions of a valid permit granted by the Council.
- A permit shall expire on 31st December of the year issued.
- A permit is not transferable to another holder.
- Application for a permit should have:
  - Name, address and occupation for the application.
  - Description of the premises and location of patients proposed to be accommodated on such.
  - Number and qualifications of the persons proposed to be employed.

- Application for renewal of permit shall be made on or before the 15th of October in each year.
- The medical Officer of health may at all times enter and inspect the premises.
- In every medical facility, rooms shall be provided for use as a mortuary or incinerators.
- The permit holder shall not permit more people than those indicated in the permit.
- The permit holder shall maintain his premises in good order and condition, to the satisfaction of the Council.
- The permit holder shall keep a record of:
  - All persons received into the premises.
  - All operations carried out in the premises.
  - All miscarriages occurring in the premises.
  - All children born in the premises.

#### **14. Sale Of Ice Cream**

- Ice-cream should not be sold or offered for sale within the city if it has not been manufactured in accordance with these by-laws.
- All ice-cream should be protected from dirt, dust or any other contamination during storage, distribution and sale.
- Application of the permit should be made to the town clerk. The permit expires on 31st December of the year issued.
- The issued permit is not transferable to any other premises.
- Inspection may be done at any time by the Medical Officer of Health or a Public Health Officer.
- Every permit holder shall
  - Maintain the premises clean at all times.
  - Keep all utensils/vessels used for ice-cream storage, distribution or sale clean and sterilized
  - Not employ any person suffering from infectious or contagious or venereal disease and in case of any infection the medical officer of health should be notified immediately.
- A permit shall be produced any time it is required by the Medical Officer OF Health or Public Health Officer.

#### **15. Private Schools**

- A permit application should be made to the Town Clerk indicating:
  - The name, address and occupation of the applicant.
  - The description of the premises proposed for the school.
  - The number of persons proposed to be employed to teach and take care of the children.
  - The number of students attending the proposed school.
- The permit shall expire on 31st December of the year issued.
- A permit is not transferable without consent of the council.

- The permit holder should maintain the premise in good order and condition to the satisfaction of the Council.
- The permit holder should ensure at all times that the number of persons employed shall not be less than those specified in the permit.
- The Medical Officer of Health May at all reasonable times enter and inspect any permitted premises.
- The fee payable for the grant, renewal or transfer of a permit shall be gazette in the latest Council fee charges and premises

## 16. Conservancy

- The occupier of any premises connected to the water company's sewerage system shall pay to the company for the use of the system a fee of Kshs. 14.20 per litre per month.
- The occupier of any premises other than residence from which waste water passes into a waste water pit or conservancy tank shall pay in advance a fee of Ksh 3000 for each emptying of the tank/pit.
- The occupier of any residence from which waste water passes to a waste water pit or conservancy tank shall pay a fee of Kshs.3000 per month for regular emptying to the tank/pit.
- The occupier of any premises from which waste water passes to a septic tank shall pay Kshs.3000 in advance for the each emptying of the tank.
- Where premises have remained unoccupied for a period not less than 30days, the company may make a refund or allowance for the fee charged during the period.
- Private exhausted services may be licensed at times to supplement the company.
- All waste after being discharged into the network shall comply with the company's discharged guidelines.
- Anyone who has entered into an agreement to pay for the water supply will be considered as the premises occupier.

## DO'S

- Observe traffic lights or zebra crossing.
- Park on designated areas only.
- Throw all waste in places approved by the Council.
- Obtain an appropriate license or permit before operating a food shop.
- Take the taxi-cab for inspection every 3 months
- Observe hygiene rules and standards when operating any eating place.
- Obtain a valid medical license before handling food for sale.
- Pay for a single business permit for running business in the city.
- Display your single business permit in a conspicuous position.
- Pay for parking ticket and display it on the windscreen of the car.

## DONT'S

- Making any kind of noise on the streets.
- Touting for passengers.
- Guiding or directing a driver of a vehicle into or out of a parking space.
- Making or causing a fire.
- Disturbing a Council waste disposal site or container
- Burning of waste.
- Hawking in undesignated area.
- Bargaining or buying from a hawker in an undesignated area.
- Parking of any vehicle other than a matatu at a matatu terminus.
- Obstructing a person from entering or alighting from a matatu.
- Selling unsafe food.
- Construct accesses without authority.
- Discharge of water from premises.
- Carrying out car washing activities on the road reserve.
- Cut a tree without Council's authority.
- Steal or destroy manhole covers/street lights.
- Park/drive on a pavement.
- Start construction without council authority.



### **Our Vision:**

A premier organisation promoting a just, free and equitable society

### **Our Mission:**

To protect human rights, and promote the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices

### **Values:**

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### **The Kenyan Section of the International Commission of Jurists**

Vihiga Road, Kileleshwa | P. O. Box 59743 – 00200, City Square, Nairobi – Kenya

Tel: +254 20 387 5981/ 675 0996 | Mobile: +254 720 491 549/ 733 491 549 | Fax: +254 20 387 5982

Email: [Info@icj-kenya.org](mailto:Info@icj-kenya.org) | Website: [www.icj-kenya.org](http://www.icj-kenya.org)