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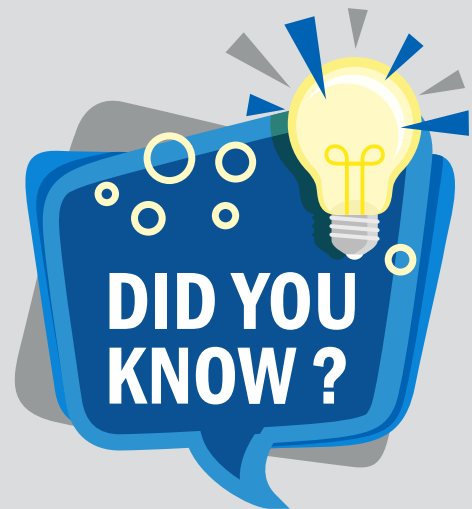
KENYAN SECTION | Since 1959



**SIMPLIFIED VERSION OF THE ACCESS TO
JUSTICE MANUAL FOR PERSONS WITH
MENTAL DISABILITIES**

WHAT IS A MENTAL ILLNESS?

The Mental Health Act defines a person suffering from mental disorder to be one diagnosed as a psychopathic person with mental illness and a person suffering from mental illness due to alcohol or substance abuse.



- According to the Task Force on Mental Health, mental illnesses include depression and anxiety followed by substance abuse with alcohol abuse being the most prevalent.
- Further, 60% of persons in remand suffer from mental conditions majority being petty offenders.

WHAT IS THE AVAILABLE POLICY AND LEGAL FRAMEWORK?

a) The Constitution of Kenya 2010

- Article 260 defines the term disability to include any physical, sensory, mental, psychological or other impairment, conditions or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day to day activities.
- Article 27 provides for the right to equality and non-discrimination directly or indirectly on any grounds including disability.
- Article 54 provides for the rights of persons with disability.



b) The Health Act

The Act calls upon Parliament to enact Legislation to among others, protect the rights of any individual with any mental conditions, ensure the custody of such persons and the management of their estate as necessary.

d) The Persons with Disabilities Act

The Act mandates the Attorney General in Consultation with the National Council of Persons with Disabilities and the Law Society of Kenya to make regulations for the provision of free legal services for persons with disabilities in cases touching on, violation of their rights, deprivation of property and capital punishment. Further, the chief justice is mandated to make rules for payment exemption in certain cases involving persons living with disabilities and that these matters are disposed of expeditiously having due regard to the particular disability and suffering.

The Act prohibits the concealment of persons with disabilities and prescribes a fine of



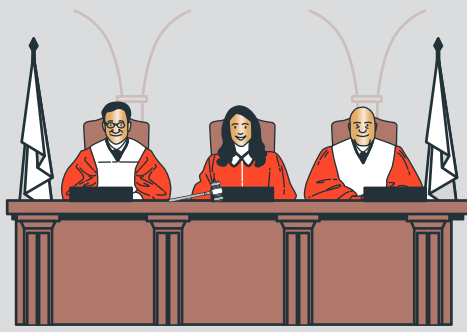
Kshs. 20,000 or imprisonment for one year.

c) The Mental Health Act

The Act empowers police officers, administrative officers and chiefs to take into custody any person they believe to be suffering from mental health and any person who is in danger of himself or others

and admit them to mental institutions within 72 hours. The Act prohibits ill treatment of a person in a mental hospital and obligates the Chief Justice to make rules providing for any matter relating to court processes under the Act.





e) Criminal Procedure Code

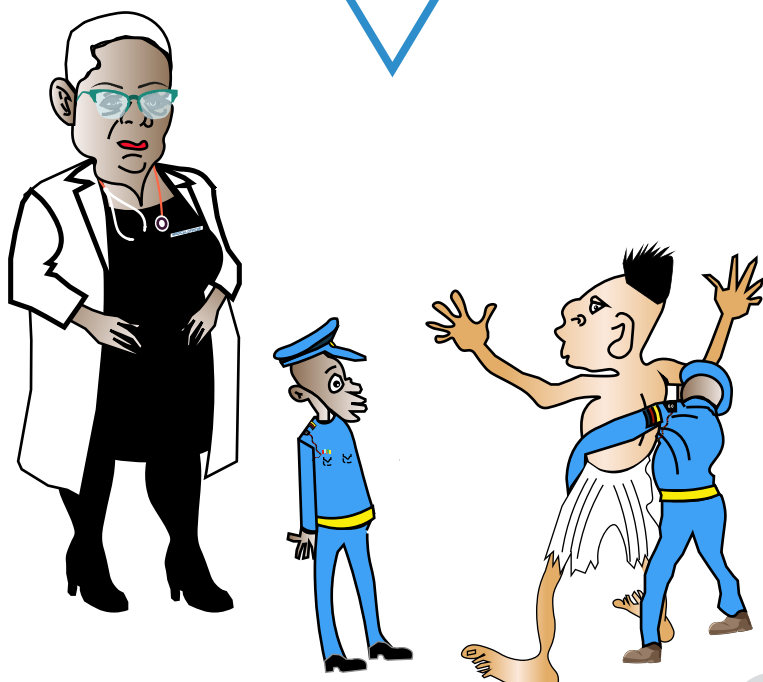
The code mandates the Court to postpone further proceedings if the accused is found to be of unsound mind or incapable of making a defence.

f) The Legal Aid Act

The Act gives effects to Article 19 (2), 48, 50 (2) (g) & (h) of the Constitution to facilitate access to Justice and social justice. The Act indicates that the applications for legal aid may be made on behalf of persons with mental incapacity.

g) The Prisons Act

The Act requires a medical officer to direct the removal of a prisoner of 'unsound mind' to a mental hospital and which shall be reckoned as part of their term of imprisonment.



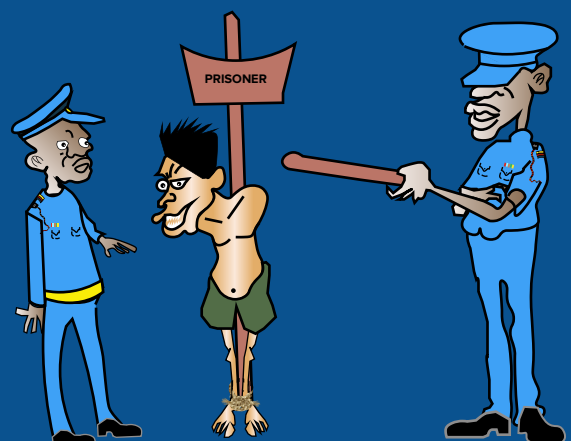
h) The Borstal Institutions Act

The Act empowers the medical officer to advise the superintendent of a borstal institution of any inmate found to be of 'unsound mind'.

i) The National Police Service Act

The Act prohibits the use of torture or cruel treatment and punishes the same with a term of imprisonment for a term not exceeding 25 years.

Further, the Cabinet Secretary has a role to develop guidelines on the promotion of human rights by making police premises accessible and well equipped to handle persons with disabilities.



j) The Probation of Offenders Act

The act empowers a court to conditionally release an offender under a probation report having regard to their mental condition.



POLICY FRAMEWORK

- The Kenya Mental Health Policy 2015-2030 main objectives include strengthening effective leadership and governance for mental health by ensuring access to comprehensive and high quality rehabilitative mental health care services and to implement strategies for the promotion of mental health, prevention of mental illnesses and substance abuse and to strengthen mental health systems.
- The Kenya Health Policy 2014 to 2030 embraces the principles of protection of the rights and fundamental freedoms of specific persons including persons with disabilities towards economic empowerment in line with vision 2030
- The bail and bond guidelines require courts to consider alternatives to remand when making decisions in the cases of persons with special mental health care needs.
- The Guidelines on the Decision to Charge require that prosecutors, in establishing culpability, have due regard to any mental or physical ill health or disability.
- The Diversion Policy notes that whereas there exist procedures for dealing with persons with mental illness in the criminal justice system, prosecutors can move the court to order an inquiry and calls for the respect for the dignity of persons with disability.
- The Sentencing Guidelines provide that the health or mental condition of the offender should be considered in determining probation.
- The Guidelines also recognize freedom from cruel, inhuman or degrading treatment in respect of custodial sentences.

k) The Kenya National Commission on Human Rights Act

The act empowers a court to conditionally release an offender under a probation report having regard to their mental condition.

INTERNATIONAL AND REGIONAL TREATIES AND CONVENTIONS RATIFIED BY KENYA

The Convention on the Rights of Persons with Disabilities prohibits discrimination on the basis of disability and guarantees equal and effective legal protection. States are obliged to offer training for justice administrators including police and prison staff.

The Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa obligates state parties to take up effective measures geared towards promoting access to justice, habilitation and rehabilitation for persons with mental illness.



The International Convention on Economic, Social and Cultural Rights underscores states’ obligation to take steps to ensure persons with disabilities are given equality by means of appropriate preferential treatment.

Principles for the protection of persons with mental disability and the improvement of mental health care prescribes that person serving criminal sentences and believed to have mental illnesses should receive the best available mental health care.

CHALLENGES IN THE CRIMINAL JUSTICE SYSTEM

- Due to their limited legal capacity, persons with mental illness are often denied the right to make respected decisions.
- Legal technicalities preclude persons with mental illnesses from actively participating in the trial process- legally stipulated processes such as cross examination and examination do not aid persons with psychosocial disorders.
- Persons with mental illness may not adequately understand their rights particularly during arrest and terms such as ‘guilty’ and ‘not guilty’.
- Persons suffering from mental illness often lack legal recognition or access to legal aid and advice or the criminal complaints mechanism.
- Lack of technical expertise among legal officers has contributed to stagnancy of the law regarding mental health.
- Lack of access to accurate and accessible information precludes persons with mental illness from effectively participating in decision making and policy development processes.
- Persons with disabilities continue to face discrimination entrenched in stereotypes prevailing in Kenyan societies.
- Persons with mental illness often face exposure to unwanted and possibly deadly force. Incarceration policies directly criminalize a typical behavior often associated with persons living with mental illness.
- Persons suffering from mental conditions are often faced with the challenge of reintegrating in society after their brush with the criminal justice system.
- Stakeholders within the criminal justice system lack the requisite knowledge, awareness and capacity to communicate effectively with persons with intellectual disabilities.
- Societal perceptions and stereotypes on persons with mental illness has led to lack of access to justice due to societal prejudice.
- Professionals within the criminal justice system lack the requisite basic training on mental health.

RECOMMENDATIONS

■ National Council on the Administration of Justice

- Promoting public awareness on mental health within the judicial system.
- Clear complaint handling mechanism for persons with mental illness.
- Developing comprehensive complaint manuals, guidelines and policies.
- Provision of psychological support and care for persons and staff with mental illness.
- Representation of persons with mental illness on the Court Users Committee.

■ Judiciary

- Offering victims of mental health protection during trial to avoid relapse.
- Provision of procedural and reasonable accommodation to reduce anxiety levels.
- Prioritizing cases of persons with mental illness.
- Data collection and reporting on cases of mental health.

■ Parliament

- Reviewing and updating laws providing for mental health.
- Create laws to ensure that persons with mental illnesses have the right to appeal, seek the restoration of their legal capacity and obtain legal assistance.
- Sufficient budgetary allocation

■ National Government

- Implementing the recommendations of the Taskforce on mental Health.
- Pursuing necessary legal reforms.

■ Civil Society

- Documenting and reporting violations of rights of persons with mental illness.
- Promoting public awareness and legal aid and advice.
- Initiating strategic public interest litigation.

■ Kenya Prison Services and Kenya Police Service

- Promote access to criminal complaints mechanism.
- Procedural accommodation during arrest and detention.
- Provision of legal assistance to persons with mental illness.

■ Director of Public Prosecution

- Prosecution of persons violating rights of persons with disabilities.



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