



**PROMOTING INCLUSION AND RESPONDING
TO JUSTICE NEEDS FOR PERSONS
WITH MENTAL DISABILITIES:
AN ACCESS TO JUSTICE MANUAL
FOR PERSONS WITH MENTAL DISABILITIES**

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Signed



Protas Saende

Chairman, ICJ Kenya.

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Executive Summary

This Manual provides an overview of the current policy and legal framework for persons with mental disability, including regional and international instruments that provide for their rights and outline state obligations. The Manual unpacks the global and regional Human Rights Instruments such as Convention on the Rights of Persons with Disabilities (CRPD), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC), African Charter on Human and Peoples' Rights.

The national legislations include, among others: Constitution of Kenya, 2010, Health Act (Nº 21 of 2017), Mental Health Act (CAP 248), Persons with Disabilities Act (CAP 253), Public Health Act (CAP 242), Age of Majority Act (CAP 33), Criminal Procedure Code (CAP 75), Legal Aid Act (Nº 6 of 2016), Prisons Act (CAP 90), Borstal Institutions Act (CAP 92), National Police Service Act (No 11A of 2011), Probation of Offenders Act (cap 64), Kenya Defence Forces Act (Nº 25 of 2012). The Manual also highlights policies and guidelines such as: Kenya Mental Health Policy 2015 to 2030, Kenya Health Policy 2014 to 2030, Sustaining Judicial Transformation 2017 - 2021, Bail and Bond Guidelines, National Prosecutorial Policy, Guidelines on the Decision to Charge, Diversion Policy and the Sentencing Guidelines.

The Manual also documents the challenges faced by persons with a mental disability in the criminal justice system. The challenges include the limitation of legal capacity, legal technicalities, limited understanding of their rights during the legal process, capture and arrest over petty offences, limited access to justice, lack of technical expertise, lack of access to accurate and accessible information, discrimination, exposure to unwarranted and possibly deadly force, lack of treatment during incarceration, challenges during reintegration and post-release, low capacity and awareness of relevant stakeholders to communicate, limited capacity of duty bearers, and challenges for children.

Further, the Manual identifies the symptoms of the different forms of mental conditions including: panic attacks, obsessive-compulsive personalities, social anxiety (phobia), dissociative identity personality, post-traumatic stress disorder (PTSD), clinical depression, postpartum depression or psychosis, postpartum psychosis, bipolar disorder, and schizophrenia. It also highlights the key terms to use or avoid when referring to persons with mental conditions. Similarly, the manual also outlines the various referral mechanisms for persons with mental illnesses.

Finally, the Manual makes recommendations to key institutions such as: the National Council on the Administration of Justice (NCAJ) to improve information sharing, collaboration and coordination of stakeholders in the criminal justice system to ensure effective responses to mental health issues within the justice system; the Judiciary to make the rules under Section 55 of the Mental health Act and under Article 50(7) of the Constitution and ensure procedural and reasonable accommodation for persons with mental conditions; Parliament to review all relevant laws to ensure the rights of persons with mental illnesses are upheld and protected within the criminal justice system; the National Government to implement the recommendations of the Taskforce on Mental Health; Civil Society to document violations of rights of people with mental health conditions and the challenges they face within the criminal justice system; Kenya Prison Service and Kenya Police Service to provide comprehensive mental health services to be offered within the detention facilities; the Probation and Aftercare services to provide psychosocial support in partnership with other stakeholders including occupational therapy; and the Director of Public Prosecutions to ensure the prosecution of all those who abuse or mistreat persons with mental conditions and where appropriate, on convicted are subjected to effective sanctions.



1.0 Introduction

Persons with disabilities, and in particular, those with intellectual disabilities are often excluded or marginalised in society and by the justice system. While mental health is linked to virtually every key issue in development, people living with mental illness are the most likely to be excluded from development interventions. ¹Further, mental illness is one of the health conditions that account for the longest years lived with disability standing at 32.4% compared to other illnesses. The 2019 census found that 2.2% (0.9 million) people in Kenya were living with some form of disability, compared to 3.8% (1.3 million) recorded in 2009. ²The 2019 census indicated that 1.9% of men had a disability and 2.9% of women had a disability. In rural areas, 2.6% of people had a disability, which was higher than the 1.4% recorded in urban areas. The census also recorded that mobility was the most commonly reported by 42% of people with disabilities. The other domains such as seeing, hearing, cognition, self-care and communication were experienced by 36% and 12% of people with disabilities. Regionally, the highest prevalence rates were recorded in Embu county (4.4%), followed by Homa Bay (4.3%), Makueni (4.1%), Siaya (4.1%) and Kisumu counties (4%), while the lowest prevalence rate was recorded in Wajir (0.6%). In 2017, the World Health Organisation ranked Kenya as one of the countries with a high prevalence of depression with 1.95 million cases (4.4% of the population) and anxiety disorders 1.37 million (3.1% of the population).³

Kenya has two national referral hospitals, 15 mental health units, 29 mental health outpatient clinics, 88 consultant psychiatrists and about 500 psychiatric nurses serving a population of over 45 million people. ⁴ In Kenya, it is estimated that one in every 10 people suffer from common mental conditions ⁵Further, this number increases to one in every four people among patients attending routine outpatient services, which translates to 12 million Kenyans in need of treatment.

According to the Task Force on Mental Health, the key illnesses include depression and anxiety, followed by substance use, with alcohol abuse being the most prevalent especially among the 18-29-year-old age group. Further, the country's mental health burden arose due to ill health, psychosocial disability and premature mortality with huge gaps in access to care.⁶

There are several challenges in Kenya with respect to mental health. In 2011, the Kenya National Commission on Human Rights (KNCHR) noted that there was entrenched stigma and discrimination against mental illness and persons with mental health conditions and low levels of awareness on mental health. ⁷Further, that the sector was neglected, while persons with mental illnesses were often neglected and abandoned in mental health facilities. Moreover, the policy, legislative and budgetary steps by the government remained ineffective to attain the right to the highest attainable standard of mental health. The report also identified the unavailability of basic mental health services, ineffective

1 Mental health and the 2030 Sustainable Development Agenda
<https://www.mhinnovation.net/sites/default/files/downloads/resource/UNGA%20brief%20final.pdf>

2 Status of disability in Kenya Statistics from the 2019 census
https://devinit.org/documents/727/Status-of-disability-in-Kenya_IF.pdf

3 Depression and Other Common Mental Disorders, WHO
<http://apps.who.int/iris/bitstream/handle/10665/254610/WHO-MSD-MER-2017.2?sequence=1>

4 Why Mental Health
<https://www.pdokenya.org/mental-health.html>

5 Mental Health Taskforce urges government to declare mental health a National Emergency Nairobi, Tuesday
<https://www.health.go.ke/mental-health-taskforce-urges-government-to-declare-mental-health-a-national-emergency-nairobi-tuesday-july-7-2020/#:~:text=In%20Kenya%2C%20it%20is%20estimated,followed%20by%20substance%20use%20disorders.>

6 Ibid

7 Silenced minds: the systemic neglect of the mental health system in Kenya
https://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf

integration of mental health in community and primary health care as gaps in the standards. Finally, the report highlighted the failure to comply with constitutional and international human rights standards as a key aspect to be addressed.

The Taskforce on Mental Health in its report⁸ also highlighted key challenges. These include the effects arising from the social, economic and physical environment such as poverty, conflict, torture, trauma, crime, droughts and floods that affect mental wellbeing. It also identified stigma and discrimination; the lack of a Mental Health Action Plan; the failure to decriminalise suicide and drug and substance use to facilitate care; the inability of 75% of the population to access mental health care; the absence of leadership and governance structure in the mental health field in Kenya; the low government expenditure on mental health i.e. 0.01% of the total expenditure; and limited mental health data and research.

Within the justice system, the Taskforce report stated that 60% of persons in remand suffered from a mental condition. It also highlighted that the system was clogged by petty offenders, some of whom were arrested and detained for possession of drugs and theft. There were also submissions to the Taskforce for the amendment of laws that target persons with a mental illness; discriminatory legal provisions that contain demeaning references to persons with mental conditions; laws that lead to the denial of legal capacity including with regards to property, marriage; and laws that criminalise symptoms of mental health conditions.

The right to access justice for persons with disabilities is recognised under Article 13 of the UN Convention on the Rights of Persons with Disabilities (CRPD) as a stand-alone right. However, it has been recognized by the Special Rapporteur on the Rights of Persons with Disabilities, the UN Committee on the Rights of Persons with Disabilities and the Office of the High Commissioner for Human Rights, that States around the world are struggling to implement this right in practice.⁹ Access to justice for persons with intellectual disabilities can be improved by the elimination of the barriers they face, training of key personnel and first responders, providing adequate budgets to key institutions, legal reform, among others.

1.1 Methodology

The team conducted literature reviews of various laws, policies, instruments, reports of the issues that are relevant to the study. These policy and legislative frameworks included the review of national laws and policies, regional instruments, international conventions and best practises. The researchers also conducted fieldwork that covered two counties, that is, Kiambu and Nairobi counties. More specifically, the team visited Makadara, Kiambu and Kikuyu law courts, Mathare referral hospital and Thika Level 5 hospital's psychiatric unit. During those visits, the team conducted key informant interviews targeting respondents drawn from the Police, Prison, Judiciary, Probation and Aftercare, Civil Society Organisations, Faith Based Organisations, Paralegals, Health, Education, and legal practitioners. This information was then analysed and compiled into this report.

⁸ Mental Health and Wellbeing Towards Happiness & National Prosperity, A report by the Taskforce on Mental Health in Kenya. <https://mental.health.go.ke/download/mental-health-and-wellbeing-towards-happiness-national-prosperity-a-report-by-the-taskforce-on-mental-health-in-kenya/>

⁹ Access to Justice of Persons with Disabilities, December 2019 https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/CDLP-Finalreport-Access2JusticePWD.docx



2.0

Overview of the Policy and Legal Framework

2.1 National Legislation

2.1.1 Constitution of Kenya, 2010

The Constitution of Kenya in various provisions, recognises and protects the rights of persons with disabilities from all forms of discrimination. It defines the term “disability” in Article 260 to include “any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities”.

The constitution has notable provisions that promote the rights of persons with disabilities. Article 27 provides for the right to equality and non-discrimination directly or indirectly on any ground, including disability, and guarantees all persons equality before the law and equal protection and benefit of the law. Article 28 provides that all persons have inherent dignity including the right to have that dignity respected and protected. Article 54 provides for the rights of persons with disabilities. This includes among others, their rights to be treated with dignity and to be addressed and referred to in a manner that is not demeaning. Also, to have reasonable access to all places, public transport and information; to access materials and devices to overcome constraints arising from the person’s disability.

Article 22 grants everyone the right to institute court proceedings in case of a denial, violation, infringement or threat to a right as set out in the Bill of Rights to every person, whether acting in their own interest, on behalf of another person, as a member of, or in the interest of a group or class of persons, or in the public interest. The constitution guarantees the rights to fair administrative action (article 47); the right to access justice (article 48); the rights of accused persons (article 49); the right to a fair trial and public hearing (article 50); the rights of persons detained, held in custody or imprisoned (article 51); Article 159 provides that justice shall be done to all irrespective of status; shall not be delayed; shall be administered without undue regard to procedural technicalities; and shall be rendered in accordance with the principles of the Constitution.

In terms of the obligations of the state, Article 21(1) provides that it is “a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.” Secondly, it provides under Article 21(3) that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including persons with disabilities.

2.1.2 Health Act, 2017

The Health Act, 2017¹⁰ seeks to establish a unified health system, provide for the coordination of the inter-relationship between the national government and county government health systems, and provide for the regulation of health care service and health care service providers, health products and health technologies. Section 2 defines

¹⁰ Health Act, 2017
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%2021%20of%202017&term=mental%20health>

“health” as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. Further, under section 4, the State has a duty “to observe, respect, protect, promote and fulfil the right to the highest attainable standard of health including reproductive health care and emergency medical treatment.” This duty includes the realisation of health-related rights and interests of vulnerable groups including persons with disabilities. Section 73 of the Act calls upon Parliament to enact legislation to among others: protect the rights of any individual with any mental condition; ensure the custody of such persons and the management of their estates as necessary; establish, manage and control mental hospitals having sufficient capacity to serve all parts of the country at the national and county levels; advance the implementation of other measures introduced by specific legislation in the field of mental health; and, ensure research is conducted to identify the factors associated with mental health. The Mental Health Act needs to be revised to encompass these aspects.

2.1.3 Mental Health Act

The Act¹¹ provides the legal framework for the care of persons with mental conditions; the custody of their persons and the management of their estates; and, for the management and control of mental hospitals. Section 4 of the act establishes the Kenya Board of Mental Health and the office of the Director of Mental Health. Section 2 of the Act defines a “person suffering from mental disorder” to be one “diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse”. Section 16 of the Act empowers any police officers, administrative officer, or chiefs to take into custody a person they believe to be suffering from mental health condition or a person who is a danger to himself or others or is likely to act in a manner offensive to public decency; or a person believed to be and is not under any proper care and control, or is being cruelly treated or neglected by any relative or other person. Such persons are required to be taken to a mental hospital within twenty-four hours of being taken into custody or within a reasonable time. The person shall then be admitted at the institution within 72 hours for examination and treatment. Under section 26, courts are empowered to make orders for the management of the estate of any person with a mental health condition; and for the guardianship of any person with a mental health condition by any near relative or by any other suitable person, including the Public Trustee. Further, courts are required under section 28 to sit in camera when handling matters where a person is alleged to have a mental health condition. Section 45 of the Act permits police or staff of mental hospitals to take and convey any escapees from a mental hospital back to the hospital. Aiding the escape of a person is an offence, or permitting a patient to quit is an offence under sections 49 and 50 respectively. Further, the ill-treatment of a person in a mental hospital is an offence under section 51 of the Act. Moreover, the Chief Justice is required under section 55 to make rules to provide for any matters relating to the procedure of the court, or of a magistrate under the Act.

¹¹ Mental Health Act
<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20248&term=mental%20health>

2.1.4 Persons with Disabilities Act, 2003

The Act¹² provides for the rights and rehabilitation of persons with disabilities with a view to achieve equalisation of opportunities for persons with disabilities and establishes the National Council for Persons with Disabilities and the National Development Fund for Persons with Disabilities. Section 2 of the Act defines the term “disability” to mean “physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.” Section 38 of the Act mandates the Attorney-General in consultation with the Council and the Law Society of Kenya, to make regulations for the provision of free legal services for persons with disabilities. This is with respect to matters affecting the violation of their rights or the deprivation of their property; cases involving capital punishment; and such other matters and cases as maybe prescribed in the regulations. Moreover, the Chief Justice is required to make rules providing for the exemption of persons with disabilities from the payment of fees in relation to certain matters or cases and their provision with free sign language interpretation, Braille services and physical guide assistance. Also, the Chief Justice is required to ensure that all suits involving persons with disabilities are disposed of expeditiously having due regard to the particular disability and suffering of such persons. The concealment of persons with disabilities is an offence under section 45 of the Act, punishable on conviction with a fine of KES 20,000, imprisonment for one year, or both.

2.1.5 Public Health Act

The Act¹³ provides for the regulation of public health, the establishment of the Central Board of Health, the functions of the Medical Department, and the duties of various health authorities. Section 95 empowers the High Court to appoint a manager for the temporary or permanent care and administration of any property of a person removed to an asylum for detention under the Act and the Mental Health Act. Also, section 111 requires the persons in charge of jails, prisons or mental hospitals to vaccinate every inmate within 14 days of their admission into the facility.

2.1.6 Age of Majority Act

This Act¹⁴ provides in section 2 that a person “shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.”

2.1.7 Criminal Procedure Code

This Act¹⁵ provides the procedure to be followed in criminal cases. Under section 162, where a court in the course of a trial or committal proceedings has reason to believe that the accused is of ‘unsound mind’ and consequently incapable of making his defence, shall

¹² Persons with Disabilities Act, 2003
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%2014%20of%202003>

¹³ Public Health Act
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%20242&term=mental%20health>

¹⁴ Age of Majority Act
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2033>

¹⁵ Criminal Procedure Code
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2075>

inquire into the fact of 'unsoundness'. Thus, if the court finds the accused to be of unsound mind or incapable of making a defence, it shall postpone further proceedings in the case. Such a person may be released on sufficient security where bail may be taken, or in where no bail may be taken, to be detained at such place as the court may deem fit. The court is required to submit the court record to the Minister for consideration by the President, who may direct that the person be detained in a mental hospital or other suitable place. Following this, the court shall issue a warrant directing the detention of the accused person until the President makes a further order in the matter, or until the court orders him to be brought before it again in the manner provided by sections 163 and 164 of the Act.

In 2018, the High Court considered the constitutionality of section 166 in the case of **Republic v SOM (2018) eKLR**,¹⁶ where the accused who was convicted of the murder of his grandmother but was found to have been insane at the time of the killing. Section 166 of the Code required the court to direct that the accused be kept in custody pending the President's order, which the accused challenged. Having considered the facts, the court declared the provisions of section 166 of the Code unconstitutional to the extent that they took away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to Article 160 of the Constitution by vesting the discretionary power to the President to determine the nature and extent of the sentence. Consequently, the court ordered that the reference to "the President" under section 166 of the Code shall be substituted with "the Court". Under section 163, where a person detained in a mental hospital is found by the medical officer as capable of making his defence, the officer is required to forward a certificate to the Director of Public Prosecutions who shall inform the court whether to continue proceedings against the person. If the DPP decides to carry on with the proceedings, the court shall order the removal of the person from detention and resume proceedings as per section 164 of the Act. Where the DPP discontinues the cases, the court shall order the person be discharged and released from custody. Under section 280 where an accused person has been arraigned upon an information stands mute of malice, or neither will nor by reason of infirmity can, answer directly to the information, the court may order the Registrar or other officer of the court to enter a plea of "not guilty" on behalf of the accused person, and plea so entered shall have the same force and effect as if the accused person had actually pleaded it. The court shall thereafter proceed to try whether the accused person is of sound or unsound mind, and, if found not to be, proceed with the trial, and if found to be of unsound mind and incapable of making his defence, order the trial to be postponed and the accused person to be kept in safe custody in such place and manner as the court thinks fit. This shall be reported to the President, who may order that the person be confined in a lunatic asylum, prison or another suitable place for safe custody.

The Act also provides under Part IXA for the receipt and consideration by courts of victim impact statements which are statements containing particulars of any personal harm suffered by the victim as a direct result of the offence or the impact of the primary victim's

¹⁶ Republic v SOM (2018) eKLR
<http://kenyalaw.org/caselaw/cases/view/152606/>

death on the members of the primary victim's immediate family. Section 329A defines "personal harm" as actual physical bodily harm, mental illness or nervous shock. These statements are received or considered in cases where the offence resulted in the death of, or actual physical bodily harm to, any person. The statements can be received at any time after a court convicts, but before it sentences an offender as per section 329C.

2.1.8 Legal Aid Act, 2016

This Act¹⁷ give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice. It also establishes the National Legal Aid Service and Legal Aid Fund and provides for the provision of legal aid in the country.

Section 2 of the Act defines legal aid to include: legal advice; legal representation; assistance in resolving disputes by alternative dispute resolution, drafting of relevant documents and effecting service incidental to any legal proceedings as well as reaching or giving effect to any out-of-court settlement; creating awareness through the provision of legal information and law-related education; and recommending law reform and undertaking advocacy work on behalf of the community. Section 41 of the Act provides the criteria for eligibility for legal aid. It provides that applications for legal aid may be made on behalf of persons with mental incapacity.

2.1.9 Children Act, 2001

The Children Act¹⁸ provides for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children. It also provides for the administration of children's institutions and gives effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Section 2 of the Act defines "child abuse" to include "physical, sexual, psychological and mental injury". Also, section 13 provides the entitlement of children the protection from physical and psychological abuse, neglect, and any other form of exploitation. Section 107 of the Act provides for the appointment of a guardian beyond a child's eighteenth birthday in exceptional circumstances, including where the child suffers from a mental or physical disability. Further, section 127 of the Act punishes the cruelty to and neglect of children which includes causing unnecessary suffering or injury to health and any mental (derangement) to a child with a fine of KES 200,000, imprisonment for a term not exceeding five years, or both. Moreover, under section 192, a court may require a child offender to undergo mental treatment for a period not exceeding 12 months as a condition of a probation order.

¹⁷ Legal Aid Act, 2016
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%206%20of%202016>

¹⁸ Children Act, 2001
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%208%20of%202001&term=mental%20health>

2.1.10 Prisons Act

The Prisons Act¹⁹ provides the legal framework for the management of prisons, youth corrective training centres, extra mural penal employment; and for the organisation, discipline, powers and duties of prison officers. Section 29 of the Act places the responsibility of the health of all prisoners in a prison on the medical officer stationed at the prison. Section 38 of the Act requires a medical officer to direct the removal of a prisoner of “unsound mind” to a mental hospital. After treatment, the prisoner may be returned to detention or released if they have completed their sentence, as the period during which the prisoner has been detained in a mental hospital under section 38 shall be reckoned as part of their term of imprisonment. Under section 42, prison officers will not be liable for escape of prisoners in mental hospitals unless it is shown that they helped such prisoners to escape or wilfully neglected to take reasonable precautions to prevent their escape.

2.1.11 Borstal Institutions Act

This Act²⁰ provides for the establishment of borstal institutions for youthful offenders and for the detention of youthful offenders. Section 15 of the Act empowers the medical officer to advise the superintendent of a borstal institution any inmate found to be of “unsound mind” to be transferred to a mental hospital. After treatment, the inmate may be returned to detention or released if they have completed their sentence, as the period during which the prisoner has been detained in a mental hospital shall be reckoned as part of their term of imprisonment. Section 39 provides that an inmate who escapes from the borstal institution or any other institutions where they had been detained on account of their physical or mental condition may be arrested without warrant by an authorised officer and taken back to a borstal institution. Further, under section 45a person in respect of whom a borstal order is in force may be removed to or from the institution, a hospital, or a mental hospital.

2.1.12 National Police Service Act

This Act²¹ provides for the operations of the National Police Service and gives effect to Articles 243, 244 and 245 of the Constitution. The Act in section 2 defines torture to include “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.” Section 95 prohibits the use of torture or cruel treatment, and punishes the same with imprisonment for a term not exceeding 25 years. The police have general powers under section 59 of the Act to arrest without warrants provided they comply with the rules contained under the schedule. Under Section 126 of the Act, the Cabinet Secretary has a role to develop guidelines on the promotion of human rights by the Service and in particular making police premises accessible and equipped to enable them to support persons with disabilities, special needs and for child protection.

¹⁹ Prisons Act

http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP:%2090&term=mental%20health#part_I

²⁰ Borstal Institutions Act

http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP:%2092#part_I

²¹ National Police Service Act

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=N%2011A%20of%202011>

2.1.13 Probation of Offenders Act

The Act²² provides the general framework for the probation of offenders. Section 4 of the Act empowers a court to conditionally release an offender under a probation order, having regard to among others, the offender's mental condition. Further, under section 9, where a person is convicted of an offence and is released under a probation order, his conviction for that offence shall be disregarded for the purposes of any enactment by or under which any disqualification or disability is imposed upon convicted persons or by or under which provision is made for a different penalty in respect of a second or subsequent offence, or in respect of an offence committed after a previous conviction provided that, if the probationer is subsequently sentenced for the original offence, the section ceases to apply in respect of that offence, and the person shall be deemed, for the purposes of any such enactment imposing disqualification or disability, to have been convicted on the date of sentence.

2.1.14 Kenya Defence Forces Act, 2012

This Act²³ provides generally for the functions, organisation and administration of the Kenya Defence Forces pursuant to Articles 232 and 239(6) of the Constitution, and gives effect to Article 241 and other relevant Articles of the Constitution. Section 2 of the Act defines torture to include "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person". During disciplinary proceedings under section 152, an accused person may be tried by summary trial provided the commanding officer has no reason to believe the person is unfit to stand trial or was suffering from a mental health condition at the time of the alleged commission of the alleged offence. Further, during a court-martial, the court is empowered under sections 178 and 179 to make a finding that an accused person is of unsound mind and consequently incapable of making a defence. Once promulgated as per section 183 of the Act and reported to the President, the accused shall be discharged or kept in custody at the President's pleasure in such place and manner as the President may direct, and pending the President's directions the accused shall be kept in service custody. Such a person detained may be transferred to or from his place of detention to a prison or mental hospital. Provisions relating to the indefinite detention or custody at the 'pleasure of the president' have come under intense scrutiny in recent years, with relevant provisions of the Penal Code and the Criminal Procedure Code being declared unconstitutional by the High Court. The practice at the military courts is not immediately clear, as such cases are not reported on publicly. However, it is only prudent that decisions from these courts also consider recent developments relating to the practice to forestall any likely injustice occurring. Lastly, under section 245, the Government is required to compensate members of the Defence Forces who lose their lives or suffer disabilities while undertaking military service or training.

²² Probation of Offenders Act
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2064>

²³ Kenya Defence Forces Act, 2012
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%2025%20of%202012>

2.1.15 Chiefs' Act

The Chiefs' Act²⁴ provides for the powers and duties of chiefs, which include maintaining order within their jurisdiction as per section 6 of the Act. Section 8 empowers chiefs and their assistants to prevent the commission of any crime within their jurisdiction, including through arrests, taking persons to courts or detention of livestock or other property. Under section 10, chiefs have the power to issue orders to be obeyed by the persons residing within the local limits of their jurisdiction, such as prohibiting any conduct which in their opinion may cause a riot, disturbance or breach of peace. Disobedience of the chief's orders is an offence punishable with a fine not exceeding 500 shillings or extramural punishment for a period not exceeding 14 days.

2.1.16 Kenya National Commission on Human Rights Act, 2011

This Act²⁵ establishes the Kenya National Commission on Human Rights pursuant to Article 59(4) of the Constitution. The Commission is empowered under section 8 to among others, promote respect for human rights and develop a culture of human rights in the Republic; monitor, investigate and report on the observance of human rights in all spheres of life in the Republic; and investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs. Section 51 of the Act requires that any correspondence from an inmate in a mental institution to the Commission should be transmitted in confidence and any written communication in that regard shall remain sealed.

2.1.17 National Gender and Equality Commission Act

This Act²⁶ establishes the National Gender and Equality Commission pursuant to Article 59(4) of the Constitution. The Act in section 2 defines a "person with a disability" as "any person with any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have a substantial or long-term effect on an individual's ability to carry out ordinary day to day activities. The Commission is empowered under section 8 to among others, promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution; monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in policies, laws, and administrative regulations in all public and private institutions; act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and persons with disabilities; co-ordinate and facilitate mainstreaming of issues of persons with disability in national development; monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution; and investigate complaints of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the

²⁴ Chiefs' Act
<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20128>

²⁵ Kenya National Commission on Human Rights Act, 2011
<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=N%2014%20of%202011>

²⁶ National Gender and Equality Commission Act
<http://extwprlegs1.fao.org/docs/pdf/ken128411.pdf>

institutions concerned. Section 51 of the Act requires that any correspondence from an inmate in a mental institution to the Commission should be transmitted in confidence and any written communication in that regard shall remain sealed.

2.1.18 Commission on Administrative Justice Act, 2011

This Act²⁷ establishes the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution, and provides its membership, powers and functions. Among the functions of the Commission specified in section 8 include the investigation of any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice; investigation of complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector; inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service; and to recommend compensation or other appropriate remedies against persons or bodies to which this Act applies. Section 51 of the Act provides that any correspondence from an inmate in a mental institution to the Commission should be transmitted in confidence and any written communication in that regard remain sealed.

2.1.19 Office of the Attorney-General Act, 2012

This Act²⁸ provides for the functions and powers of the Attorney-General, and the discharge of duties and the exercise of powers of the office. Under section 5 of the Act, the Attorney-General is responsible for among others, advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid; coordinating reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report; and drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters.

2.1.20 Office of the Director of Public Prosecutions Act

This Act²⁹ give effect to Articles 157 and 158 of the Constitution and to provide for the powers and functions of the Director of Public Prosecutions. Under section 5, the Director has power to among others, direct the Inspector-General to investigate criminal conduct; institute and undertake, take over and continue, or discontinue any criminal proceedings. The principles guiding the office are stipulated under section 4 which include, impartiality and gender equity, the need to serve the cause of justice, prevent abuse of the legal process and public interest; and the promotion of constitutionalism. Under section 14, the Office is bound to ensure reasonable access to its services in all parts of Kenya, and ensure its duties

27 Commission on Administrative Justice Act, 2011
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%2023%20of%202011>

28 Office of the Attorney-General Act, 2012
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%2049%20of%202012>

29 Office of the Director of Public Prosecutions Act
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=N%202%20of%202013>

are carried out impartially, and avoid discrimination on any ground including health status, disability, or conscience.

2.1.21 Contempt of Court Act, 2016

This Act³⁰ defines and limits the powers of courts in punishing for contempt of court. Paragraph 9 of the Schedule states that criminal proceedings against a person cease to be active if the accused is found to be under such disability as to render him or her unfit to be tried or unfit to plead.

2.1.22 Penal Code

This Act³¹ provides for various criminal offences. Section 11 of the Code provides for the presumption of sanity, stating that every person is “presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved. Further, section 12 of the Code provides that a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. However, a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission. Section 226 of the Code creates the offence of suicide as a misdemeanour. The Code in section 146 makes reference to persons with mental illness in derogatory terms by using terms such as “idiot” and “imbecile” to describe persons. Section Previously, section 25(2) and (3) of the Code required that a sentence of death not be pronounced against minors, who were to be detained at the President’s pleasure. In 2017, the High Court in **A O O & 6 others v Attorney General & another [2017] eKLR**³² declared section 25 (2) & (3) of the Penal Code unconstitutional finding that it violated the provisions of Article 53 (1) (f) (i) & (ii), (2), and Article 160 (1) of the constitution of Kenya, 2010 and international conventions governing the rights of children. The petitioners in the case who were aged between 12 and 17 years, were after conviction, sentenced to imprisonment at the President’s pleasure for which they had been imprisoned for periods ranging from 13 to 22 years.

2.1.23 Judicial Services Act

This Act³³ provides for the delivery of judicial services and the administration of the Judiciary; the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes.

³⁰ Contempt of Court Act, 2016
<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=N%2046%20of%202016>

³¹ Penal Code
<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063>

³² A O O & 6 others v Attorney General & another [2017] eKLR
<http://kenyalaw.org/caselaw/cases/view/135588/>

³³ Judicial Services Act
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Judicial_Service_Act_2011.pdf

The Council is empowered under section 35 to ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. Further, it is required to formulate policies relating to the administration of justice; implement, monitor, evaluate and review strategies for the administration of justice; facilitate the establishment of court user committees at the county level; and mobilise resources for purposes of the efficient administration of justice.

2.2 Policies and Guidelines

2.2.1 Kenya Mental Health Policy 2015 to 2030

This policy³⁴ seeks to ensure the reform of mental health systems in Kenya by providing a framework, in line with Constitutional provisions guaranteeing the right to the highest attainable standard of health. The objectives of this policy are: to strengthen effective leadership and governance for mental health; to ensure access to comprehensive, integrated and high quality, promotive, preventive, curative and rehabilitative mental health care services at all levels of healthcare; to implement strategies for the promotion of mental health, prevention of mental illnesses and substance use; and, to strengthen mental health systems. It underscores why mental health should be understood, the determinants of mental health and mental conditions, as well as giving policy directions on prevention, management and control of mental conditions.

2.2.2 Kenya Health Policy 2014 to 2030

With its motto as ‘Towards attaining the highest standard of health’, this policy³⁵ aims to be as comprehensive as possible, to make improvements to the overall health sector in the country, in line with the Constitution, Vision 2030 and global commitments. It embraces the principles of protection of the rights and fundamental freedoms of specific groups of persons, including the right to health of children, persons with disabilities, youth, minorities, the marginalised and older members of the society, in accordance with the Constitution. It also strives to contribute towards economic empowerment in line with Vision 2030.

2.2.3 Social Transformation Through Access to Justice

This Framework³⁶ highlights Chief Justice Martha Koome’s vision for the judiciary. Particularly, one of the outcomes that it seeks to achieve is a Strong Institution that is Accessible, Efficient and Protects the Rights of all especially the Vulnerable. This vision builds on the previous achievements and reforms in the Judiciary as contained in preceding Judiciary blueprints: The Judiciary Transformation Framework (JTF) (2012-2016) spearheaded by Hon. Chief Justice (Rtd) Dr. Willy Mutunga and the Sustaining Judiciary Transformation (SJT) (2017-2021), developed under the leadership of Hon. Chief Justice (Rtd) David Maraga.

³⁴ Kenya Mental Health Policy 2015 to 2030
<http://publications.universalhealth2030.org/ref/e5ab9a205fdbd7c811bb895d09e4f81c>

³⁵ Kenya Health Policy 2014 to 2030 2014 (Ministry of Health Kenya)
<http://publications.universalhealth2030.org/ref/d6e32af10e5c515876d34f801774aa9a>

³⁶ Social Transformation Through Access to Justice
<https://www.judiciary.go.ke/download/chief-justice-martha-koomes-vision-for-the-judiciary-social-transformation-through-access-to-justice-sta-j/?wpdmdl=22991&refresh=6269ef53acee91651109715>

The Judicial Service Commission has a Disability Mainstreaming Policy which provides reasonable accommodation for both employees and court users. Also, the Judiciary ensures all its customer facing interfaces, language translation and accessibility for persons with disability are provided for. The plan does not make specific plans or deliberate affirmative actions for the accommodation of persons with mental illnesses. However, it documents the implementation of the Active Case Management, Bail and Bond Guidelines and Sentencing Guidelines as critical components of the transformation agenda.

2.2.4 Bail and Bond Guidelines

The objective of these Guidelines³⁷ is to guide police and judicial officers in the application of laws that provide for bail and bond. It also provides general principles to guide bail and bond decision-making which include: the right of accused person to be presumed innocent; accused person's right to liberty; accused's obligation to attend trial; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice; and the consideration for the rights of victims.

The guideline notes that accused persons who are mentally ill tend to experience longer periods of detention than their normal counterparts since the judicial process of determining whether they are of sound mind and hence capable of making their defence is not regulated. Further, that they face considerable challenges in places of detention, such as discrimination and undignified treatment, and that such Further, places of detention often do not accommodate the needs of such accused persons.

Guideline 4.28 requires courts when making bail decisions in the cases of persons with special mental health care needs and those with disabilities to consider alternatives to remand such as close supervision or placement with a fit person determined by the court. Detention should only be as a last resort, taking into account the nature and circumstances of the offence, and the risks that such persons pose to the public.

2.2.5 National Prosecutorial Policy

This policy sets out the overall policy on prosecutions. It provides guidance to prosecutors on the factors to be taken into account in the exercise of prosecutorial discretion. These include: whether there is enough admissible evidence to support a realistic prospect of conviction against the perpetrator; and whether the prosecution is in the public interest, based on (inter alia): the nature and seriousness of the offence; the likely consequences of prosecution; degree of victim's vulnerability; the level of culpability of the perpetrator; and the length of delay in criminal proceedings. Courts may review the prosecutorial decision to prosecute or not prosecute on the ground of: unconstitutionality, i.e. where the decision infringes the constitutional right of individuals; insufficient factual or evidentiary foundations for the case; or abuse of process.³⁸

³⁷ Bail and Bond Guidelines
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf

³⁸ Mandatory prosecution jurisdictions
https://www.icc-cpi.int/RelatedRecords/CR2019_07328.PDF

2.2.6 Guidelines on the Decision to Charge

The Guidelines³⁹ are intended to cement and enhance the growth of a stronger, streamlined and professional prosecutorial service in Kenya and apply in any context in which a prosecutor would reasonably understand that a criminal prosecution could result. They also set out the functions and duties of prosecutors in relation to the decision to charge and the conduct of criminal proceedings so that prosecutors may properly exercise their functions.

The guidelines provide that a prosecutor in making charging decisions, must be fair and objective and must not let personal views based on ethnic or national origin, gender, disability, age, religion or belief, sexual orientation, status, or gender identity of a suspect, accused person, victim or any witness influence their decision and must be apolitical. Likewise, prosecutors in assessing the culpability of suspects have regard to whether the suspect is, or was at the time of the offence, affected by any significant mental or physical ill health or disability, as in some circumstances this may mean that it is less likely that a prosecution is required.

The guideline defines a vulnerable victim as a “natural person who suffers injury, loss or damage as a consequence of an offence, and who, due to age, gender, disability or other special characteristics may require the provision of special justice and support”. The guidelines also provide that the prosecutor while assessing the impact or harm to the victim or community, need to consider if a prosecution is likely to have an adverse effect on the victim’s physical or mental health.

2.2.7 Diversion Policy

The main objective of this Policy⁴⁰ is to enhance access to justice by providing alternatives to prosecution that are accessible to an offender and are visible and accountable to victims and the community. The policy defines a vulnerable person as a person who, due to age, gender, disability or other special characteristics, may require the provision of special justice and support.

The policy recognises the various methods that the law makes provision for vulnerable people in criminal cases, including through the requirement for consent of the ODPP for proceedings against persons with a mental condition; and the power of the ODPP to discontinue proceedings or discharge and release offenders. The 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 under section 162 of the Criminal Procedure Code where there is reason to believe that an offender is suffering from mental illness. Likewise, it calls for the respect for the dignity of persons with disabilities. It defines these to include persons who have long-term physical, mental, intellectual or sensory impairments which may hinder their full and effective participation in society on an equal basis with others.

³⁹ Guidelines on the decision to charge
<https://www.odpp.go.ke/download/3730/>

⁴⁰ Diversion Policy
<https://www.odpp.go.ke/wp-content/uploads/2019/10/DIVERSION-POLICY-grided-A4-final.pdf>

2.2.8 Sentencing Guidelines

The objective of these Guidelines⁴¹ is to guide judicial officers in the application and interpretation of laws that govern sentencing. Under Guideline 9.3 the health or mental condition of the offender is one of the grounds to be considered in making a decision on whether to place an offender on probation. With respect to offenders with mental illness, the Guideline requires courts to comply with the provisions of section 166 and 167 of the Criminal Procedure Code. However, the court may recommend that the offender be detained in a mental hospital. Courts may also review the timeline for detention orders made under section 167(4) of the Criminal Procedure Code, as such persons often remain detained for an inordinately long period.

Guideline 20.21 recognizes the right of persons with disability to be treated with dignity and have reasonable access to all places, the freedom from cruel, inhuman or degrading treatment, and to be accorded reasonable accommodation. Further, Guideline 20.22 provides that sentences imposed must not amount to cruel, inhuman or degrading treatment in view of the disability and the facilities available in respect to custodial sentences.

Further, Guideline 20.24 requires that courts should be mindful when imposing sentencing orders against offenders with disability, to ensure that they do not amount to an excessive punishment in view of the extent of disability and in light of the offence committed or cruel, inhuman or degrading treatment in view of the extent of disability of the offender. The Guideline 23.8 recognises mental illness or impaired functioning of the mind as a mitigating circumstance warranting a more lenient penalty than what would be ordinarily imposed.

2.3 International and Regional Human Rights Instruments

2.3.1 Convention on the Rights of Persons with Disabilities (CRPD)

This Convention⁴² provides the basis for the protection of the rights of persons with disabilities. Kenya ratified the CRPD on 19 May, 2008,⁴³ but is yet to sign the Optional Protocol. The Convention seeks to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.” It defines persons with disabilities to include those who have “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Article 5 calls for the equality and non-discrimination of all persons before and under the law; the prohibition of discrimination on the basis of disability; and the guarantee to persons with disabilities equal and effective legal protection

⁴¹ Sentencing Guidelines
<http://kenyalaw.org/kl/fileadmin/pdfdownloads/SentencingGuidelines.pdf>

⁴² Convention on the Rights of Persons with Disabilities (CRPD)
<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁴³ Ratification Status for Kenya.
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN

against discrimination on all grounds. The CRPD requires State Parties to take measures to provide reasonable accommodation for persons with disabilities.

Article 8 requires State Parties to undertake to adopt immediate, effective and appropriate measures to raise awareness throughout society regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; and to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; and to promote awareness of the capabilities and contributions of persons with disabilities.

Article 9 requires State Parties to take appropriate measures to enable persons with disabilities to live independently and participate fully in all aspects of life, access, on an equal basis with others, the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

Article 10 requires State Parties to: reaffirm the rights of persons with disability to recognition everywhere as persons before the law; recognize their rights to enjoy legal capacity on an equal basis with others in all aspects of life; take appropriate measures to provide them access to the support they may require in exercising their legal capacity; and ensure that all measures relating to their exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. In particular, the safeguards should respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.

With respect to access to justice, article 12 requires States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. Further, State Parties are called upon to promote appropriate training for those working in the field of administration of justice, including police and prison staff.

State Parties are further called upon to take measures to guarantee that persons with disabilities enjoy their rights to: liberty and security of person (article 14), freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15); freedom from exploitation, violence and abuse (article 16), respect for physical and mental integrity (article 17); liberty of movement, to freedom to choose their residence and to a nationality (article 18); live independently and to be included in the community (article 19); personal mobility (article 20); freedom of expression and opinion, and access to information (article

21); respect for privacy of their information, family, home or correspondence (article 22); respect for home and the family (article 23); education (article 24); health (article 25); Habilitation and rehabilitation (article 26); Work and employment (article 27); adequate standard of living and social protection (article 28); Participation in political and public life (article 29); and, Participation in cultural life, recreation, leisure and sport (article 30).

Kenya's initial State Report to the Committee on the Rights of Persons with Disability indicates that the issue of legal capacity still remains problematic due to the lack of awareness on the rights of persons with disabilities.⁴⁴ Efforts have therefore been put in place to ensure that substituted decision making is replaced by supported decision making to ensure that persons with disabilities enjoy their right to legal capacity. Within the criminal justice system, persons with disabilities find themselves as witnesses or victims and therefore may be required to adduce evidence which may present challenges in the determination of the credibility of the evidence. The government asserted that the challenge was being addressed by the review of the Evidence Act. Also, persons with mental conditions have been victims of pressure, violence, undue influence and other forms of abuses that tend to inhibit this right.

2.3.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Kenya ratified the ICESCR⁴⁵ on 1st May 1972.⁴⁶ Article 2 (2) of the Covenant provides that States must guarantee the rights under it without discrimination of any kind. "Discrimination of any kind" includes on the grounds of disability.⁴⁷ States therefore have the responsibility to take positive actions in cases of vulnerable and disadvantaged groups and ensure that persons with disabilities are able to fully participate in society and are given equality by means of appropriate preferential treatment. Kenya's Combined Second to Fifth Report to the Committee on Economic, Social and Cultural Rights noted that persons with disabilities were persons who are vulnerable to discrimination.⁴⁸

2.3.3 International Covenant on Civil and Political Rights (ICCPR)

Kenya ratified the ICCPR⁴⁹ on 1st May 1972.⁵⁰ While it does not clearly explicitly provide for the rights of mentally disabled persons, it recognizes in its preamble, the right to the inherent

⁴⁴ Kenya's Report on the CRPD.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fKEN%2f1&Lang=en

⁴⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR)

<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

⁴⁶ Ibid., (n 101).

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN

⁴⁷ No, General Comment. "5: persons with disabilities." Eleventh session (1994).

<https://www.refworld.org/pdfid/4538838f0.pdf>

⁴⁸ Combined second to fifth periodic reports of States parties due in 2013

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW2Mbmlr6bjcj69OB9bDJS0Jlnzfm8SnuRoSjugno1Nhdjpt-pjDEVKUUb%2bAX55b%2fjlt%2faAtW0OoF77Y839M876ZCvUjXBmxYh9UU8JQaAaFOwu>

⁴⁹ International Covenant on Civil and Political Rights (ICCPR)

<https://www.ohchr.org/documents/professionalinterest/ccpr.pdf>

⁵⁰ UN Treaty Body Database

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN

dignity and the equal and inalienable rights of all humans and that this is the foundation of freedom, justice and peace in the world. Moreover, disability is covered by the term “other status” in articles 2 and 26, which together constitute the non-discrimination clauses of the treaty.⁵¹

Article 14 provides that all persons shall be equal before the courts and tribunals, while Article 16 provides that “everyone shall have the right to recognition everywhere as a person before the law”. Article 9 of the ICCPR provides for the right to liberty and security of the person. Kenya’s fourth periodic report to the Human Rights Committee of 2018 identified the National Gender and Equality Commission (NGEC) as a channel to combat discrimination and promote equal opportunities based on gender equality, for persons with disabilities and other vulnerable or marginalized groups.⁵²

2.3.4 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Convention⁵³ was ratified by Kenya in 1997.⁵⁴ Article 2 of the CAT requires States to “take measures to prevent acts of torture within their jurisdictions.” Moreover, Article 10 requires States to educate and inform law enforcement, medics, public officials and persons involved in the custody, interrogation or treatment of any arrested, detained or imprisoned persons. Article 11 requires States to “review interrogation rules, instructions, methods and arrangements for the arrest, detention or imprisonment of persons in their jurisdiction.”

2.3.5 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW⁵⁵ was ratified by Kenya in 1984.⁵⁶ Article 2 of the CEDAW requires State parties to condemn discrimination against women in all its forms, and pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”. Kenya’s eighth Periodic Report of States parties due in 2015 to CEDAW submitted in 2016 indicates that non-discrimination provisions have been entrenched in the Persons with Disability Act and that the National Gender and Equality Commission is the oversight body mandated to protect and promote the rights of persons with disabilities.⁵⁷

⁵¹ The current use and future potential of United Nations human rights instruments in the context of disability
<https://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>

⁵² Fourth periodic report submitted by Kenya under article 40 of the Covenant, due in 2015*
<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsju22L%2bcWBero6zgtOYNisijhRnh9dksjH9M-puuF7v%2bg6hIMN3Ye0ZM81VBESK9hZL72rvGzuJCSBHmo9VuhX%2bw2Y0dlJyGClkV2FtLYboEu>

⁵³ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

⁵⁴ UN Treaty Body Database
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN

⁵⁵ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
<https://www.ohchr.org/documents/professionalinterest/cedaw.pdf>

⁵⁶ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN

⁵⁷ Kenya’s Eighth Periodic Report to the Committee on the Elimination on Discrimination against Women
<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjlf%2fiarzVw%2bcyfdY9GxZ4qs0%2f%2f6%2bISOP-ieXnJX5bSbMNMhy8L0QJb1Msoi4tf3a%2fvGWnFS3ZaafRgtlvHir3A67OLfkHNcyslp67aw6FbG>

2.3.6 Convention on the Rights of the Child (CRC)

The CRC⁵⁸ was ratified on July 30 1990.⁵⁹ Article 12 of the CRC provides for the right of children to be heard and represented in all proceedings affecting them. The Committee on the Rights of Children contends that self-representation and full participation of children with disabilities is crucial in the fulfilment of their rights under the CRC.⁶⁰

Article 23 of the Convention clearly provides for the rights of children with disabilities and requires State Parties to recognize mentally or physically disabled children and ensure their enjoyment of a full and decent life in conditions which gives them their dignity, promotes self-reliance and facilitates their active participation in the community. Further, Article 19 of the CRC requires States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2.3.7 African Charter on Human and Peoples' Rights

Kenya ratified the ACHPR⁶¹ on January 23, 1992.⁶² Article 2 states that every person is entitled to enjoy his or her rights without distinction of any kind. Article 16 (1) of the Charter provides the rights of every individual to "enjoy the best attainable state of physical and mental health". Article 18 (4) provides that "the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".

Article 28 of the Charter provides that every person has a duty to respect and consider his fellow human being without discrimination. In Kenya's Report⁶³ on the ACHPR the government highlighted legislative measures to ensure the protection of the rights to equality and non-discrimination, including amendments to the Mental Health Act (Mental Health Amendment Bill, 2018). To enhance equalisation of opportunities, habilitation and rehabilitation of persons with disabilities, the Persons with Disability Act, 2003 was to be repealed by the Persons with Disability Bill, 2018.

⁵⁸ Convention on the Rights of the Child (CRC)
<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁵⁹ UN Treaty Body Database
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN

⁶⁰ General Comment N° 9 (2006) The rights of children with disabilities
<https://www.refworld.org/docid/461b93f72.html>

⁶¹ African Charter on Human and Peoples' Rights
<https://www.achpr.org/legalinstruments/detail?id=49>

⁶² Ratification Table:- African Charter on Human and Peoples' Rights
<https://www.achpr.org/ratificationtable?id=49>

⁶³ Kenya's Report on the ACHPR
<https://www.achpr.org/states/statereport?id=135>

2.3.8 African Charter on the Rights and Welfare of the Child

The Charter⁶⁴ lays out the fundamental rights and obligations on the status of the African child. Kenya ratified the Charter on July 25th 2000.⁶⁵ Article 13 (1) of the Charter provides that “every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.” Article 13(2) requires State Parties to ensure assistance to a disabled child and their assistants and access to training that will aid the child to receive the fullest possible social integration and development. Further, under Article 13(3) that State Parties use available resources in order to achieve convenience for the mentally and physically disabled persons to move and access places which they might want access to.

2.3.9 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa

This instrument⁶⁶ guarantees the comprehensive rights of women and girls in Africa. Kenya ratified this instrument on the 6th of October 2010.⁶⁷ Article 2 of the Protocol calls upon State Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. The Protocol states in Article 8 that women and men are equal before the law and shall have the right to equal protection and benefit of the law. Therefore, States Parties are required to take all appropriate measures to ensure among others: effective access by women to judicial and legal services, including legal aid; support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; and, to reform existing discriminatory laws and practices in order to promote and protect the rights of women.

Article 23 of the Protocol guarantees the protection of women living with disabilities and requires State Parties to ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; and ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability.

2.3.10 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights

The Protocol⁶⁸ seeks the establishment of an African Court on Human and People’s Rights to complement and reinforce the functions of the African Commission on Human and People’s rights. Kenya ratified this protocol on February 4th 2004.⁶⁹ Article 3 of the Protocol states that the Court’s jurisdiction extends to all cases and disputes concerning the interpretation of the African Charter, the Protocol and any other relevant Human Rights Instrument ratified by the State concerned.

64 African Charter on the Rights and Welfare of the Child
<https://au.int/en/treaties/african-charter-rights-and-welfare-child>

65 African Charter on the Rights and Welfare of the Child
<http://kenyalaw.org/treaties/treaties/14/African-Charter-on-the-Rights-and-Welfare-of-the-Child>

66 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf

67 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
<https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>

68 Protocol of the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights
<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>

69 Protocol To The African Charter On Human And Peoples’ Rights On The Establishment Of An African Court On Human And Peoples’ Rights.
<http://kenyalaw.org/treaties/treaties/44/Protocol-to-the-African-Charter-on-Human-and-Peoples-Kenya-Law>

2.3.11 Statute on the Establishment of Legal Aid Fund for the African Union Human Rights Organs

This statute⁷⁰ recognizes that this right and other rights acknowledged by the African Union need assistance from a legal aid fund in order to achieve their protection. It seeks to provide legal assistance to indigent applications before the human rights organs of the AU. Article 2 of the Statute provides that the Legal Aid Fund is established independently to provide legal assistance to indigent applicants before Human Rights Organs of the Union. Its objectives as enunciated under Article 3 are to: mobilise and receive resources to finance the Legal aid Scheme of the Human Rights Organs of the African Union; foster cooperation and coordination among all stakeholders and within the provision of legal aid; engage in activities or projects that will further the objectives of the Statute.

2.3.12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

This Protocol⁷¹ seeks to promote, protect and ensure the full and equal enjoyment of all human and people's rights by all persons with disabilities and to ensure the respect for their inherent dignity. Article 4 calls on State Parties to the Protocol to take appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary steps, to ensure, respect, promote, protect and fulfil the rights and dignity of persons with disabilities, without discrimination on the basis of disability.

The Protocol also provides for the rights of disabled persons to: non-discrimination; equality; equal recognition before the law; life; liberty and security of the person; and freedom from torture or cruel, Inhuman or degrading treatment, slavery, forced labour or unlawful punishment; access to justice; health; Habilitation and rehabilitation; self-representation; freedom of expression and opinion; and access to information. States are also called upon to take measures to ensure women, children, youth and older persons with disabilities have the full enjoyment of human and peoples' rights on an equal basis with others.

2.3.13 Treaty for the Establishment of the East African Community

Under Article 7 of the Treaty⁷² Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights. Under Article 120, Partner States undertake to cooperate in the field of social welfare with respect to development and adoption of a common approach towards the disadvantaged and marginalised groups, including children, the youth, the elderly and persons with disabilities through rehabilitation and provision of, among others, foster homes, health care education and training. The Treaty under Chapter 8 establishes the East African Court of Justice,

⁷⁰ Statute on the Establishment of Legal Aid Fund for the African Union Human Rights Organs
<https://au.int/en/treaties/statute-establishment-legal-aid-fund-african-union-human-rights-organs>

⁷¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa
<https://au.int/sites/default/files/treaties/36440-treaty>

⁷² Treaty for the Establishment of the East African Community
<https://www3.nd.edu/~ggoertz/rei/rei200/rei200.02tt1.pdf>

to ensure the adherence to law in the interpretation and application of and compliance with the Treaty. The Court has jurisdiction over the interpretation and application of the Treaty which may be extended to include other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date via a Protocol.

2.3.14 Principles for the protection of persons with mental disability and the improvement of mental health care

These principles⁷³ were adopted by the UN General Assembly on 17 December 1991. It provides various principles with respect to fundamental freedoms and basic rights; protection of minors; determination of mental illness; medical examination; confidentiality; standards of care, treatment and medication; consent to treatment; rights and conditions in mental health facilities; admission principles; procedural safeguards; access to information and so on. The principles apply to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness. Such persons should receive the best available mental health care as provided in Principle 1. Likewise, the Principles apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances without prejudicing the persons' rights under the instruments.

73 Principles for the protection of persons with mental illness and the improvement of mental health care
https://www.who.int/mental_health/policy/en/UN_Resolution_on_protection_of_persons_with_mental_illness.pdf



3.0 Challenges in the Criminal Justice System

3.1 Limitation of Legal Capacity

Legal capacity can generally be defined as the ability a person has to exercise their legal rights and obligations. Essentially, it is someone's right to participate fully in the legal system⁷⁴ Persons living with mental conditions often face challenges in the accessibility and exercise of their legal capacity.⁷⁵ Further, there are prejudices, stereotypes and assumptions against people with mental conditions, including that they cannot make decisions. As such, they are often denied their right to make decisions, have those decisions respected, or have their views sought even on issues that affect them.⁷⁶ The resulting restrictions are not only carried on within society, but are codified within the framework of the law to systematically deny them legal recognition in areas such as education, employment, management of property and land and access to healthcare.

Indeed, in its report to the United Nations Committee on the Rights of Persons with Disabilities, the government noted that the issue of legal capacity remained a challenge particularly to those with mental and cognitive disabilities, "where decisions are made on their behalf without consulting them".⁷⁷ The government expressed its desire to shift from substituted to supported decision making. While the age of full legal capacity in Kenya is 18 years, various laws permit the full deprivation, or partial restriction, of an adult's right to legal capacity, based on their disability.

The Mental Health Act still allows for substituted decision making, where a person may be deprived of, or have their legal capacity restricted, and a personal representative appointed by the Court. These measures are insufficient insofar as article 12 of the CRPD is concerned. Section 107 of the Children Act permits the extension of guardianship beyond the age of 18 years in "exceptional circumstances", such as where a child has a mental or physical disability that renders them incapable of maintaining themselves or managing their affairs and property without the assistance of a guardian.

Section 11 of the Penal Code which provides for a presumption of sanity in relation to the commission of criminal offences. Further, section 162 of the Penal Code, provides that persons of 'unsound mind' may have their trial proceedings postponed by courts.⁷⁸ This could impede the rights of these persons under article 48, 49 and 50 of the Constitution.⁷⁹

Moreover, a person's right to give evidence will depend on the individual's form of disability.⁸⁰ Section 125 of the Evidence Act states that, **'persons are competent unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions.'** Essentially limiting their right to appear as witnesses.

⁷⁴ United Nations, 'Promoting the rights of persons with disabilities: Full participation and equality in social life and development,' <https://www.un.org/esa/socdev/enable/rights/>.

⁷⁵ NHRI information to the 3rd Pre-sessional Working Group of the Committee on the Rights of Persons with Disabilities https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/Kenya_National_Commission_on_Human_Rights_Shadow_Report.pdf

⁷⁶ The right to legal capacity in Kenya https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/Mental_Disability_Advocacy_Center_Shadow_Report.pdf

⁷⁷ Initial Report to the CRPD Committee, 31 August 2011, https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/CRPD_State_Report_Kenya.pdf

⁷⁸ Section 162, Penal Code. <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2063>

⁷⁹ Article 48, Constitution of Kenya.

⁸⁰ Juma Paul, 'Right to self-representation for people with mental disabilities in Kenya's Courts', The African Disabilities Rights Yearbook, <http://www.saflii.org/za/journals/ADRY/2019/5.html>.

The erasure of legal capacity has been argued to consequently lead to the inability of persons with mental disabilities to represent themselves in legal proceedings, especially in situations where they cannot afford legal counsel.⁸¹ As it stands, these persons are not allowed to participate in court processes, especially where it becomes apparent to the court that they do not have the capability to understand the proceedings or even make their own defence.⁸² Article 22 of the ICCPR stipulates that, 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (d) To be tried in his presence, and to defend himself in person or through legal assistance,' clearly safeguarding the rights of all persons, including of the mentally disabled, to self-represent in proceedings.

3.2 Legal Technicalities

The pre-trial and trial stages of the legal process are argued to be quite imbalanced with the needs of persons living with psychosocial disability. First is the need to establish a form of sanity in order to be granted the opportunity to actively participate in their processes.⁸³ Secondly, once the aforementioned criteria is fulfilled, they have to undergo legally stipulated processes such as cross-examination and examination which may not aid or be aided by their pre-existing conditions.⁸⁴ Furthermore, there is the possibility of sometimes limiting the admission of expert witnesses and testimony, which may have the dangerous effect of causing injustices as was seen in the case of *Richard Kaitany Chemagong v R*, where an accused person that was sentenced to death was only saved by medical examination which unearthed the fact that he was actually mentally disabled.⁸⁵ The principle of 'reasonable accommodation' has been provided for in numerous instruments such as the Convention on the Rights of Persons with Disabilities.⁸⁶

Additionally, despite laws being declared unconstitutional, legal reforms are yet to be undertaken to officially amend the laws granting the president authority with the mandate to dictate the type of incarceration persons found guilty but insane shall face.⁸⁷ Previously, the provisions had created a situation of indefiniteness as regards to the time persons would serve, if they should serve it in prison or whether they are to be diverted, and it led to a number of offenders with mental conditions opting not to disclose their illness in order to receive a definite sentence and subject themselves to 'ordinary' prison conditions.⁸⁸

81 Juma Paul, 'Right to self-representation for people with mental disabilities in Kenya's Courts', *The African Disabilities Rights Yearbook*, <http://www.saflii.org/za/journals/ADRY/2019/5.html>

82 Leonard Mwangemi Munyasia v Republic [2015] eKLR. <http://kenyalaw.org/caselaw/cases/view/114089>

83 Section 163, Criminal Procedure Code <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075>.

84 Juma Paul, 'Right to self-representation for people with mental disabilities in Kenya's Courts' <http://www.saflii.org/za/journals/ADRY/2019/5.html>

85 Wanyama Jentrix, 'A call to strengthen the law on insanity in Kenya', Strathmore University Press. https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_1.pdf

86 Convention of the Rights of Persons with Disabilities,

87 Section 166, Penal Code. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063>

88 Wanyama Jentrix, 'A call to strengthen the law on insanity in Kenya'. https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_1.pdf

People with mental conditions are encouraged to be seen as not just 'objects' of the law, charity and social protection, but as subjects of protective legal provisions.⁸⁹ However, it has been seen that there are certain situations where they are regarded as objects in legal proceedings, contravening the call by CRPD. This was seen in the case of *Wilson Morara Siringi v Republic*,⁹⁰ where the Appellant had been convicted of raping a disabled person and during the trial, the Prosecution and the Magistrate referred to the complainant as a 'mentally retarded' person. Justice Majanja held that the term implied that the complainant was an object of social protection rather than a subject capable of having rights and that it was in violation of Article 12 of the CRPD.

3.3 Limited Understanding of their Rights during the Legal Process

It is brought to light that another challenge faced by persons with mental conditions in the criminal justice system is the fact that they may not fully understand their rights.⁹¹ This can be seen especially during situations of arrest where they do not understand the rights of an arrested person as read out to them, or even general cautions given to them by law enforcement officers.⁹² It has also been demonstrated that they possess an insufficient understanding of terms such as 'guilty' and 'not guilty', which subsequently has impacts on the entire trial process.⁹³ Especially when they give misunderstood responses to police officers, which have the possibility of increasing their susceptibility to arrest, incarceration and possible execution, regardless of whether they committed the crime.⁹⁴ A lack of understanding due to their disabilities can pose a great risk for the infringement of their basic rights of an accused and arrested person as safeguarded by the constitution of Kenya.⁹⁵

Further, the criminal justice system may also fail to recognize the rights of persons with mental conditions and therefore, in the course of their duty, infringe their rights. In the case of *Wilson Morara Siringi v Republic*, the Appellant had been convicted of raping a disabled person and in during the trial, the Prosecution and the Magistrate referred to the complainant as a 'mentally retarded' person. Justice Majanja held that the term implied that the complainant was an object of social protection rather than a subject capable of having rights and that it was in violation of Article 12 of the CRPD.

89 CRPD

90 [2014] eKLR.

91 Jones Jessica, 'Persons with intellectual disabilities in the criminal justice system', *International Journal of offender therapy and comparative criminology*, 2007.
https://www.researchgate.net/publication/6202672_Persons_With_Intellectual_Disabilities_in_the_Criminal_Justice_System_Review_of_Issues

92 Jones Jessica, 'Persons with intellectual disabilities in the criminal justice system'.

93 Claire, Murphy, 'People with learning disabilities as offenders and alleged offenders in the UK criminal Justice system,' *Journal of the Royal Society of Medicine*, 1998.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1296635/pdf/jrsocmed00026-0008.pdf>

94 Davis Leigh Ann, 'People with intellectual disabilities in the criminal justice system: Victims and Suspect,'
https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/part_12_victimization_-_people_with_id_in_cj_system.pdf

95 Article 49, Constitution of Kenya.

3.4 Capture and Arrest over Petty Offences

An interview by Lydia Matata of Samuel Macharia Njoroge, a recurring offender living with a mental illness, demonstrates the nature of mental illness with regards to petty and criminal offences.⁹⁶ It is unfortunately common for Kenyans living with mental and psychosocial disabilities to commonly brush with the law, especially as the system gives little priority to medical treatment of such offenders. This is made especially clear with the criminalization of offences such as begging, causing breaches of peace as well as indecent acts⁹⁷, which are mostly done by persons with mental conditions due to their debilitating status in societies.⁹⁸ Elizabeth Kamundia, a human rights lawyer specialising in mental health says, 'persons with psychosocial disabilities will come in conflict with these laws for offences such as indecent acts, like taking off one's clothes or causing a disturbance because of a tendency to sometimes get aggressive as a result of the disorder'.⁹⁹ They are then faced with the payment of fines, which they ordinarily cannot afford, or spending time in prison. With the lack of proper and adequate medical responses to such persons, the possibility of recidivism upon release are higher. The Report of the NGEK on the Pre-trial Detention for Persons with Disabilities in Correctional institutions concluded that there was absence or inadequate guarantees for detainees with disabilities that amount to violation of their right to access to justice; there exists biases against persons with certain disabilities thus enabling continuation of denial of their right to legal capacity; the Kenya Prison Service is willing to do the right thing in order to undertake necessary reforms only that they need the technical support as well as resources.¹⁰⁰

3.5 Limited Access to Justice

Persons with mental conditions are sometimes faced with false accusations where other parties are involved but would want to conceal their identities as cover-up. In the circumstances, law enforcement may fail to clearly understand the origin of the case as sometimes witnesses are biased against the person with mental conditions leading to their arrest and detention.

Further, the persons often lack legal representation or access to legal aid and advice or the criminal complaints mechanisms. It has also been reported that some perpetrators of offences may also influence the decision-making process and justice may not be served to the person with a mental condition on that basis. During court hearings, such persons may have limited participation in the adjudication process, and limited access to effective remedies. Over and above, the lack of access to treatment facilities and the challenges in the health system¹⁰¹ may also restrict their access to justice.

⁹⁶ Matata Lydia, 'Kenyans living with mental illness get lost in the criminal justice system', <https://pettyoffences.org/kenyans-living-with-mental-illness-get-lost-in-the-criminal-justice-system/>

⁹⁷ Section 182, Penal Code
<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2063>

⁹⁸ Matata Lydia, 'Kenyans living with mental illness get lost in the criminal justice system'.
<https://pettyoffences.org/kenyans-living-with-mental-illness-get-lost-in-the-criminal-justice-system/>

⁹⁹ Matata Lydia, 'Kenyans living with mental illness get lost in the criminal justice system'.
<https://pettyoffences.org/kenyans-living-with-mental-illness-get-lost-in-the-criminal-justice-system/>

¹⁰⁰ Report of the NGEK on the Pre-trial Detention for Persons with Disabilities in Correctional institutions
<https://www.ngeckkenya.org/Downloads/APCOF%20PTD%20Kenya%20WEB.pdf>

¹⁰¹ Audit of Mental Health Services in Kenya
http://oagkenya.oagkenya.go.ke/index.php/reports/doc_download/2072-the-provisions-of-mental-health-services-in-kenya

3.6 Lack of Technical Expertise

The field of mental health in law is quickly demonstrating the interdisciplinary path that the legal field is taking. It has been said that the stagnancy of the law regarding mental health, especially in Kenya is attributable to the fact that legal officers have little understanding as to the workings of the human mind.¹⁰² This calls for the need for psychiatric experts and their counterparts to fill the gaps that have unfortunately been created in law.

However, as it stands, there is a stark shortage of such experts in Kenya. In 2011, the country had slightly over 77 psychiatric consultants, 418 psychiatric nurses and 30 clinical psychologists.¹⁰³ Recent information indicates that there are around 125 psychiatrists in the country,¹⁰⁴ but for a country with an estimated population of 54.9 million in 2021, the ratio of psychiatrists to population falls way below the expected 1:10,000 ratio. An underwhelming number to cater for all the needs of mentally disabled persons in the criminal justice system. The courts have also had instances where they limit the admission of expert witnesses in courts as was seen in the case of Leonard Mwangemi Munyasia v Republic. Since the courts are not experts, they are encouraged to rely on these testimonies as they can clarify ambiguities as to the difference between legitimate symptoms and unnecessary claims.¹⁰⁵

The lack of technical expertise can be said to be more pronounced in the initial stages of arrest, as police may not be able to immediately identify someone with a mental condition.¹⁰⁶ This demonstrates the need for special training of law enforcement officers to be slightly versed with basic apparent symptoms of mental disabilities.

3.7 Lack of Access to Accurate and Accessible Information

According to a 2017 study¹⁰⁷ found that due to lack of access to information, persons with disabilities were not able to effectively participate in decision making and policy development processes at both the national and county levels. Some broadcast media remains inaccessible for persons with disabilities, with only 13 out of 18 free to air television channels providing sign language interpretation during newscasts. Meanwhile, print media remains unavailable in Braille, while online media is only accessible to those with access to computers with assistive technology.

Persons with disabilities face challenges in accessing information in the public domain in areas such as schools, hospitals, courts, and government offices. Likewise, there is limited facilitation of their communication needs when they attend meetings. This could be as a result of the limited awareness of the public on ways to facilitate the communication needs for persons with disability.

102 Wanyama Jentrix, 'A call to strengthen the law on insanity in Kenya'.
https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_1.pdf

103 Kenya National Commission on Human Rights, 'Silenced minds: the systemic neglect of the mental health system in Kenya',
https://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf.

104 Kenya Psychiatric Association

105 Wanyama Jentrix, 'A call to strengthen the law on insanity in Kenya'
https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_1.pdf

106 Claire, Murphy, 'People with learning disabilities as offenders and alleged offenders in the UK criminal justice system'.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1296635/pdf/jrsocmed00026-0008.pdf>

107 sing the gap in civic participation for persons with disabilities in Kenya: A national level analysis concerning the implementation of Article 21 of the Convention on the Rights of Persons with Disabilities (2017), ARTICLE 19 Eastern Africa

Public information is usually disseminated through traditional media including newspapers, television, radio, community barazas (public meetings) and new media through the Internet. This poses great challenges for persons with disabilities, especially those who live in areas where they do not have access to electricity, cannot afford to buy newspapers and those who cannot read due to low levels of education. Though signage is provided for in parliamentary proceedings and sub-titles for some newscasts, the portion of the screen allocated is relatively small and people with hearing impairments must move close to the screens to be able interpret the signs. Other programmes do not provide sign language or subtitles. The lack of brailled materials for the visually impaired and sign interpreters in the media and other institutions to cater for the hearing impaired creates a problem in accessing information and communicating effectively and prevents the full integration of persons with disabilities into society.¹⁰⁸

3.8 Discrimination

Persons with disabilities continue to face discrimination which is entrenched in the stereotypes prevailing in Kenyan societies. These portray people with disabilities as burdens and curses, and sometimes lead to families hiding such persons.¹⁰⁹ As a result, these individuals or families that have persons with disabilities shy away from revealing such persons. Despite their recognition as persons before the law, they continue to be discriminated against in practice by both state and private entities. Some persons with disabilities have been denied national identity cards due to their disability status, while in some communities, they are often referred to as “stupid or idiots”, further contributing to the restrictions placed upon them.¹¹⁰

3.9 Children

According to Kenya’s Report to the CRC,¹¹¹ remand homes and rehabilitation schools are meant to hold children of delinquent behaviour. However, the children were inadequately catered for. Also, children in rehabilitation schools are neglected by their parents.¹¹² The Briefing Report on the Implementation of the African Charter on the Rights and Welfare of the Child shows that the criminal justice does not fully accord children the right to access to justice by reducing the sentences of the perpetrators arrested on the grounds of sexually assaulting children with disabilities.¹¹³ The Report recommended that: the justice system should ensure that age-appropriate reasonable accommodation measures are provided to children with disabilities to enhance access to justice in line with Article 13 of the CRPD; the child’s disability should be considered as an aggravating circumstance in sentencing, rather than being used as a ground for

108 KNCHR, (July, 2014), From Norm to Practice, A Status Report on the Implementation of the Rights of Persons with Disabilities in Kenya, Retrieved from: <https://www.knchr.org/Portals/0/Disability%20Publications/Status%20Report%20on%20the%20Implementation%20of%20the%20Rights%20of%20Persons%20with%20Disabilities%20in%20Kenya.pdf?ver=2018-06-03-175344-433>

109 Initial report to the CRPD Committee, 31 August 2011
https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/CRPD_State_Report_Kenya.pdf

110 The right to legal capacity in Kenya
https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/Mental_Disability_Advocacy_Center_Shadow_Report.pdf

111 Kenya’s Report to the Committee on the Rights of Children
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRC%2fC%2fKEN%2f2&Lang=en

112 Ibid., (n 130) para 144 (5).

113 Briefing Report on the Implementation of the African Charter on the Rights and Welfare of the Child by KNCHR
<https://www.knchr.org/Portals/0/KNCHR%20Briefing%20Report%20on%20the%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child%20.pdf>

casting doubt on the competency of the child's testimony; actors in the justice sector including magistrates, judges, prosecutors and police should be trained about the specific barriers faced by children with disabilities in accessing justice, and their role in dismantling these barriers to ensure non-discrimination in accessing justice.¹¹⁴

3.10 Exposure to Unwarranted and Possibly Deadly Force

Persons with mental conditions usually behave in ways quite different from societal norms, and sometimes possessing and displaying acts that may be termed as 'lewd' or 'offensive'. It is unfortunately so that said behaviour may be confused with drug-induced behaviour.¹¹⁵ A report by ACLU and Bazelon Centre for Mental Health Law showed that incarceration policies such as the battle against drugs, indirectly criminalise atypical behaviour, which are associated with persons living with mental illness.¹¹⁶ Police, being first responders in situations of crime, have sometimes been known to confuse criminal behaviour with criminalised behaviour, and respond with unnecessary lethal force. Such is the case of Charly 'Africa' Keunang, a homeless and mentally ill man, who was shot to death by police officers in skid row.¹¹⁷

3.11 Lack of Treatment during Incarceration

Prisons do not double up as treatment centres. Incorrectly placing someone in a prison facility, instead of medical treatment centres, has the possibility of denying them medicine and treatment and potentially worsening their situations.¹¹⁸

3.12 Challenges during Reintegration and Post-release

The individuals who have mental conditions are faced with the challenge of reintegrating into society, after their brush with the criminal justice system. On top of the stigma they already face, ex-convicts have further stigma within society upon release, with the ill-conceived views that they are undeserving of treatment due to their criminal status, as well as being seen as dangerous.¹¹⁹ Furthermore, the reintegration can be more pronounced when offenders feel the pressure of constantly feeling like they are under intensive 'watchful eyes' of members in their community. Moreover, the Probation and aftercare services is not well equipped to handle the reintegration of persons with mental health conditions, especially when engaging with a hostile community.

114 Ibid., pp 19 - 20.

115 Oberhaltzer Eliot, 'Police, courts, jails and prison all failed disabled people,' Prison Policy Initiative, 2017. <https://www.prisonpolicy.org/blog/2017/08/23/disability/>

116 A report by the ACLU and the Bazelon Center for Mental Health Law, 'A way forward: diverting people with mental illness from inhumane and expensive jails to community-based treatment that works', 2014. <https://www.prisonlegalnews.org/media/publications/A%20Way%20Forward%20-%20Diverting%20People%20with%20Mental%20Illness%20from%20Inhumane%20and%20Expensive%20Jails%20into%20Community-Based%20Treatment%20that%20Works%2C%20ACLU%20%26%20Bazelon%2C%202014.pdf>

117 Tchekmedyan Alene, 'LAPD officers are found liable in skid row shooting death of Charly 'Africa' Keunang,' Los Angeles Times, 2018. <https://www.latimes.com/local/lanow/la-me-ln-lapd-charly-keunang-20180510-story.html>

118 Oberhaltzer Eliot, 'Prisons, Courts, Jails and Police all failed disabled people'. <https://www.prisonpolicy.org/blog/2017/08/23/disability/>

119 Continuity of offender treatment for substance use from institution to community, chapter 6

3.13 Low Capacity and Awareness of Relevant Stakeholders to Communicate

Stakeholders within the criminal justice system do not all have the requisite knowledge, awareness and capacity to understand and communicate effectively with persons with intellectual disabilities. Further, there are no appropriate services to help the police and other government institutions to communicate with these persons.¹²⁰ Kenya's Report to the CAT indicated that there was a lack of specialised training for police officers especially those in crime offices.¹²¹ The recommendation put forward reiterated that the National Police Service Act mandates the Inspector General to collaborate with other institutions to train the police officers.¹²²

3.14 Use of Derogatory Terms

Societal perceptions and stereotypes on persons with mental illnesses has led to all sorts of discrimination and labelling. As a result, derogatory terms have been projected into the legal and policy framework such as the Penal Code. These terms were mostly used by the colonial administrators against the native citizens even for the sole purpose of demeaning them even when there was no presence of a mental illness.

Mental health conditions were used to depict a person as of lesser intelligence, uncivilised and deviant. The most common terms used are: unsound mind, idiot, imbecile, retarded, mentally challenged among others. The consequence of the use of these terminologies is the enhanced systemic exclusion from society. This has led to denied access to services like reproductive health, access to inclusive education, lack of access to legal capacity and informed decision making and lack of access to justice due to societal prejudices.

3.14 Capacity of Duty Bearers

A key challenge is that a majority of the professionals within the criminal justice system have not undergone basic training on mental health. Further, the institutions lack professional intermediaries (not interpreters) to facilitate communication between the victim, accused and the justice system. Also, they face difficulties in handling accused persons who have mental conditions. Moreover, the filing system is a challenge especially when an officer handling a case is transferred or when the files go missing. Also, there is poor coordination within the various departments in the criminal justice system to ensure the rights of persons with mental conditions are protected.

¹²⁰ NHRI information to the 3rd Pre-sessional Working Group of the Committee on the Rights of Persons with Disabilities
https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/Kenya_National_Commission_on_Human_Rights_Shadow_Report.pdf

¹²¹ UN Treaty Body Database
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2fCAT%2fADR%2fKEN%2f32159&Lang=en

¹²² Ibid.



4.0 Identification of Symptoms of the Different Forms of Mental Conditions

Mental disability is not about a diagnosis, it is about the functional impact and barriers which may be faced by someone living with a mental health condition. A psychosocial disability arises when someone with a mental health condition interacts with a social environment that presents barriers to their equality with others.¹²³ There are two broad categories of mental disabilities: Intellectual disability (or ID) is a term used when a person has certain limitations in cognitive functioning and skills, including communication, social and self-care skills. These limitations can cause a child to develop and learn more slowly or differently than a typically developing child.¹²⁴ Symptoms of the disability start developing in teenage or early adulthood. Sometimes the symptoms could be disguised as rebellion or a pretentious personality. If not detected early enough for appropriate intervention, one condition can lead to a more severe one.¹²⁵

4.1 Intellectual Disabilities

Intellectual disability (or ID) is a term used when a person has certain limitations in cognitive functioning and skills, including communication, social and self-care skills. These limitations can cause a child to develop and learn more slowly or differently than a typically developing child.

Someone with intellectual disability has limitations in two areas. These areas are:

- **Intellectual functioning:** Decision making processes and the intellectual capacities are affected. One may not correctly state the time location or give a full description of the event, but with reasonable accommodations, communication takes place.
- **Adaptive behaviours:** Self-care, social interaction and independent living is affected by the disability.

There are many different signs of intellectual disability in children. Signs may appear during infancy, or they may not be noticeable until a child reaches school age. It often depends on the severity of the disability. Some of the most common signs of intellectual disability are:

- Rolling over, sitting up, crawling, or walking late;
- Talking late or having trouble with talking;
- Slow to master things like toilet training, dressing, and feeding themselves;
- Difficulty remembering things;
- Inability to connect actions with consequences;
- Behaviour problems such as explosive tantrums; and,
- Difficulty with problem-solving or logical thinking.

Intellectual disability is a spectrum of various conditions mainly: Autism, Down syndrome and Cerebral palsy.

¹²³ What is psychosocial disability?
<https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/psychosocial-what-is.aspx>

¹²⁴ What is Intellectual Disability?
[https://www.specialolympics.org/about/intellectual-disabilities/what-is-intellectual-disability#:~:text=Intellectual%20disability%20\(or%20ID\)%20is,than%20a%20typically%20developing%20child.](https://www.specialolympics.org/about/intellectual-disabilities/what-is-intellectual-disability#:~:text=Intellectual%20disability%20(or%20ID)%20is,than%20a%20typically%20developing%20child.)

¹²⁵ Mental disability
<https://www.collinsdictionary.com/dictionary/english/mental-disability>

4.2 Psychosocial Disabilities

Psychosocial disabilities can be clustered into various categories.

4.2.1 Panic Attacks

A panic attack is a sudden episode of intense fear that triggers severe physical reactions when there is no real danger or apparent cause. Panic attacks can be very frightening. When panic attacks occur, you might think you're losing control, having a heart attack or even dying.¹²⁶ Most people may go through a panic attack on a few occasions while they are in stressful situations. When the situation deescalates, they get back into their normal lives. However, when the episodes are recurrent, unexpected panic attacks and one spends long periods in constant fear of another attack, it can be clustered as psychosocial disability. The signs or symptoms include:

- Sensing of a looming danger;
- Fear of loss of control or death;
- Increased heart rate;
- Profuse sweating;
- Trembling or shaking;
- Shortness of breath or tightness in your throat;
- Nausea;
- Abdominal cramping;
- Chest pain;
- Dizziness;
- Numbness or tingling sensation; and,
- Feeling of unreality or detachment.

Victims of domestic violence, war, sexual abuse and other atrocities usually experience the symptoms from time to time especially when they come into a direct contact with the perpetrators or a situation that remind them of the traumatizing events.

4.2.2 Obsessive-compulsive Personalities

Obsessive-Compulsive Personality is characterised by a pervasive preoccupation with orderliness, perfectionism, and control (with no room for flexibility) that ultimately slows or interferes with completing a task.¹²⁷ The following symptoms indicate the presence of the condition in an individual when at least four or more of them appear:

- Preoccupation with details, rules, schedules, organisation, and lists;
- Striving to work with perfection where completion becomes an issue;
- Working excessively and not for the basic family income;
- Unwillingness to abandon worthless objects, even the ones that have no value;
- Reluctance to delegate unless on condition that the assignment will be done their way;
- Being mean when spending for themselves and others because they see money as something to be saved for future disasters; and,
- Stubbornness and not willing to change a certain stand.

¹²⁶ Panic attacks and panic disorder
<https://www.mayoclinic.org/diseases-conditions/panic-attacks/symptoms-causes/syc-20376021>

¹²⁷ Obsessive-Compulsive Personality Disorder (OCPD)
<https://www.msmanuals.com/professional/psychiatric-disorders/personality-disorders/obsessive-compulsive-personality-disorder-ocpd>

4.2.3 Social Anxiety (Phobia)

A phobia is a type of anxiety that causes an individual to experience extreme, irrational fear about a situation, living creature, place, or object. When a person has a phobia, they will often shape their lives to avoid what they consider to be dangerous. The imagined threat is greater than any actual threat posed by the phobic stimulus. Social Anxiety Disorder (OCPD) is the cause of terror.¹²⁸

Social phobia, or social anxiety is a profound fear of public humiliation and being singled out or judged by others in a social situation. It is not the same as shyness and it is a great challenge in the criminal justice system.

Phobia usually identifies with the following symptoms:

- A feeling of excessive anxiety when exposed to a source;
- Feeling that the source of fear should be avoided at all costs;
- When exposed to the trigger, the functionality of the individual is compromised; and,
- Acknowledging that the fear lacks rationale, it is unreasonable, and overrated, combined with an inability to control the feelings.

Symptoms of anxiety can as well manifest in a phobic situation.

4.2.4 Dissociative identity Personality

The condition is also called split personality or multiple personality. Dissociative identity disorder (DID) is a mental health condition. People with DID have two or more separate identities. These personalities control their behaviour at different times. Each identity has its own personal history, traits, likes and dislikes. DID can lead to gaps in memory and hallucinations (believing something is real when it isn't).¹²⁹

People who have been involved in the criminal justice system and they pose a serious challenge to the duty bearers in terms of communication. The challenges emanate while engaging the individual to give real life accounts and the response may be distorted in terms of the sequence of events, clarity, perceptions that are based on illusions or delusional exaggerations, presentation of non-existent accounts and images. Other common signs and symptoms of DID can include:

- Depression and anxiety;
- Loss of memory
- Substance use disorder;
- Delusions; and,
- Suicidal thoughts and self-harm.

¹²⁸ Everything you need to know about phobias
<https://www.medicalnewstoday.com/articles/249347>

¹²⁹ Dissociative Identity Disorder (Multiple Personality Disorder)
<https://my.clevelandclinic.org/health/diseases/9792-dissociative-identity-disorder-multiple-personality-disorder>

4.2.5 Post-Traumatic Stress Disorder (PTSD)

Also known as post-traumatic disorder is a condition characterised by failure to recover after experiencing or witnessing a terrifying event.¹³⁰ The condition may last months or years, with triggers that can bring back memories of the trauma accompanied by intense emotional and physical reactions. The symptoms may include:

- Nightmares or flashbacks;
- Avoidance of situations that may rekindle the trauma;
- Heightened reactivity to stimuli; and,
- Anxiety or depressed mood.

4.2.6 Clinical Depression

Depression is a mood disorder that involves a persistent feeling of sadness and loss of interest. It is different from the mood fluctuations that people regularly experience as a part of life.¹³¹ Life incidents such as bereavement or the loss of a job, a strained relationship can be major causes. It consists of episodes where the symptoms last for at least 2 weeks. Depression can last for several weeks, months, or years. The symptoms of depression can include:

- A depressed mood;
- Reduced interest or pleasure in activities once enjoyed;
- A loss of sexual desire;
- Irregular sleeping patterns;
- Agitation, restlessness with a lot of movements;
- Slowed movement and speech;
- Feelings of guilt and lack of self-worth;
- Difficulty in making decisions;
- Recurrent thoughts of death or suicide, or an attempt at suicide;
- Fluctuations in appetite; and,
- Weight loss or gain that is not intended.

4.2.7 Postpartum Depression/Psychosis

Postpartum depression may interfere with the ability to care for a new-born baby and handling other daily tasks. Symptoms usually develop within the first few weeks after giving birth, but may begin earlier, during pregnancy, or later, up to a year after birth. The signs and symptoms include:

- Depressed mood or severe mood swings;
- Crying excessively;
- Difficulty bonding with the baby;

¹³⁰ What Is Posttraumatic Stress Disorder?
<https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd>

¹³¹ What is depression and what can I do about it?
<https://www.medicalnewstoday.com/articles/89333#definition>

- Withdrawing from family and friends;
- Inability to sleep (insomnia) or sleeping too much;
- Intense irritability and anger;
- Feelings of worthlessness, shame, guilt or inadequacy;
- Diminished ability to think clearly, concentrate or make decisions;
- Restlessness;
- Severe anxiety and panic attacks;
- Thoughts of self-harm as well as harming the baby; and,
- Recurrent thoughts of death or suicide.

4.2.8 Postpartum Psychosis

With postpartum psychosis is a rare condition that typically develops within the first week after delivery whose signs and symptoms are severe and may include:

- Confusion and disorientation;
- Obsessive thoughts about your baby;
- Hallucinations and delusions;
- Sleep disturbances;
- Excessive energy and agitation;
- Paranoia; and,
- Attempts to harm yourself or your baby.

4.2.9 Bipolar Disorder

It is also known as manic depression where the individual undergoes a mood swing of two extremes, severe depression and mania (low and high respectively). In bipolar disorder, the dramatic episodes of high and low moods do not follow a set pattern. Someone may feel the same mood state (depressed or manic) several times before switching to the opposite mood. These episodes can happen over a period of weeks, months, and sometimes even years.¹³² Bipolar Disorder is further classified into two major categories.

Bipolar I Disorder is defined by manic episodes that last at least 7 days, or by manic symptoms that are so severe that the person needs immediate hospital care. Usually, depressive episodes occur as well, typically lasting at least 2 weeks. Symptoms of the mania state include:

- Excessive happiness, hopefulness, and excitement;
- Sudden changes from being joyful to being irritable, angry, and hostility;
- Rapid speech and poor concentration;
- Distorted sleep patterns;
- Unusually high sex drive;
- Making grand and unrealistic plans;
- Showing poor judgement; and
- Drug and alcohol abuse.

¹³² Bipolar Disorder
<https://www.webmd.com/bipolar-disorder/mental-health-bipolar-disorder>

Bipolar 2 Disorder is a less severe type of bipolar disorder characterised by depressive and hypomanic episodes. It involves at least one depressive episode lasting at least two weeks and at least one hypomanic episode lasting at least four days. Hypomanic symptoms include:

- Rapid, “pressured” (uninterruptible) and loud speech;
- Increased energy, with hyperactivity and a decreased need for a persistently elevated or irritable mood;
- Flying suddenly from one idea to the next; and,
- Having exaggerated self confidence.

Symptoms of the Depressive Phase of Bipolar Disorder include:

- Feeling of sadness or hopelessness;
- Loss of interest or pleasure in most activities;
- Difficult in verbal communication;
- Difficult in personal grooming;
- Withdrawal from social interactions;
- Loss of appetite; and,
- Lack of interest in intimate relationships

The treatment includes counselling and medication, such as mood stabilisers.

4.2.10 Schizophrenia

Schizophrenia is a chronic brain disorder that affects less than one percent of the U.S. population. When schizophrenia is active, symptoms can include delusions, hallucinations, disorganised speech, trouble with thinking and lack of motivation. However, with treatment, most symptoms of schizophrenia will greatly improve and the likelihood of a recurrence can be diminished.¹³³ The signs and symptoms include:

- Hallucinations, such as hearing voices or seeing things that do not exist.
- Paranoia (excessive fear and suspicions on seeing other people or objects)
- Exaggerated or distorted perceptions, beliefs and behaviours.
- Loss or a decrease in the ability to initiate plans, speak, express emotion or find pleasure.
- Confused and disordered thinking and speech, trouble with logical thinking and sometimes bizarre behaviour.
- Abnormal movements.

¹³³ What Is Schizophrenia?
<https://www.psychiatry.org/patients-families/schizophrenia/what-is-schizophrenia>

4.3 Terms to Use or Avoid

Societal perceptions and stereotypes on persons with mental illnesses has led to their discrimination and labelling. As a result, certain labels and terms which are derogatory are used against such persons, and at the same time, have been incorporated into the legal and policy framework in Kenya. The use of the terms date back to the colonial period and beyond, when the level of sensitivity to the humanity of persons with mental illnesses was relatively low. Mental health conditions were used to depict a person as of lesser intelligence, uncivilised and deviant and terms such as unsound mind, idiot, imbecile, retarded, mentally challenged used.

The consequence of the use of these terminologies is the stigma and enhanced systemic exclusion of persons with mental illness from society. This has led to denial of access to services like reproductive health, access to inclusive education, lack of access to legal capacity and informed decision making and lack of access to justice due to societal prejudices. For the purposes of compliance with the human rights-based language, we have substituted these terms from the way they appear as medical terms. The phrase unsound mind has been retained, being a legal terminology but it has been used with an asterisk (*).

The following table shows the terms to use or avoid when referring to persons.¹³⁴

Don't Use	Use
"A vegetable" or "Veg"	Use diagnosis or "comatose," "non-responsive," or "vegetative state."
"Abuse" or "Problem"	"use" with an appropriate modifier such as "risky," "unhealthy," "excessive" or "heavy" or "Misuse."
"Addict," "Alcoholic," "User," "Drunk," "Junkie" "Former addict," "Reformed addict" and "Abuser"	"someone with a drug addiction", "recovering," "patient," "in recovery from," "a person with alcoholism" or "Person who previously used drugs".
"Afflicted by mental illness", "suffers from mental illness" or "is a victim of mental illness"	"Living with a mental illness," "a person diagnosed with a psychiatric disorder," or "a person with a mental health history."
"an intellectually disabled person"	"A person with an intellectual disability"
"Clean" and "Dirty"	"tested positive for (drug)"
"Committed suicide," "Successful" or "Completed attempt"	"Died by suicide," "lost by suicide," "killed himself," or "took her own life."
"Crazy," "Disturbed," "Unhinged," "Freak," "Nuts," "Mad," "Psycho" or "Psychotic"	"Mental illnesses" or "A mental illness"
"Disorder," "Impairment," "Abnormality" and "Special"	"Condition"
"He is bipolar."	"He is living with bipolar disorder"
"High functioning", "Low functioning" and "Severe"	"Significant" or use the medical diagnoses and describe an individual's abilities and challenges.
"Insane asylum," "mental health hospital,"	"Behavioural health hospital" or "psychiatric hospital"
"Insane," "Insanity" "Mental" and "Mentally deranged"	"Mental illnesses" or "A mental illness" except when or quote or referring to a criminal defence.
"Is a drug abuser."	"Has a substance use disorder."

¹³⁴ Mental illnesses: Terms to use. Terms to avoid

<https://bit.ly/3ARNV5w>; Words Matter: Reporting on Mental Health Conditions <https://www.psychiatry.org/newsroom/reporting-on-mental-health-conditions>; Disability Language Style Guide <https://ncdj.org/style-guide/>; Words Matter - Terms to Use and Avoid When Talking About Addiction <https://bit.ly/3AQ4e2O>; Swapping Out These Words Can Help End The Stigma Of Mental Illness <https://www.girlboss.com/read/word-choice-mental-illness-stigma>

"Mental illness" as an aggregate term	"Mental illnesses," "A mental illness," or "mental health experience."
"Mentally ill person" or "Person who is mentally ill"	"Person with a mental illness" or "Person living with a mental health issue"
"Mentally retarded," "Retard" and "Mental retardation"	"Intellectual disability" or "a person with an intellectual disability."
"Normal behaviour" and "abnormal behaviour"	"Usual behaviour" or "typical behaviour"
"Rehab" or "Detox" centre.	"Treatment centre"
"Schizophrenic," "a schizophrenic person," "psychotic," or "disturbed"	"Person living with schizophrenia," "Person experiencing psychosis, disorientation or hallucination" or "a person diagnosed with schizophrenia."
"She is psychotic."	"She experiences symptoms of psychosis" or "She has a psychotic condition."
"Shrink"	"psychiatrist," "Psychoanalyst," "Psychologist," "Psychotherapist," or "mental health professional."
"Slow learner" or "Retarded."	"learning disability" - use quotes if the diagnosis is not available.
"Special" or "Special needs"	"Functional needs" or be specific about the needs or services in question.
"Substance abuse"	"Substance use disorder"
"Suffers from mental illness."	"Has a mental health illness"
"Suffers from," "victim of," "afflicted with," or "stricken with"	Use neutral language, state the facts about the nature of the disability, avoid characterising those conditions as afflictions, and the use of "descriptions that connote pity."
"Unsuccessful suicide attempt" or "Failed attempt"	"Attempted suicide"

The following terms may be used to describe specific mental health issues.¹³⁵

Term	Meaning
Diagnosed or undiagnosed	A mental illness is diagnosed by a mental health professional such as a psychiatrist, general practitioner or psychologist. A person with a diagnosed mental illness may be receiving treatment by a mental health professional, with specific therapy and/or medication.
Unwell	This is a term used when someone with mental illness is experiencing an episode of mental illness. Just as one would describe someone as having the flu and being unwell, this is the same for a person with mental illness. For example, 'Mary has anxiety and is currently unwell.'

Episode / episodic or cyclic	<p>This describes the occurrence of a person's mental illness.</p> <p>The course of a person's mental illness may be described as being episodic or cyclic, meaning they have periods of well-ness and short periods of being unwell. If a person becomes unwell you may describe this. For example, 'Ben has diagnosed depression and is currently experiencing an episode.'</p>
Acute or chronic	<p>This describes the extent of the symptoms being experienced by a person with mental illness. Acute mental illness is characterised by significant and distressing symptoms requiring immediate treatment. This may be the person's first experience of mental illness, a repeat episode or the worsening of symptoms of an often continuing mental illness. The onset is sudden or rapid and the symptoms usually respond to treatment.</p> <p>Chronic mental illness is characterised as being long-lasting or recurrent. Just as you would describe someone as having chronic arthritis or a chronic back condition, this is the same for a person with mental illness. For example, 'Anna has chronic depression.'</p>
Treated / untreated	<p>A person with a diagnosed mental illness is being treated if they are receiving some type of treatment such as specific therapy and/or medication by a doctor. For example, 'Jane has schizophrenia which is currently being treated by her doctor.'</p>



5.0 Referral Mechanisms for Persons with Mental illness

5.1 The Ministry of Health

The Ministry of Health aims to achieve a progressive, responsive and sustainable health care system for accelerated attainment of the highest standard of health to all Kenyans. The Ministry's mandate is in regards to health policy, health regulation, national referral Health facilities, capacity building and technical assistance to Counties.¹³⁶

During the COVID-19 pandemic, the Ministry prioritised mental health and wellbeing. The Ministry adopted the Mental Health and Psychosocial Support (MHPSS) through the provision of mental health and psychological services to the general public, quarantined and hospitalised persons, healthcare workers, and high-risk vulnerable populations.¹³⁷ These included the provision of 24-hour access to tele-counselling services and psychological care via hotline numbers 1199 and 719.

In 2019, the Ministry announced the implementation of the Quality Rights Mental Health initiative which aims to transform mental health and promote human rights for people with mental conditions.¹³⁸ As part of the initiative, it targets to conduct e-training on WHO Quality Rights on mental health, human rights and recovery to at least 50,000 service providers, users, carers and other community workers in 47 counties. The Ministry also plans to conduct public awareness on the initiative to change the narrative, attitudes and practises and assessment and reports on the quality of care and observance of human rights in the National referral hospitals, 15 mental health units, 29 mental health outpatient clinics in Kenya and social care and community based mental health services. Also, to build the capacity among mental health professionals and other health workers, people with lived experience, families, carers and other supporters, NGOs and organisations of people with disabilities on how to implement a human rights and recovery approach in the mental health and social care fields in line with the Convention on the Rights of Persons with Disabilities (CRPD). Moreover, the Ministry will develop long term strategies on sustainable and effective Quality Rights implementation in Kenya, establish and train a mixed stakeholders national coordinating committee and assessment committees and monitor and evaluate improvement of mental health services following the Quality Rights e-training and assessments.

5.2 Mathare Mental Hospital

Implementation of the Presidential directive on Mental Health, and transformation of Mathare Mental Hospital into a Semi-Autonomous. Government Agencies (SAGA) or a parastatal is also underway to provide referral specialised care, training and research in mental health.¹³⁹

¹³⁶ Ministry of Health
<https://www.health.go.ke/about-us/about-the-ministry/>

¹³⁷ Government prioritize mental health in Covid-19 response Nairobi, Saturday, June 20, 2020
<https://www.health.go.ke/government-prioritize-mental-health-in-covid-19-response-nairobi-saturday-june-20-2020/>

¹³⁸ Kenya adopts Quality Rights Mental Initiative
<https://www.health.go.ke/kenya-adopts-qualityrights-mental-health-initiative/>

¹³⁹ Government prioritize mental health in Covid-19 response Nairobi, Saturday, June 20, 2020
<https://www.health.go.ke/government-prioritize-mental-health-in-covid-19-response-nairobi-saturday-june-20-2020/>

5.3 The Taskforce on Mental Health

The Task Force was established in December 2019 to assess mental health systems and mental wellbeing of Kenyans.¹⁴⁰ As part of its mandate, it would also review the mental health systems including the legal, policy and administrative environment to identify areas that may benefit from reform, for optimal delivery. It was also expected to identify plans of synergy among existing enabler legislations and policies for the effective implementation of the recommended solutions.

In its final report, the Taskforce recommended that: a Presidential declaration of mental ill health as a national public health emergency; that National and County governments establish amenities and facilities to provide recreational activities to the public; all employers to ensure healthy working spaces, and fully-fledged wellness centres in learning institutions staffed with psychologists; mental Health Literacy is incorporated in curricula at all levels of education from schools, colleges and universities, and similar programmes be designed and implemented in the community; promote mental health and wellness in families and communities through community health and wellbeing programmes.

5.4 National Council for Persons With Disabilities (NCPWD)

The National Council for Persons with Disabilities is a state corporation established by the Persons with Disabilities Act No 14 of 2003 and set up in November 2004.¹⁴¹ The mission of the Council is to promote and protect equalisation of opportunities and realisation of human rights for persons with disabilities to live decent livelihoods.

The core functions of the Council include formulating and developing measures and policies designed to achieve equal opportunities for persons with disabilities; cooperating with the government during the National Census to ensure that accurate figures of persons with disabilities are obtained; and issuing orders requiring the adjustment of buildings that are unfriendly for use by persons with disabilities. The Council is also mandated with recommending measures to prevent discrimination against persons with disabilities; encouraging and securing the rehabilitation of members of the community; registering persons with disabilities and institutions and organisations giving services to persons with disabilities; and raising public awareness on disability.

5.5 The Kenya National Commission on Human Rights (KNCHR)

The Commission is established by Article 59 of the Constitution of Kenya, 2010 and the Kenya National Commission on Human Rights Act, 2011 as an independent National Human Rights Institution.¹⁴² It is Kenya's lead agency in the promotion, protection and monitoring of human rights. The Commission is also the designated monitoring agency of the Convention on the Rights of Persons with Disabilities (CRPD).¹⁴³

¹⁴⁰ Taskforce formed to assess mental health issues of Kenyans
<https://www.health.go.ke/taskforce-formed-to-assess-mental-health-issues-of-kenyans/>

¹⁴¹ National Council for Persons With Disabilities (NCPWD),
<http://ncpwd.go.ke/index.php/about-ncpwd>

¹⁴² Kenya National Commission on Human Rights,
<https://www.knchr.org/About-Us/Establishment>

¹⁴³ Kenya National Commission on Human Rights, (2013-2019), Designation of KNCHR as Monitoring Agency,

In line with its monitoring role the Commission organises awareness raising activities on the Convention; reviews legislation, policies, and programs and judicial decisions to ensure compliance with the Convention and makes recommendations towards harmonisation with the CRPD. It is also required to undertake research, formal investigations and general inquiries on lived experiences of persons with disabilities and make recommendations for remedial action and preventive measures. Further, the KNCHR is required to provide training and information to policy makers on preparation of initial and periodic reports to the Committee on the Rights of Persons with Disabilities; follow up on implementation of the Concluding Observations of the Committee on the Rights of persons with Disabilities; and ensure the involvement and participation of persons with disabilities or their representative organisations in the monitoring. In 2015, the KNCHR submitted its report to the NHRI information to the 3rd Pre-sessional Working Group of the Committee on the Rights of Persons with Disabilities.¹⁴⁴

5.6 National Gender and Equality Commission (NGEC)

The National Gender and Equality Commission (NGEC) was established by the National Gender and Equality Commission Act, 2011 pursuant to Article 59 (4) of the Constitution of Kenya.¹⁴⁵ Its mandate is to promote gender equality and freedom from all forms of discrimination in Kenya, especially for special interest groups (which include women, youth, persons with disabilities), children, the older members of society, minorities and marginalised groups) through ensuring compliance with policies, laws and practice.

The NGEC monitors, promotes and mainstreams issues of disability and elderly in governance structures in order to achieve substantive equality and inclusion at all levels. It also addresses discrimination and human rights issues such as participation and marginalisation affecting persons with disability and older members of the society in accordance with Articles 27, 54 and 57 of the constitution and international commitments signed by Kenya.¹⁴⁶

More specifically, the Commission's roles include to coordinate state and non-state actors on disability to ensure participation and inclusion for substantive equality and inclusion; monitor the compliance in issues of disability and ageing in accordance with the laws of the country; conduct audits on the status of disability and advises the government on emerging issues; facilitate public education programmes and engagements in promoting inclusion and participation of vulnerable groups in their own programmes; and review of proposed legislation to ensure conformity and compliance to human rights principles and standards on disability and ageing as prescribed by the Constitution.

<https://www.knchr.org/Our-Work/Research-and-Compliance/Disability>

¹⁴⁴ NHRI information to the 3rd Pre-sessional Working Group of the Committee on the Rights of Persons with Disabilities
https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/Kenya_National_Commission_on_Human_Rights_Shadow_Report.pdf

¹⁴⁵ National Gender and Equality Commission (NGEC),
<https://www.ngeckenya.org/home/about>

¹⁴⁶ People Living with Disability and the Elderly,
<https://www.ngeckenya.org/SpecialInterestGroups/PersonsLivingWithDisabilities>

5.7 Commission on Administrative Justice (CAJ)

The Commission, also known as the Office of the Ombudsman, is a constitutional commission established under Article 59(4) of the Constitution of Kenya, 2010, and the Commission on Administrative Justice Act, 2011.¹⁴⁷ The Commission has the mandate of tackling maladministration in the public sector

The CAJ's functions with respect to the Access to Information Act, 2016, include investigating on its own initiative or upon complaint made regarding violation of the Act; to request for and receive reports from public entities with respect to the implementation of the Act and to assess and act on those reports with a view to assessing and evaluating the use and disclosure of information and the protection of personal data; to develop and facilitate public education awareness and develop programmes on right to access to information and right to protection of personal data.

It is also empowered to work with public entities to promote the right to access to information and work with other regulatory bodies on promotion and compliance with data protection measures in terms of legislation; to monitor state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data; to hear and determine complaints and review decisions arising from violations of the right to access to information; and to perform such other functions as the Commission may consider necessary for the promotion of access to information and promotion of data protection.

5.8 National Fund for the Disabled of Kenya (NFDK)

The National Fund for the Disabled of Kenya was established in 1981 as a Trust to aid persons with disabilities.¹⁴⁸ The mission of the Fund is to offer the best support services to persons with disabilities in Kenya through effective and efficient provision of resources, promotion of awareness and advocacy of appropriate policies.

The organisation received seed funding from the government of KES 100 million in 2009 and has funded 24 flagship projects per year in 24 counties and seeks to support over 150 institutions catering for persons with disabilities, while empowering over 3,000 individual persons with disabilities every year.¹⁴⁹ A total of 118 projects have been initiated countrywide, with 103 already commissioned while others are either completed and awaiting handover or in various stages of implementation. However, only one of the 118 projects has been ICT related, and this was for the construction of an ICT Block.¹⁵⁰ Nonetheless, the Fund partnered with the Safaricom Foundation in equipping select projects across the country for the purchase of ICT equipment, beddings, furniture and workshop tools in various facilities constructed by the Fund.¹⁵¹

¹⁴⁷ Commission on Administrative Justice (CAJ),
<https://www.ombudsman.go.ke/index.php/who-we-are/about-us>

¹⁴⁸ National Fund for the Disabled of Kenya,
<https://nfdk.or.ke/background/>

¹⁴⁹ NFDK Big Grant Programme,
<https://nfdk.or.ke/big-grant-programme/>

¹⁵⁰ NFDK Flagship Projects,
<https://nfdk.or.ke/wp-content/uploads/2020/07/nfdk-flagship-projects.pdf>

¹⁵¹ NFDK Flagship Projects,
<https://nfdk.or.ke/pwds-act/programs/flagship-projects/>

5.9 National Development Fund for Persons with Disabilities (NDFPWD)

The National Development Fund for Persons with Disabilities (NDFPWD) was established in 2003 under Section 32 of the Persons with Disabilities Act, 2003. The Fund supports persons with disabilities through the provision of assistive devices and services; educational assistance; economic empowerment; infrastructure and equipment for institutions; cash transfers; legal assistance; job placements; disability mainstreaming; and support for persons with albinism.¹⁵² The fund is managed by the National Council for Persons with Disabilities. The Fund supports the provision of assistive devices and services such as wheelchairs, crutches, hearing aids, callipers, surgical boots and prosthetic arms or legs.

5.10 The Ministry of Labour and Social Protection

The Ministry of Labour and Social Protection is the focal point for disability issues in Kenya.¹⁵³ Its stated mission is to promote decent work and empower vulnerable groups, and one of its key objectives is to coordinate the development, implementation and review of policies on vulnerable persons. Within its Disability Mainstreaming Department, it aims to establish structures and systems that ensure persons with disabilities access information and services, such as training staff on sign language, availing materials in Braille, ramps, signage, guides, accessible toilets, lifts with visual, audio and ductile features, non-slippery floor surfaces, disability friendly vehicles and walkways, and accessible parking.¹⁵⁴ As part of its work on education, it provides financial assistance to persons with disabilities from primary, secondary and vocational training schools, as well as colleges and universities.¹⁵⁵

5.11 National Police Service (NPS)

The aim of the NPS¹⁵⁶ is to provide professional and people centred police service through community partnership and upholding rule of law for a safe and secure society. According to Article 244 of the Constitution, the NPS's mandate is to: Strive for the highest standards of professionalism and discipline among its members; prevent corruption and promote and practice transparency and accountability; Comply with constitution standards of human rights and fundamental freedoms; and train staff to the highest possible standards of; competence, integrity, respect for human rights, fundamental freedoms and dignity as well as foster and promote relationships with the broader society-relation to persons with disabilities. The core functions of the Kenya Police Service¹⁵⁷ are to: maintenance of law and order, preservation of peace, protection of life and property, prevention and detection of crime, apprehension of offenders and the enforcement of all laws and regulations with which it has been charged.

¹⁵² The National Development Fund for Persons with Disabilities (NDFPWD), <http://ncpwd.go.ke/index.php/ndfpwd#:~:text=The%20National%20Development%20Fund%20for,individuals%20to%20function%20in%20society.>

¹⁵³ Ministry of Labour and Social Protection, State Department of Labour, Executive Order N° 1 of 2018, <http://labour.go.ke/vision-mission-mandate/>

¹⁵⁴ National Council for Persons with Disabilities, Mainstreaming, <http://ncpwd.go.ke/index.php/mainstreaming>

¹⁵⁵ National Council for Persons with Disabilities, Education, <http://ncpwd.go.ke/index.php/ndfpwd/37-education>

¹⁵⁶ National Police Service <https://www.nationalpolice.go.ke/pages/search.html>

¹⁵⁷ Kenya Police Service <https://www.kenyapolice.go.ke/pages/links.html>

5.12 The Office of the Director of Public Prosecutions

The core functions of the Office of the Director of Public Prosecutions¹⁵⁸ are: instituting and undertaking criminal proceedings against any person before any court of law except the court martial; taking over and continuing with any criminal proceedings commenced in any court by any person or authority with the permission of the person or authority; discontinuing at any stage before judgement is delivered of any criminal proceedings with the permission of the court; and, directing the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct.

Other functions include among others to: ensure due regard to the public interest, the interest of the administration of justice and the prevention and avoidance of abuse of legal process; undertake public prosecution of cases forwarded by all investigation agencies including the Police, Ethics and Anti-corruption Commission, Directorate of Criminal Investigations (DCI), Banking Fraud Investigations Units (BFIU), and cases taken over from private prosecutors; represent the State in all criminal cases, criminal applications and appeals; advice Government Ministries, Departments and State Corporations on matters pertaining to the application of criminal law; expound and disseminate the National Prosecution Policy (NPP) and the Code of Conduct for Prosecutors; monitor the training, appointment, and gazettement of Public Prosecutors in Statutory Corporations; address parliamentary questions relating to administration of criminal justice; address complaints raised by members of the public, watchdog bodies and other institutions; and undertake other administrative roles relating to efficient and effective administration of criminal law in the country.

5.13 National Council on the Administration of Justice

The National Council on the Administration of Justice (NCAJ)¹⁵⁹ is a statutory institution bringing together policy and decision makers from Kenya's justice sector. The institution has the mandate to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.

5.14 National Legal Aid Service (NLAS)

The National Legal Aid Service was established under section 5 of the Legal Aid Act 2016, and succeeded the National Legal Aid and Awareness Programme (NALEAP). Its mandate is to: provide legal aid services to indigent, marginalised, and vulnerable persons; establish a legal aid scheme to assist the indigent to access legal aid; promote legal literacy and legal awareness; support community legal services by funding justice advisory centres, education, and research; and promote the use of alternative dispute resolution methods that enhance access to justice.¹⁶⁰ The

¹⁵⁸ The Office of the Director of Public Prosecutions
<https://www.odpp.go.ke/>

¹⁵⁹ United Nations Office on drugs and Crime
<https://www.unodc.org/easternafrika/plead/national-council-on-the-administration-of-justice.html>

¹⁶⁰ National Legal Aid Service
<https://statelaw.go.ke/departments/national-legal-aid-service/>

Service provides legal aid services on matters such as: civil, criminal, children, and constitutional matters and matters of public interest.¹⁶¹ NLAS is governed by a board of 11 members who are representatives of State and non-state actors. It also has a Secretariat consisting of a director, technical and support staff who are mandated to provide administrative work. The service has a presence in five counties within Kenya i.e. Nairobi, Mombasa, Kisumu, Eldoret and Nakuru with intention to establish offices in all the 47 counties.

5.15 Judiciary

The Judiciary of Kenya is established as an independent arm of government and the custodian of justice under Chapter 10 of the Constitution of Kenya with a mandate to exercise judicial authority in Kenya. The Judiciary aims to “administer justice in a fair, timely, accountable and accessible manner, uphold the rule of law, advance indigenous jurisprudence and protect the constitution.” It comprises five Superior courts made up of the Supreme Court, Court of Appeal, High Court, Employment and Labour Relations Court, and the Environment and Land Court. The subordinate courts consist of the Magistrate Courts, Court Martials and Kadhi’s Courts. The Judiciary also supervises several tribunals.

Article 48 of the Constitution provides that “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” Other affiliate institutions of the Judiciary include: the Judicial Services Commission (JSC), Kenya Law (National Council for Law Reporting (NCLR)), and the Kenya Judicial Academy (formerly the Judiciary Training Institute).¹⁶² In 2019, the Judiciary established the National Committee on Criminal Justice Reforms (NCCJR) to spearhead comprehensive review and reform of Kenya’s Criminal Justice system in the Country. The committee is expected to review the criminal justice system in Kenya and make legal, policy, institutional, operational, and administrative recommendations necessary for better functioning of the criminal justice sub-sector.¹⁶³

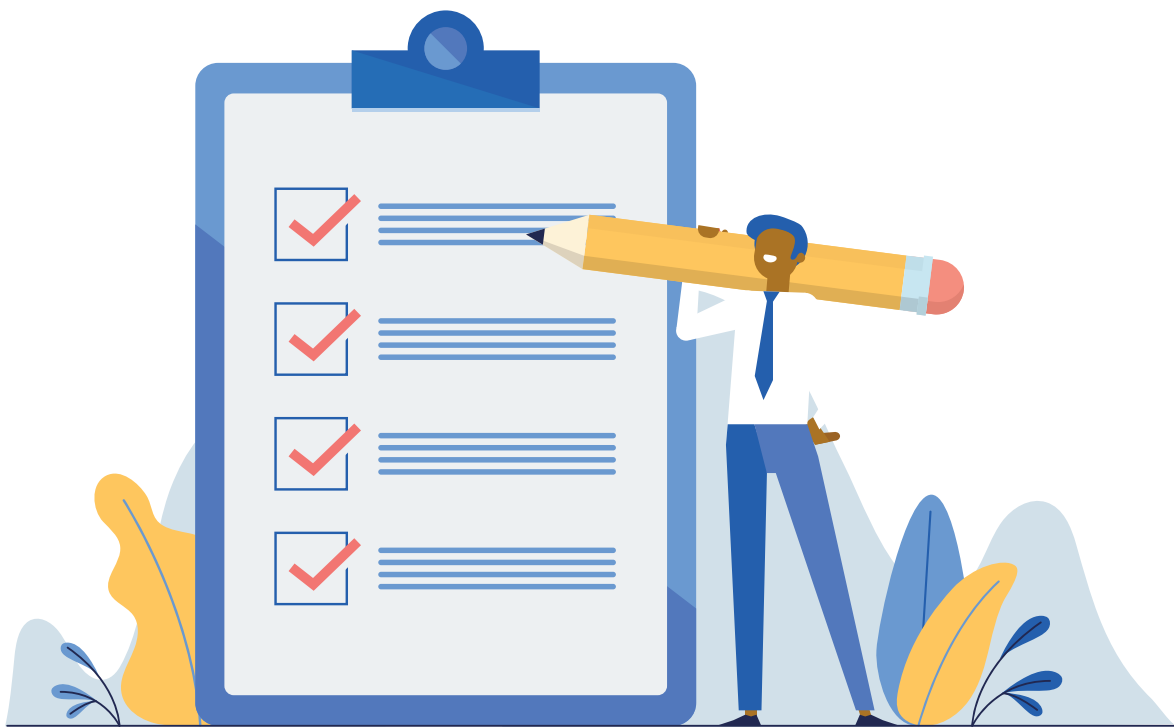
5.16 Approaches

The first point of engagement with the criminal justice system is either the police station or the chief/sub-chief’s office. If a victim or a perpetrator has a mental disability, and the parties are not able to communicate, the case may be dismissed. However, the victim or the perpetrators are sometimes referred to a mental health institution for Mental Health assessment. In most cases, the treatment procedure is not voluntary and the stakeholders rely on family members or a person close to the accused for information. The Magistrate or a Judge may order for a mental assessment test which is conducted by a government psychiatrist. It is worth noting that the Judiciary is yet to put in place appropriate guidelines for such cases.

¹⁶¹ Provision of Legal Aid Services
<https://statelaw.go.ke/services-to-the-public/receipt-of-legal-advice/>

¹⁶² Kenya Judicial Academy
<https://www.judiciary.go.ke/chief-justice-martha-koome-launches-the-kenya-judiciary-academy-kja/>

¹⁶³ National Committee on Criminal Justice Reforms (NCCJR)
<https://www.judiciary.go.ke/about-us/our-programmes/national-committee-on-criminal-justice-reforms/>



6.0 Recommendations

6.1 National Council on the Administration of Justice (NCAJ)

- Promote public awareness on mental health and mental conditions within the justice system.
- Improve information sharing, collaboration and coordination of stakeholders in the criminal justice system to ensure effective responses to mental health issues within the justice system.
- Mobilise sufficient resources to support initiatives.
- Provide information proactively and communicate about mental health care support and referral mechanisms in all criminal justice sector institutions' websites, notice boards, and social media handles and radio in a simple, clear, timely and accessible manner on an equal basis with others.
- Develop a clear complaints handling and develop referral mechanism guidelines for persons with mental health conditions to be implemented by all the criminal justice system actors, coordinated at the court user committee level.
- Build the capacity and raise awareness to staff within institutions about mental health to enable staff recognise mental health conditions, communicate with those affected, and otherwise respect and promote rights of persons with mental health conditions.
- Develop comprehensive mental health manuals, policies and guidelines for staff for criminal justice sector institutions, and make them widely available to all staff engaged in the administration of justice.
- Carry out regular research to monitor and create understanding on the state of mental health within the criminal justice sector institutions.
- Collect disaggregated data by disability, age, gender, location, ethnicity at all stages of the criminal justice system including on the number of persons who cannot take plea or stand trial by reason of their mental condition and those committed to custody in prison and other mental health facilities.
- Provide psychosocial support and care for staff and persons with mental health needs.
- Ensure that at least every police, prison, prosecution, court or probation station and court user committee has a representative trained on mental health.
- Collaborate with stakeholders including civil society, philanthropic organisations, medical fraternity and the private sector to promote mental health awareness within the criminal justice system.
- Ensure the representation of persons with mental conditions in court users committees.
- Provide intermediaries whenever needed to enable clear communication in courts and with law enforcement agencies to ensure safe, fair and effective engagement and the opportunity to fully participate in legal proceedings.

6.2 Judiciary

- The Chief Justice should make the rules under section 55 of the Mental health Act to provide for any matters relating to the procedure of the court, or of a magistrate under the Act. The Chief Justice should make the rules under article 50(7) of the Constitution to provide for how intermediaries may be used to facilitate the communication between the accused or the complainants with the court. Victims with mental disabilities should also be offered protection during trial to avoid relapse.

- Recognition and provision of support for persons with mental conditions during the proceedings which may require rearrangement of the sitting and creating an accommodative environment.
- Provision psychosocial support, including referral of any court users accused or victims with mental health conditions.
- Provide for procedural accommodation for persons with disabilities in court proceedings e.g. creating a friendly environment to reduce anxiety levels or confrontation of the victim or witness with the accused, enhance communication, and ensure stress management.
- Prioritisation and fast-tracking of cases of persons with mental conditions.
- Provision of reasonable accommodation during trial to ensure effective access to justice and guarantee their equal participation in all legal proceedings.
- Collect data and reporting on the cases involving persons with mental conditions.
- Safeguarding the rights of persons with mental conditions including by extending time limits for responses, ensuring privacy of proceedings where necessary, ensuring availability of intermediaries, ensuring access to information on cases etc.

6.3 Parliament

- Review all relevant laws to ensure the rights of persons with mental conditions are upheld and protected within the criminal justice system. These include guaranteeing their right to legal capacity, participation in adjudicative processes, prohibition of their detention, their referral for treatment, deletion of derogatory terms, procedural accommodations to promote access to justice, elimination of restrictions and barriers to accessing justice, ensuring effective remedies and their enforcement, among others.
- Repeal or amend all laws, regulations, policies, guidelines and practises that directly or indirectly restrict the legal capacity of persons with disabilities, including those that: allow for substituted decision-making and those that require that a person be “of sound mind” to take any action, thereby excluding persons with disabilities from access to justice; establish and apply doctrines of “unfitness to stand trial” and “incapacity to plead”, which prevent persons from participating in the legal process based on their capacity; authorise or empower medical professionals to be the sole preferred “experts” in determining or opining on a person’s capacity to make decisions, testify or for any other purpose; restrict or exclude witnesses from testifying based on assessments of their capacity to testify; prevent persons from initiating and pursuing legal claims; and subject accused persons with mental conditions to detention in prisons, mental health facilities for periods at “president’s pleasure” based on the perceived danger or need for care.
- Ensure laws have procedures to ensure that persons who have been declared to be without legal capacity have the right to appeal, seek the restoration of their legal capacity and obtain legal assistance in doing so.
- Enact laws, regulations, policies, guidelines that create an actionable and enforceable right to receive individually determined procedural accommodations including the support necessary to enable persons with disabilities to participate effectively in all proceedings in any court or tribunal.

- Review all policies and laws that use derogatory terms against persons living with mental conditions such as “idiot”, “imbecile” etc.
- Provide sufficient budgetary allocations for criminal justice sector institutions to address the needs of persons with mental conditions.
- Provide sufficient budgetary allocations to enhance the capacity of Mathare Hospital and other hospitals and facilities to cater for the needs of persons with mental health conditions.
- Amend the Persons with Disability Act to require the police, prison and court officials to obtain training on disability rights and issues.

6.4 National Government

- Implement the recommendations of the Taskforce on Mental Health.
- Pursue the legal reform necessary to ensure the rights of persons with mental conditions are upheld and protected within the criminal justice system. These include guaranteeing their right to legal capacity, participation in adjudicative processes, prohibition of their detention, their referral for treatment, deletion of derogatory terms, procedural accommodations to promote access to justice, elimination of restrictions and barriers to accessing justice, ensuring effective remedies and their enforcement, among others.
- Implement programmes to sensitise the public and raise awareness on mental health, including building the capacity of staff and other justice sector stakeholders.
- Develop guidelines and toolkits to promote access to justice for persons with mental conditions within the justice system.
- Incorporate training modules on mental health in the curriculums of judiciary, prisons, police, probation, prosecution staff at their respective training institutions, and hold regular training sessions as part of continuous professional development.
- Expand the services of the National Legal Aid Service to ensure the provisions of legal aid, advice and representation for persons with mental conditions across the country.

6.5 Civil Society

- Document violations of rights of people with mental health conditions and the challenges they face within the criminal justice system.
- Report on the violations of the rights of persons with mental conditions to treaty body monitoring institutions such as the African Commission on human and Peoples’ Rights and under the Universal Periodic Review (UPR) Process.
- Promote public awareness on mental health conditions, how persons affected to realise their rights through their justice system, and on the referral mechanism available.
- Provide legal aid and advice to persons with mental health conditions within the criminal justice system.
- Conduct evidence-based research to create understanding on the situation of mental health within the criminal justice system.
- Conduct strategic public interest litigation cases to challenge retrogressive laws, policies and practises that violate the rights of persons living with mental conditions.

6.6 Kenya Prison Service and Kenya Police Service

- Provide comprehensive mental health services to be offered within the detention facilities.
- Improve transport systems to different facilities.
- Provide comprehensive medical care within detention and prison facilities, and ensure that health-care and psychosocial support are available at the request of persons with mental conditions based on their free and informed consent.
- Ensure routine checks on all the detainees and prisoners on the status of their mental health.
- Ensure access to criminal complaints mechanisms at the police stations.
- Provide reasonable accommodation to persons with mental conditions.
- Provide for procedural accommodations during arrest and detention, including such adjustments and communication support, use of de-escalation techniques, and the safeguard of all due process guarantees to prevent violence and abuse.
- Provide legal assistance to persons with mental conditions who have experienced violence, including victim support, and assistance in reporting crimes, making complaints and initiating legal proceedings on equal basis with others.

6.7 Probation and Aftercare services

- Provide psychosocial support in partnership with other stakeholders including occupational therapy.
- Implement re-integration initiatives based on social-cultural context.
- Conduct community psychoeducation or sensitization programs on reintegration of offenders.
- Incorporate family members in the aftercare programs.
- Review community service orders to provide for convicts with mental conditions comprehensively.
- Provide holistic health service provision.

6.8 Director of Public Prosecutions

- Ensure the prosecution of all those who abuse or mistreat persons with mental conditions and where appropriate, on convicted are subjected to effective sanctions.
- Provide procedural and reasonable accommodation to persons with mental conditions.



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ICJ Kenya House, Off Silanga Road,
Karen, P.O. Box 59743 – 00200

Email: info@icj-kenya.org
+254-020-2084836/8
+254-720-491549
+254-733-491549