



**DECRIMINALIZE  
PETTY OFFENCES  
ATTRACTING CRIMINAL  
SANCTIONS**

# Policy Brief

Law and Policy Research on the Petty Offences and Practices Affecting Populations at the National Level and in Kisumu, Mombasa and Nairobi Counties



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# Executive Summary

Criminalization and punishment of petty offences in Kenya has over the years provided a basis for gross violation of the human rights of poor and vulnerable populations especially those in cities and major urban centers of Kenya. Unfortunately this has continued to be the case even after the promulgation of a robustly progressive and rights based Constitution of Kenya 2010. Annually, hundreds of thousands of mainly poor, vulnerable and minority categories of Kenyans, such as hawkers, touts, commercial sex workers, street urchins face punishment, extortion, deprivation and violence meted out mainly by law enforcement agents of the National Police Service and County Government Enforcement Officers commonly known as *askaris*.

A new law and policy research conducted by the ICJ Kenya titled 'Law And Policy On The Petty Offences And Practices Affecting Populations At The National Level and in Kisumu, Mombasa and Nairobi Counties' looks at the roots of this criminalization of poverty in this dispensation. The research was carried out in the period between 2014 and 2017.

The legal research identifies the gaps in legislative and policy frameworks on petty offences and practices that result in human rights abuses encountered by minority and vulnerable groups arising from their enforcement with a view to contribute to reform of the criminal justice system. It points out the need for reforms, capacity building and transformation of institutions connected to and responsible law enforcement in the urban areas of Nairobi, Mombasa and Kisumu and the rest of the country. The brief essentially puts forward a strong case for legal and policy and institutional reforms regarding the handling of petty offences that must of essence take into account the constitutional provisions and standards on the enjoyment of human rights by all without discrimination.

# Introduction

Petty offences are generally understood as minor criminal acts which attract less severe punishment and are considered to be of a lower level of seriousness compared to felonies. In some jurisdictions, the term petty offences is used interchangeably with the terms, minor offences, misdemeanors, summary offences or regulatory offences, while in other jurisdictions, these terms have been distinguished from each other. Petty offences trace their origin from English laws that were designed to, among other things, force people to work, restrict the movement of potential labourers, curtail criminal activity, punish idleness, and enable law enforcement agents to make arrests without proof of actual commission of offences. These petty offences were contained in the Vagrancy Act, sections of the Penal Code<sup>1</sup> and by-laws established under the now repealed Local Government Act. Most of the offences punished include, idleness, begging, loitering, drunkenness, disorderliness, prostitution, indecent exposure, nuisances and generally offensive conduct.

The enforcement of laws that provide for petty offences often target specific groups such as women, young men, the poor and the disadvantaged. Further, mass arrests especially of street families, low-income people, minority groups and refugees, are common especially after terror incidences<sup>2</sup> or before high profile public events.

Such arrests are carried out as part of a strategy to clear streets of unsightly people.

Groups such as sex workers, street vendors or hawkers, public service vehicle touts, street families, LGBT community, persons who use drugs, human rights defenders, are also regular victims of such practices which may also include being placed under surveillance, harassment, threats and intimidation, even while in custody.<sup>3</sup> In addition, LGBT community is vulnerable to profiling, discrimination, blackmail, rape, forced medical examination and 'treatment'.<sup>4</sup>

The promulgation of the Constitution of Kenya, 2010, introduced reforms that significantly transformed the country's governance. In its comprehensive Bill of Rights, the Constitution provides for the protection of the right to dignity; freedom from cruel, inhuman, or degrading treatment or punishment; freedom and security of the person; right to equality and freedom from discrimination; right to privacy; freedom of association; freedom of movement; right to fair trial and administrative action; rights of accused persons; right to nondiscrimination in access to justice and the right to health; The coming into force of the County Government Act in 2013, repealed the Local Government Act. However, the by-laws established under the repealed Act have remained in force, pending amendments by County Governments.

<sup>1</sup> Local authorities had a separate system for the enforcement of the by-laws, complete with law enforcement officials (Askaris), prosecutors and courts for hearing criminal cases

<sup>2</sup> BBC News (2014) - Kenyan Nairobi blasts: Police arrest 627 in Eastleigh. Retrieved from <http://www.bbc.com/news/world-africa-26838638> (April 2014)

<sup>3</sup> Prostitution, homosexuality, drug use and distribution, and street vending in certain areas are offences in Kenya

<sup>4</sup> KHRC (2011) Outlawed amongst Us, Kenya Human Rights Commission. Nairobi. Retrieved [http://www.khrc.or.ke/component/docman/doc\\_download/14-the-outlawedamongst-us.html](http://www.khrc.or.ke/component/docman/doc_download/14-the-outlawedamongst-us.html) (06.03.2017)



The government also enacted the National Policy and Action Plan for Human Rights, Sentencing Policy, Active Case Management Guidelines, and the Bail and Bond Policy Guidelines. However, it is yet to enact critical legislation such as the Prevention of Torture Bill and Rules and Regulations to implement the Legal Aid Act, 2016 despite numerous commitments to do so in the past. Kenya is also yet to ratify the Optional Protocol to the Convention against Torture and other cruel inhuman and degrading punishment, implement all concluding observations made by Committee against Torture, or domesticate the UN Declaration on Human Rights Defenders. In addition, the country is yet to fully implement the recommendations of the Dakar Declaration

and Recommendations on the Right to a Fair Trial in Africa; the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa; and the Luanda Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa.

# Context of the Research

First, some of these offences are so vague and broad in their description and as a result, are capable of wide interpretation. Some offences in their definition criminalize conduct that is essentially not criminal and they go against the well-established principle of legal certainty, which requires among others, that laws must be definite, clear and sufficiently precise to allow a person, to foresee, to a reasonable degree in the circumstances, the consequences of which a given action may entail. Whereas some of the offences as provided in the previous by laws and current county legislation may appear as legitimate provisions to regulate public order, their enforcement is subjective and the threshold for determining whether an offence has been committed or not, will largely be subjective and depend on the specific law enforcer.

The enforcement of these offences subject ordinary civilians, many of whom are unaware of their rights, to unparalleled human rights abuses. These include: arbitrary arrests and detention; assault, harassment and degrading treatment during arrest and detention; false arrests; unfair bail terms, irregular fines; irregular sentencing practices; profiling and stigma; and social marginalization. Mass arrests or swoops commonly known as 'operations' routinely conducted by law enforcement agencies targeting street families, low-income people, minority groups including women and refugees. These are common-place in response to crime or sometimes as part of a strategy to raise revenue through fines, to clear streets of certain groups of people or mostly, to extort bribes. Further, many suspects who are arrested opt to pay the bribes to secure their early release, and avoid further fines, the inconvenience of detention, or further consequences. Those unable to pay, are usually detained mostly on trumped-up charges such as idling, loitering, drunk and disorderly conduct, public nuisance or other petty offences. The result is exposure of otherwise innocent civilians to hardened criminals, their introduction to criminal activity and untold suffering to their families.

The conditions in detention facilities in the country are also generally inhumane, as the facilities are overcrowded, unhygienic, and lack basic medical treatment facilities especially for the mentally ill and persons living with HIV/Aids or those suffering from Tuberculosis. In some facilities, minors are not separated from adults, nor the ill from the well. Further, pretrial detention periods remain excessive, a state exacerbated by lack of access to legal aid and poverty due to unreasonable or excessive bail conditions. For persons with mental disorders in contact with the law, the limited treatment facilities and bureaucracy required for their release also intensifies their abuse by increasing their detention periods. When the cases make it to Court, sometimes petty offenders are charged *en masse* and most accused petty offenders often plead guilty to the charges to avoid lengthy trial periods.<sup>5</sup>

Lastly, our criminal justice system remains over-burdened and under-funded to tackle the volume of cases. As poverty and unemployment increase, so does crime.

<sup>5</sup> Legal Resources Foundation Trust: Kenya Criminal Justice System Audit Report (2017)



Criminalization and punishment of certain minority groups as well as poor and vulnerable people on the basis of enforcement of the law on petty offences continues to reflect the ugliest face of the unreformed law enforcement practices by both the national police service as well as the enforcement agencies of the county government long after the repeal of the Local Governments Act and the promulgation of the Constitution of Kenya 2010. In Kenya, the violations resulting from the enforcement of these sections of the law and bi-laws of county governments are so widespread that they must form the biggest agenda of criminal justice system reform without further delay.

## Research Methodology

The research objective was to identify legislation on petty offences and practices that result in human rights violations experienced by minority and vulnerable groups arising from law enforcement with a view to contribute to reform of the criminal justice system in Kenya. The research involved a legal review of the domestic and international legal framework that provide protections for human rights abuses arising from the enforcement of petty offences, analysis of the county bi-laws from Nairobi, Mombasa and Kisumu counties, and observation of the practices by actors in the justice system in handling potential and actual petty offences at different stages in the justice chain.

The research methodology included desktop research, analysis of the laws and bi-laws on petty offences, interviews and other key informants of the Nairobi, Mombasa and Kisumu County Governments, analysis of key reports offering key evidence of contradictions of the laws and by-laws with the Constitution, an analysis of various reports published by human rights organizations offering evidence of violations and insights into the nature and extent of human rights violations. The research also utilized comparative analysis of the legal and policy frameworks applicable in various East and Southern African countries as relates to petty offences as well as a study of regional and international instruments and standards concerning the treatment of petty offences. This approach to policy and legal research enabled ICJ Kenya to cover a wide ground on this subject matter.



# Findings from the Research

The research generally establishes among other findings that sections of the Penal Code and by-laws of Kisumu, Nairobi and Mombasa county governments contradict some provisions of the Constitution and human rights; that egregious violation of rights of the named populations accompanied with excessive use of force and torture have been recorded and are in practice.

Some of the key findings in brief include:

- The sections of the Penal Code that criminalize petty offences are offensive to the Constitution of Kenya including sections 175 (1), 182 and 193.<sup>6</sup>
- Unreformed County government bi-laws are not in conformity with the provision of the County Governments Act, 2012<sup>7</sup> and the Constitution and are still in force in Mombasa, Kisumu and in Nairobi counties.
- Major human rights violations and abuse are taking place in the pre-detention and pre-trial stages as well as violation during trial and detention for petty offenders. These violations affect different people differently based on their gender, age, profiling and category of petty offence they are suspected to have committed, in all the counties.
- County government machinery such as patrol vehicles and personnel (arresting officers) are used to intimidate and harass marginalized and vulnerable groups to extort bribes in the pretext of their being petty offenders.
- High cases of extortion of bribes from vulnerable groups are recorded in all the three counties, especially streets vendors, regardless of whether they have licenses for trade.
- Gender based violence is rampant with cases of rape and sexual exploitation and harassment of women and members of the LGBTI community being targeted the most.
- Some detention facilities do not recognize the right to privacy or the rights of minors hence cases of children being mixed with adults and women being detained in cells with men have been reported widely in all the three counties.
- Discrimination of minority groups such as those in the LGBTI community is perniciously rampant and violence is used to enforce the by-laws against the express prohibition of torture and excessive use of force by the Constitution in Nairobi, Mombasa and Kisumu Counties.
- Bribery and extortion surrounding the punishment of petty offences has evolved into a political economy where petty offences are punished so harshly that the victims find the offering of bribes a reprieve instead of being dragged through a largely unjust system that deprives people of their dignity at all the stages from arrest and detention to trial and afterwards.

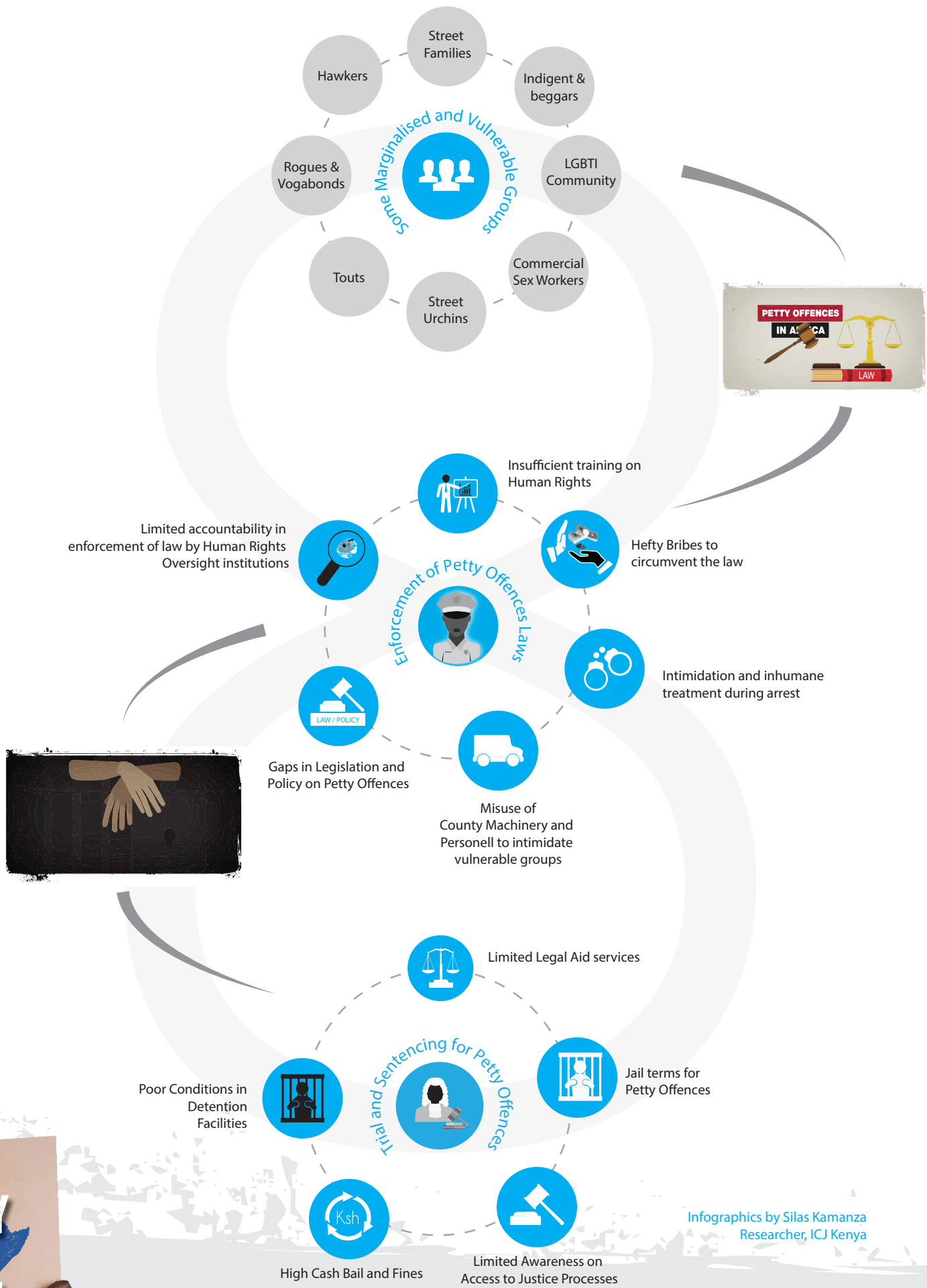
<sup>6</sup> The Penal Code, Cap 63, Laws of Kenya

<sup>7</sup> The County Government Act, 2012, Laws of Kenya



- Profiling and discrimination of minority groups and vulnerable groups such as the mentally challenged persons as well LGBTI community provides evidence of the wide gap between provisions in the Constitution regarding non-discrimination and the reality on the ground where culture and traditions die hard. Sensitization and re-education of law enforcement officers therefore becomes a significant area of action to make a difference for the state of human rights in Kenya.
- The human rights oversight and accountability institutions have large gaps to cover in order to ensure that the human rights of populations that are affected by petty offences are protected and promoted.

# PETTY OFFENCES CYCLE OF POVERTY



Infographics by Silas Kamanza  
Researcher, ICJ Kenya

**POVERTY IS NOT A CRIME!**

# Recommendations and Call to action

The research in summary makes key recommendations that stakeholders should focus on in order to sustain reforms in the criminal justice system and end the violation of human rights of minority groups and vulnerable populations. The findings of the report are intended to inform public awareness on the issue of petty offences, demonstrate their adverse effects and thus, build and make a case before policy makers on the need to decriminalize or reclassify such offences.

## 1. Policy Makers at National and County Levels

The provisions in law that criminalize petty offences should be repealed including sections of the Penal Code that do not align with the Constitution of Kenya and retrogressive county bi-laws in Nairobi, Mombasa and Kisumu counties. An alternative framework for petty offences should also be introduced that clearly defined petty offences, re-classifies them as misdemeanors that do not attract criminal sanctions and provide for non-custodial sentences to punish those found guilty of petty offences.

## 2. State Actors/Agencies

There is need for the government to strengthen ongoing reforms of structures and practices in handling petty offences by the justice system actors. This should necessarily focus on dismantling of the askaris system and introduction of the metropolitan police services under the National Police Service and County Policing Authority for such law enforcement agencies to conform to the constitutional standards for law enforcement and policing. The Kenya National Commission on Human Rights may need to conduct research to establish the economic cost of violations of rights and detention and trial of poor, vulnerable people resulting from the criminalization of petty offences. The National Police Service and County governments should initiate human rights orientation and training for national and county law enforcement agencies respectively, including inclusion of human rights training in the curriculum for law enforcement agents.

### 3. Non State Actors

Civil Society Organizations and other Non-State actors should consolidate effort towards advocacy in the reform process. This includes developing/strengthening capacity of the actors in the justice chain( police officers, city council askaris, judicial officers, probation officers, community paralegals among others) to effectively comply with human rights standards in their service delivery. It also requires further sensitization of members of the public on petty offences and initiatives aimed at addressing human rights violations resulting from poor enforcement of laws and practices. It extensive research and necessitates Public Interest litigation to inform changes in policies and practices in addressing petty offences and advocacy for full implementation of the Human Rights Policy and Action Plan.

### 4. Citizens

The citizenry must also exercise their responsibly to seek/access information relating to petty offences, laws that protect their rights in this regard and avenues for redress of human rights violations as result. Consequently, they must also remain vigilant of malpractices of law enforcements agents in the handling of petty offenders during arrest, detection and trial process and report such cases to the relevant authorities for substantive redress. The citizen must cultivate an interest in participating in advocacy initiatives by State and Non State actors to foster a collective approach to solving the problem.



# About ICJ Kenya

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, nonprofit and a member based organization. ICJ Kenya is the only African national section. It is affiliated with International Commission of Jurists (ICJ), Geneva, but operates autonomously. Founded in 1959, it is the oldest human rights organization in Kenya and is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya. Its membership is drawn from the Bar as well as the Bench and currently constitutes of over 500 jurists as members.

ICJ Kenya is dedicated to the legal protection of human rights in Kenya, and the African region in terms of the general mandate for national sections defined by Article 4 of the ICJ Statute. ICJ Kenya has observer status with the African Commission on Human and Peoples' rights. It is governed under a constitution through an elected Council of 7 members that serves for two-year fixed terms. At ICJ Kenya, we focus our efforts in serving people around the African continent whose problems our interventions are capable of addressing, with a special focus on the people of Kenya both at the national and county level. For the purpose of exchanging knowledge, information and best practices, we will identify and develop opportunities for engaging with stakeholders at the national, regional and international levels.

**Our vision:** A premier human rights organization promoting a just, free and equitable society.

**Our mission:** To promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practices.





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