

REPUBLIC OF KENYA



THE JUDICIARY

**REPORT OF THE JUDICIARY
TECHNICAL COMMITTEE
DEVELOPING THE
CRIMINAL PROCEDURE
BENCH BOOK**

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JUDICIARY TECHNICAL COMMITTEE DEVELOPING
THE CRIMINAL PROCEDURE BENCH BOOK**

FEBRUARY 2018



**The Hon. Mr. Justice David K. Maraga, EGH
Chief Justice/President Supreme Court of Kenya,
Supreme Court Building,
Chief Justice's Chambers,
NAIROBI**

Your Lordship,

**RE: TRANSMITTAL LETTER OF THE REPORT AND THE
JUDICIARY CRIMINAL PROCEDURE BENCH BOOK**

Whereas His Lordship the former Chief Justice, Hon. Mr. Justice (Dr.) Willy Mutunga, appointed the Judiciary Technical Committee to Develop a Criminal Procedure Bench Book vide Gazette Notice Number 8504 of 10th November, 2015,

And being mindful of the terms of reference for the Judiciary Technical Committee namely to:

- a) Update and align the 2004 Criminal Procedure Bench Book to the Constitution of Kenya 2010 as well as other statutes enacted post 2004.
- b) Provide a quick and comprehensive guide for judges and magistrates dealing with criminal proceedings.
- c) Set out the principles and values that underpin criminal proceedings hence grounding judicial decisions within these principles and values.
- d) Promote consistency, uniformity and predictability in criminal proceedings.
- e) Provide key references for judges and magistrates who wish to conduct further research.
- f) Guide other stakeholders involved in criminal proceedings.

And grateful and humbled by the honor bestowed upon us through the appointment to the Technical Committee, and having fulfilled our mandate in accordance with the terms of reference,



We, the members of the Technical Committee Developing the Judiciary Criminal Procedure Bench Book, are delighted to hereby submit to your Lordship, the Judiciary Criminal Procedure Bench Book and our final report.

Hon. Lady Justice Hannah Okwengu, EBS
Chairperson

Hon. Mr. Justice William Ouko
Vice-chairperson

Hon. Mr. Justice Kathurima M'Inoti
Member

Hon. Mr. Justice Edward Muriithi
Member

Hon. Mr. Justice (Prof) Joel Ngugi
Member

Hon. Felix Kombo
Member

Hon. Denis Mikoyan
Member

Mrs. Jill Ghai
Member



FOREWORD



The Judiciary is developing robust, indigenous, patriotic and progressive jurisprudence that will give the country direction in dealing with historical perceptions and experiences of marginalization and exclusion; that will be aligned to international best practice; enable the Judiciary to continue to play a constructive role in the consolidation of democracy; and will contribute to the realization of a free, prosperous and united Kenya where human rights and freedoms are enjoyed by everyone without discrimination. By providing information and guidance in criminal proceedings to all judges and magistrates, the Criminal Procedure Bench Book will undoubtedly improve the substantive quality of jurisprudence in criminal matters as well as the expediency and efficiency of the courts in handling these matters.

During the development of the Bench Book, the Technical Committee identified issues regarding criminal procedure that require administrative and/or legislative action and reforms. These findings form the bulk of the Report of the Technical Committee and are of invaluable utility to the Judiciary and other actors in the criminal justice system as we at the Judiciary seek to enhance access to justice through our criminal justice processes. As the Technical Committee that developed the Criminal Procedure Bench Book reported to me, I am acutely aware of the efforts that went in to the development of this Bench Book and I thank the Chair, the Honourable Lady Justice Hannah Okwengu, JA and the Technical Committee for their steadfast commitment and dedication to this important task.

Since the promulgation of the Constitution of Kenya 2010, the Judiciary has been undergoing a significant process of transformation. In regard to criminal justice, notable accomplishments in this regard include the development of guidelines on Bail and Bond, on Sentencing, on Active Case Management of Criminal Cases in Magistrate Courts and High Courts, and on Traffic Offences; the appointment of task forces to implement these guidelines and policies such as the Task Force on Criminal Justice Reform and the Bail and Bond Implementation Committee; the formation of criminal court users committees; to mention a few. These interventions, coupled with other initiatives to enhance access to justice generally such as Judiciary Service Weeks, the construction and establishment of new courts, and the hiring of additional judges, judicial officers and judiciary staff, have contributed towards the significant reforms and improvement in the dispensation of justice in criminal matters.



As the Chair of the Implementation and Monitoring Committee (IMC) of the Honourable the Chief Justice's strategic blueprint for the Judiciary entitled, Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021, I undertake to prioritise the implementation of these recommendations for legislative and policy reform. Apace with the institution's ambitious continuing transformation agenda and the enhancement of training and continuous professional development on criminal procedure through the Judiciary Training Institute, the implementation of the legislative, administrative and policy recommendations contained in this Report shall go a long way to enhancing access to justice in our criminal justice process for the benefit of all persons in Kenya.

Hon. Lady Justice Philomena Mbete Mwilu, MGH
Deputy Chief Justice/Vice President Supreme Court of Kenya



ACKNOWLEDGMENTS



The Criminal Procedure Bench Book was prepared by a Technical Committee, which was appointed by the former Chief Justice of the Republic of Kenya, Hon. Mr. Justice (Dr.) Willy Mutunga. The Technical Committee was tasked to develop a Criminal Procedure Bench Book for the Judiciary aimed at: providing judicial officers with a thorough and comprehensive guide; reference resource on all aspects of criminal procedure; and substantively and procedurally improving the dispensation of justice through the criminal trial process.

The opportunity to participate in the development of the Criminal Procedure Bench Book for the Judiciary was indeed a great honour. I wish to express my deep gratitude to the Hon. Mr Justice

(Dr) Willy Mutunga and Hon. Mr Justice David Kenani Maraga, the current Chief Justice, for entrusting the Committee with such an important task, and for the support extended to the Technical Committee during the process. I salute the former Deputy Chief Justice Hon. Lady Justice Kalpana Rawal who was instrumental in putting the Technical Committee together and launching the process. My sincere appreciation and gratitude also extends to the current Deputy Chief Justice Hon. Lady Justice Philomena Mbete Mwilu, for her invaluable guidance, and Hon. Anne Amadi Chief Registrar of the Judiciary for her support.

I wish to thank the members of the Technical Committee, Hon. Mr Justice William Ouko, the Vice chairperson; Hon. Mr. Justice Kathurima M'Inoti, Hon. Mr. Justice Edward Muriithi, Hon. Mr. Justice (Prof) Joel Ngugi, Hon. Felix Kombo, Hon. Denis Mikoyan, Mrs. Jill Ghai, Mr. Mokaya Orina and Mr. Njagi Nderitu. Their commitment and sacrifice have seen the successful completion of the Technical Committee's mandate. I give glory and honour to the Almighty God for giving the members of the Technical Committee good health and keeping them focused on accomplishing the task before them.

The Criminal Procedure Bench Book is a document that judges and magistrate will be interacting with almost on a daily basis. Stakeholder engagement during the development of the Bench Book was therefore crucial. I am grateful to the magistrates and judges who actively participated in the bench focused group discussions, and the Head of stations who organised for external stakeholder engagement, through the court user committees and Prisons Department. I sincerely appreciate the contribution of the members of the various court user committees, Criminal Investigation Department, Internal Police Oversight Authority, Witness Protection Agency, and Prisons Department, who engaged with



the Technical Committee. To the members of the Judiciary, Attorney General's office, Office of the Director of Public Prosecutions, Law Society of Kenya, Non Governmental organisations and other Civil Society groups who participated in the validation exercise, thank you for your erudite contribution that helped refine the Bench Book.

My immense gratitude goes to Dr Sarah Kinyanjui, the indefatigable lead consultant, and Maureen Naserian Sitelu, the able research consultant, whose commitment and dedication to providing the much-needed technical and drafting support to the Technical Committee was outstanding. I thank Dr. Masha Baraza, the coordinator for the Technical Committee, for providing excellent logistical support. The contribution of the following law lecturers and students is also appreciated: Michael Okello, Elizabeth Odhiambo, Dr. Juliet Okoth, Henry Kariuki, Brenda Mwenesi, Natalie Akwanalo, Janet Njeri and Daniel Mwambi.

I wish to thank Hon. Justice Kathurima M'Inoti and Hon. Justice William Ouko who developed the 2004 Bench Book for Magistrates in Criminal Proceedings, a useful reference Book, which provided a starting point for the Technical Committee.

This exercise would not have been possible without the support of our partners. I extend my special gratitude to Katiba Institute, Commonwealth Human Rights Initiative, GIZ Kenya, International Development Law Organization (IDLO), United Nations Development Program (UNDP), Judiciary Performance Improvement Project (JPIP), and National Council for Administration of Justice (NCAJ), for their financial and technical support.

**Hon. Lady Justice Hannah Okwengu, EBS
Chairperson of the Technical Committee**



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1. INTRODUCTION

1.1 The Constitution

The Constitution of Kenya, promulgated in August 2010, birthed notable reforms in the entire justice system. The Constitution has contributed to the realization of long overdue reforms in the criminal justice system. The impact of this different constitutional dispensation on the criminal justice system is evident in various ways.

First, the Constitution places emphasis on accountability, transparency and impartiality of State Officers when executing their duties. Resonating with this, the Judiciary's transformation agenda includes accountability, improvement and transparency as part of its goals. Recent policy directions for judges and magistrates in criminal matters such as the Bail and Bond Policy Guidelines and the Sentencing Policy Guidelines are informed by these goals. The policy directions seek to provide a framework within which judges and magistrates adhere to these constitutional principles.

Second, the elaborate regime for a fair trial guaranteed by the Constitution has impacted the conduct of criminal trials. The robust jurisprudence from the courts upholding the right to a fair trial reflects a criminal justice system that is reforming. Third, the recognition of victims in the Constitution, which led to the enactment of the Victim Protection Act, heralds a shift from a largely retributive system to one that embraces restorative justice.¹ These reforms, amongst others, operate among remnants of the old regime in terms of the legislative framework and practices. For example, there are statutory provisions that are clearly unconstitutional, or that have even been declared by a court to be so, but have not been subsequently repealed or amended. There is therefore need to review the laws governing the criminal justice system with a view to enhancing compliance with the requirements of the letter and spirit of the Constitution.

1.2 Appointment of the Judiciary Technical Committee

It was against this backdrop that retired Chief Justice Hon. Mr. Justice (Dr.) Willy Mutunga appointed a Judiciary Technical Committee to develop a Criminal Procedure Bench Book. The existing Bench Book for Magistrates was published in 2004. There was therefore need to update it and develop a comprehensive Bench Book reflecting the reforms and the evolving jurisprudence after 2010.

¹ Art. 50(9), Constitution of Kenya.



Through Gazette Notices No. 8504 of 2015, No. 4424 of 2016 and No. 4628 of 2016 the following members were appointed to serve in the Technical Committee developing the Bench Book:

1. Lady Justice Hannah Okwengu- Judiciary (Chairperson)
2. Hon. Mr. Justice William Ouko - Judiciary (Vice Chairperson)
3. Hon. Mr. Justice Kathurima M'Inoti- Judiciary
4. Hon. Mr. Justice (Prof.) Joel Ngugi- Judiciary
5. Hon. Mr. Justice Edward Muriithi- Judiciary
6. Hon. Dennis Mikoyan- Judiciary
7. Hon. Felix Kombo- Judiciary
8. Ms. Jill Ghai - Katiba Institute
9. Mr. Njagi Nderitu - Representative of the Office of Director of Public Prosecutions²
10. Mr. Nabil Mokaya Orina - Representative of the Law Society of Kenya ³
11. Chief Inspector Reuben Onchoka - Representative of the Kenya Police Service⁴
12. Dr. Masha Baraza - Coordinator

The terms of reference for the Committee were to “develop a Criminal Procedure Bench Book for the Judiciary of Kenya that will provide judicial officers with a thorough and comprehensive guide and reference resource on all aspects of criminal procedure”.

Pursuant to the said Gazette Notice, the Committee appointed Dr. Sarah Kinyanjui as lead consultant and Ms. Naserian Sitelu as research consultant, to provide technical support.

1.3 Structure of the Report

The report is divided into four parts. Part one presents the background that informed the development of the Bench Book, and the framework within which it was developed. The second part sets out the methodology employed by the Committee in executing its mandate. Part three summarises the issues identified by various stakeholders as requiring to be dealt with in the Bench Book. The fourth part of the Report contains the Committee’s recommendations.

² Mr Njagi relinquished his position on 30th April 2017 upon leaving the office of the DPP.

³ Mr. Orina left for further studies towards the end of the exercise hence did not sign the report.

⁴ Due to exigencies of duty Chief Inspector Onchoka was not able to participate effectively but arranged for members of the committee to meet with police investigators (DCIOS) from different parts of the country.

2. METHODOLOGY

2.1 Literature Review

The 2004 Bench Book provided the starting point for developing the 2018 Bench Book. The former Bench Book was reviewed in light of the 2010 Constitution and subsequent changes in the law. The Committee further referred to relevant statutes to determine the prevailing legal position on matters that were to be addressed in the Bench Book. An analysis of judicial decisions was conducted for two purposes. The first was to identify recurring issues raised during criminal trials, thus signalling areas in which the Bench Book ought to provide guidance. The second was to determine the correct legal position on matters of interest.

Reference was also made to regional and international legal instruments, which provided insights to the matters at hand. A comparative analysis of Bench Books from different jurisdictions was also undertaken to guide the Committee in deciding on an appropriate format and style for this jurisdiction.

2.2 Expert and Stakeholder Consultation

It was not lost on the Committee that the main users of the Bench Book were best placed to guide on their needs in relation to the book. Stakeholders were therefore engaged at different levels, having conducted the desk research, questionnaires were drafted and circulated to all the stations with the intention of identifying, first, the need for a Bench Book, and second, the problematic areas for inclusion in the Bench Book. Magistrates, judges and members of court users' committees filled in customised questionnaires.

Individual interviews were also carried out with key informants. The key informants varied from station to station but generally included the presiding judges, or heads of station, magistrates, prosecutors and defence counsel. Other key informants included representatives from key agencies such as the Witness Protection Agency, non-governmental organisations and selected authors of criminal procedure text books in Kenya. The NGOs key informants selected represented diverse interest groups such as children, women, prisoners, and persons with disabilities. A special focus group discussion was held with children at the Nakuru remand home.

Focus group discussions were held in different stations with participants from the court



users' committees, and key agencies such as the Law Society of Kenya and the National Police Service. The focus group discussions were held in twenty four stations namely Milimani, Makadara, Kibera, Thika, Machakos, Nyeri, Kerugoya, Nyahururu, Embu, Meru, Kisumu, Kisii, Kakamega, Bungoma, Eldoret, Iten, Eldama Ravine, Molo, Nakuru, Garissa, Kitui, Makueni, Malindi and Mombasa. The sampling ensured that the different regions of the country were represented. The main purpose of the focus group discussions was to identify matters in criminal proceedings on which guidance was required. They were also designed to provide an opportunity for participants to share good practices in the management of criminal proceedings.

A validation workshop, with participants from the Judiciary and different agencies in the criminal justice system, was held for the Committee to receive feedback on the draft Bench Book.

Members of the Technical Committee then held meetings and retreats, during which the results of the literature review and stakeholder consultations were discussed, and contents of the Bench Book developed.



3. STAKEHOLDERS' VIEWS ON THE CONTENTS OF THE BENCH BOOK

The interviews and stakeholder engagements revealed key matters in the criminal trial process that need to be addressed. This section summarises the matters that were commonly identified by stakeholders as requiring particular clarification in the proposed Bench Book. Inclusion of a concern in this section does not necessarily indicate that the Committee was of the view that the concern was justified nor that, if justified, it was something that could be appropriately addressed in the Bench Book.

3.1 The Twenty-four Hour Rule

The requirement in Article 49(1)(f) of the Constitution to present a suspect in court within twenty four hours was flagged as particularly problematic to implement especially on the part of police officers. They indicated that the circumstances in which they operate pose challenges which hinder their compliance with the twenty-four hour rule. For example, an arresting officer who is stationed in a remote police post has to contend with a myriad of administrative hurdles to present the suspect within the stipulated period. They held the view that the courts must take cognisance of the unique circumstances of each case.

Another issue raised by the stakeholders relates to applications made to the court to extend the detention of the accused persons when the police are unable to comply with the 24-Hour Rule. Concern was expressed over the legality of, or the justification for, some orders extending detention. It was therefore proposed that the Bench Book provide guidance on situations in which detention may be extended.

The Bench Book discusses the operation of the twenty-four hour rule within the context of the rights of an accused person. It sets out the legal position on the extension of detention beyond the required twenty four-hours and provides guidance on the remedies available when this right is infringed.

3.2 Bail

Stakeholders pointed out that there were stark discrepancies in the imposition of bail conditions by different courts; that there was lack of uniformity in procedures for processing and releasing accused persons who had posted bail; that the threshold for 'compelling reasons' to deny bail remains unclear to stakeholders; and that there is need for guidance on the process of reviewing bail terms.



The courts' insistence on log books, pay slips or land title documents as the only acceptable documents for sureties to produce was an issue of concern to stakeholders, who also complained that the process of verifying these documents is lengthy, occasioning undue delay.

Stakeholders raised concern that the granting of bail for those charged with defilement as this often necessitates the holding of victims in protective custody. The victims' lives are thereby interfered with by being held in remand homes, secluded from their families and away from school. They therefore proposed that the Bench Book should guide courts to remain mindful of the length of time victims are held in protective custody, and to give priority to such cases to ensure that they are concluded expeditiously.

In response to these concerns, the Bench Book discusses the right to bail, considerations for release on bail or bond pending trial, and pending appeal, bail considerations with respect to specific categories of individuals such as children, as well as bail approval procedures.

3.3 Victim Participation

Stakeholders expressed the need for guidance on the scope and modalities of participation of victims in the criminal trial process. In particular, they suggested that the Bench Book should clarify the extent of participation of victims in bail applications, communication with victims to keep them informed of the progress of the trial, and the extent of participation of advocates representing victims. They also expressed the need for guidance on the weight to be attached to victim impact statements.

As the role of the victim spans the entire criminal trial process, the Bench Book discusses the role of victims at different stages such as in plea bargaining, bail applications, hearing and sentencing. It also highlights assistance to be offered to victims such as provision of interpreters or allowing the use of intermediaries.

3.4 Legal Representation

Stakeholders drew attention to the need for guidance on the nature of cases where legal aid should be provided; the unpacking of the concept of "substantial injustice" used in the Constitution and the Legal Aid Act; and the need for guidance on how the court should proceed where the accused rejects the assistance of a state-supplied lawyer.



Views gathered from stakeholders revealed systemic challenges in the pro bono lawyers' scheme, which are beyond the scope of the Bench Book but have been recommended in this report as an area for reform. The Bench Book discusses issues relating to the right of an accused to an advocate.

3.5 Intermediaries

Stakeholders highlighted the varied practices in the use of intermediaries, and noted that when and how intermediaries may be used remain unclear. Questions were raised as to whether the court can require the involvement of intermediary on its own motion. Stakeholders also noted the need for guidance on the determination of whether a witness is vulnerable.

The Bench Book sets out the role of intermediaries in the criminal trial process and the use of intermediaries in the case of vulnerable witnesses such as children and persons with disability.

3.6 Vulnerable Persons

During the stakeholder engagements, it was highlighted that there is inadequate guidance on the determination of when a person is vulnerable and how they are to be treated.

The Bench Book provides guidance on these matters within the context of different stages in the criminal trial process. In particular, matters related to the following groups of vulnerable persons were discussed during the stakeholder engagements and are given specific attention in the Bench Book.

3.6.1 Victims of Sexual Offences

Stakeholders expressed concern over the treatment of victims of sexual offences and issues impacting on the prosecution of cases involving sexual offences such as evidentiary matters.

The Bench Book deals with these matters within the context of different stages of the criminal trial process.



3.6.2 Children

Stakeholders made various observations concerning children found to be in conflict with the law. First, they pointed out that children in need of care and protection are often not distinguished from children in conflict with the law. The lack of adequate facilities compounds this problem and results in situations where children in need of care and protection are held in remand homes together with children in conflict with the law.

Second, children matters are often not expedited leading to long term absences from school. Third, they pointed out the need for effective diversion procedures of children matters from the criminal justice system. It was also noted that the system does not offer alternatives on how to handle children acting on the instruction of adults. A good example of this is the sale of illicit brew by children on the instruction of their parents.

Conflicting views emerged with regard to examination of child witnesses. It was noted that there is need for clarity on who is considered a ‘child of tender years’ for purposes of determining whether a *voir dire* is needed. There is also need for guidance on conducting the *voir dire*.

A major concern was raised over the prosecution of boys and young male adults (slightly above eighteen) who are alleged to have engaged in ‘consensual’ sex with girls within the same age bracket. Stakeholders challenged the discriminatory implementation of the law which targeted the young males for prosecution.

Finally, stakeholders noted that age assessment presents challenges. For instance, there were conflicting reports from doctors, parents and the child in many cases. Further, many stations do not have access to a qualified doctor to provide an age assessment report. The stakeholders therefore recommended the inclusion of a section in the Bench Book that would provide guidance on matters relating to children.

The Bench Book has mainstreamed matters related to children throughout the trial process, thus discussing them within the context of different stages in the criminal trial process.

3.6.3 Persons with Disabilities

Stakeholders highlighted the inadequacy of the criminal justice system in addressing the needs of persons with disabilities. These range from infrastructural requirements to support mechanisms to facilitate meaningful participation during the criminal trial process.



The Bench Book guides on the concept of reasonable accommodation as well as related matters such as the use of intermediaries and interpreters.

This report recommends an assessment of the extent to which all criminal justice agencies are accessible to persons with disabilities and their level of compliance with the legal requirements on the treatment of such persons.

3.6.4 Accused Persons with Mental Disabilities

With regard to persons with disabilities, the stakeholders raised specific concerns over inconsistencies in procedures adopted by courts in relation to accused persons with mental disabilities, which sometimes result in indeterminate periods of detention. They highlighted the need for guidance and sensitization on how to deal with mental health issues.

Stakeholders observed that police stations, courts and prisons are ill equipped to deal with persons with mental disability. They recommended the provision of suitable infrastructure for accommodating persons with mental disabilities and training of personnel.

The Bench Book covers procedures that relate to persons with mental disabilities and reiterates their right to be treated with dignity. This report also recommends appropriate amendment of the law and guidance in this area.

3.7 Unrepresented Accused Persons

Stakeholders noted that there is need for guidance on the appropriate scope of courts assistance to unrepresented persons during the trial process.

The duty of the court in such cases has been set out in the Bench Book.



3.8 Plea Bargaining

During the stakeholder engagements it was noted that, in spite of its potential to promote expeditious processing of criminal matters and raising conviction rates, plea-bargaining remains underutilised. One reason attributed to this was that prosecution officers were especially cautious because of the fear of allegations of corruption. Stakeholders therefore underscored the need for guidelines on plea-bargaining.

In line with the submissions made by stakeholders, the Bench Book discusses pertinent issues in plea bargaining such as the involvement of the victim in the process, offences in which plea agreements cannot be pursued, the contents of the court record when an agreement is reached and the limits on appeal when a plea agreement is entered.

3.9 Social Enquiry Reports

In view of the courts' reliance on social enquiry reports, stakeholders held discussions as to whether probation officers should be examined on oath to determine the authenticity of the reports. It was similarly observed that because pre-bail reports are not anchored in law, some courts rely on them while others do not.

Stakeholders raised concerns over the practice of probation officers preparing reports on the strength of information gathered through telephone conversations alone. Some stakeholders, were of the opinion that this mode of gathering information was effective while others cast doubt on the reliability of such information. It was noted that this was occasioned by lack of resources to cater for all the demands within the Department of Probation and After Care Services.

This report recommends further research with respect to the use of pre-bail reports. It also recommends adequate budgetary provision to ensure authenticity and reliability of social enquiry reports generally and that probation officers be held responsible for such reports.

3.10 Electronic Evidence

The stakeholders pointed out that the practice in admission of electronic evidence is still developing and that there is need for guidance. The Bench Book provides guidance on this matter.



3.11 Stay of Proceedings

Questions were raised on the appropriateness of superior courts indefinitely staying proceedings of lower courts. Stakeholders were of the view that such a stay order is an interference with the authority of the trial court and encourages litigants to forum shop. Stakeholders recommended that such stay orders should be discouraged and that, at a minimum, the order should be only for a limited period.

3.12 Court Record

The stakeholders emphasised that the court record must reflect an accurate transcription of what transpired in court. Given the courts' workload and the objective to expedite proceedings, stakeholders proposed the recognition of a set of abbreviations.

In response to the stakeholders' submissions, the Bench Book provides guidance on the contents of the court record and recommends the use of appropriate abbreviations.

3.13 Withdrawals, Discharges and Acquittals

In relation to withdrawal of cases in the Magistrates' Courts, stakeholders noted that there is often inordinate delay in prosecutors obtaining letters of approval from the Office of the Director of Public Prosecutions where such approval is required. Queries were likewise raised as to the rationale of barring certain offences such as sexual offences and murder from the ambit of those that can be withdrawn. It was also highlighted that the use of the term 'complainant' in various sections such as sections 176, 202 and 204 of the Criminal Procedure Code has been problematic as the term is used interchangeably to mean either the victim or the prosecution.

The Bench Book provides guidance on this issue and this report makes recommendations on the need for reform of the law to provide clarity.



3.14 Transfer of Judges and Magistrates

During the stakeholder engagements, it was observed that the transfer of judges and magistrates is one of the significant causes of delayed proceedings. The need for a better mechanism for implementing transfers with minimal inconvenience to the parties was noted. Judges and magistrates observed that where a matter is partly heard by one magistrate and partly by another, the common solution is usually to allow a fresh trial upon the application by the accused. This causes inordinate delay in the conclusion of the trials. Stakeholders recommended that the Bench Book should provide guidance for courts to assess each case on its own merits and not to automatically order a fresh trial.

The application of section 200 of the Criminal Procedure Code which relates to part-heard cases is discussed in the Bench Book.

3.15 Matters Related to Sentencing

Stakeholders pointed out that the Sentencing Policy Guidelines addressed many concerns relating to sentencing. Concerns were raised over injustices occasioned by mandatory sentences. It was noted that sentencing adults who committed offences while they were children is problematic. Those convicted of capital offences as adults are held at the President's pleasure which means indeterminate detention. With respect to those convicted of non-capital offences, most of the options provided under section 191 of the Children Act are inappropriate.

Stakeholders also noted that the operation of the proviso to section 333 of the Criminal Procedure Code on taking into account the time spent in custody during trial is still haphazard. While the proviso is couched in mandatory terms, it is often not applied. It is not also clear what 'taking into account' means. Some interpret this to mean that the actual time spent in custody should be deducted from the term of imprisonment imposed. Others are of the view that it only requires consideration and not automatic computation.

Prisoners raised concerns over the selective application of remission. The power of remission by the Kenya Prison Service was abolished in 2014. It was however reinstated on 15th December 2015.⁵ Convicts who were affected by the unavailability of remission during the said period requested to be considered for remission albeit retrospectively.

5

See Statute Law (Miscellaneous Amendments) Act, 2015 No. 25 of 2015.



The Bench Book contains a section which provides guidance on sentencing. Many of the issues raised above require law reform and appropriate recommendations have been made in this report.

3.16 Administrative Matters

Certain administrative matters were flagged as contributing to inefficiencies in the criminal justice system. For instance inmates reported that they did not have a clear grievance mechanism to address concerns affecting them during trial. Stakeholders noted that there was need for review of the filing system in court registries to avert complaints of missing files. Such missing files have often resulted in inordinate delays and lengthy periods in custody for the accused who have been detained. It was proposed that appellants be held in prisons closer to the trial court to ease both access to court records and court attendance. Inmates raised concerns over delays in the preparation of court records, and delayed responses to their appeals as well as the failure of the courts to advise on reasons for rejecting appeals. The need for guidance on the requisite qualifications for persons filling in and verifying P3 forms for production in criminal cases was also highlighted.

This report makes recommendations to address these matters.



4. RECOMMENDATIONS

The desk review and stakeholder engagements revealed laudable ongoing reforms in the criminal justice system. This momentum should be sustained through continued legal reform initiatives, robust litigation and stakeholder engagements.

Informed by the stakeholder engagements, the Bench Book seeks to provide guidance on pertinent issues within the criminal trial process in line with the current law. However issues requiring legal or institutional reforms are addressed through the recommendations contained in this section. The recommendations are divided into five categories:

- 1) Regulations and guidelines needed to operationalize or streamline procedures set out in primary legislation;
- 2) Law reform;
- 3) Further research;
- 4) Inter-agency cooperation.
- 5) Criminal Procedure Bench Book Digital Platform

4.1 Regulations and Guidelines

To operationalize or streamline legal provisions, the Committee recommends the issuing of the following rules/regulations:

4.1.1 Regulations Anchored on Specific Law

- 1) *Rules on Magistrates' Courts' power to hear and determine claims for redress of human rights violations.* The Chief Justice is mandated to make rules under section 8 of the Magistrates Court Act. These rules should provide guidance on orders that Magistrates' Courts may make in matters where human rights violations are established.
- 2) *Rules on victim impact statements.* There is need for additional rules to bring into full effect Part IX of the Criminal Procedure Code on victim impact statements, as authorised by section 329F of the Criminal Procedure Code.
- 3) *Rules on habeas corpus proceedings.* The current rules on habeas corpus proceedings need to be reviewed.
- 4) *Rules of court prescribing the manner of taking down evidence in cases coming before the High Court.* It is desirable that the Chief Justice issues these rules as authorised by section 201 of the Criminal Procedure Code.



- 5) *Rules to govern the use of teleconferencing and video conferencing.* It is desirable that the Chief Justice issues these rules as authorised by section 63A(2) of the Evidence Act.
- 6) *Plea Bargaining Rules in accordance with section 137(O) Criminal Procedure Code.* It is noted that the Attorney General published plea bargaining rules through Legal Notice 47 of 2018 as the Bench Book went to press.

4.1.2 Guidelines

While not anchored on specific law requiring regulations to be issued, it is recommended that the following guidelines be issued to streamline the implementation of the law.

- 1) *Guidelines on the use of alternative dispute resolution mechanisms in criminal cases* as envisaged in Article 159(2)(c) of the Constitution are necessary. In particular, it is important that guidance be provided on the criteria that courts may use to recognise remedies in traditional dispute resolution in a criminal matter.⁶
- 2) The Sentencing Policy Guidelines provide general guidance during sentencing but there is need for further *guidance with regard to offence-specific sentencing*.
- 3) *Guidelines on standardized and acceptable abbreviations that can be used in the court record* such as P.O.N.G.E to mean plea of not guilty entered, C.R.E to mean charge read and explained or P.G.E to mean plea of guilty entered.
- 4) *Guidelines on handling of documents produced as security in criminal trials* including their verification should be provided. The guidelines should identify the acceptable forms of security, the authorised agencies to verify the securities, the party to bear the cost of verification and samples of forms to be filled.
- 5) *Guidelines on the use of intermediaries* are desirable to address aspects such as eligibility to be an intermediary, oaths for intermediaries, and the conduct expected of intermediaries during the proceedings. They should also set out a comprehensive definition of vulnerable witnesses who may require intermediaries.
- 6) *Guidelines on victim participation* are needed to include the mode and extent of required communication to keep victims informed of the proceedings. They should also set out requirements on recording the participation of victims in the proceedings and protection of child victims.

6 The need for guidelines was underscored by the High Court in *Republic v Abdulahi Noor Mohamed (alias Arab)* High Court at Nairobi Criminal Case 90 of 2013; [2016] eKLR.



4.2 Recommendations for Law Reform

This section highlights proposals for the amendment of the law or enactment of new laws where there is a lacuna.

4.2.1 Proposed Amendments to the Criminal Procedure Code

The Criminal Procedure Code has many outdated provisions and requires an overhaul to conform to the recent developments in criminal law and most importantly to conform to the requirements of the Constitution of Kenya 2010. Some of the specific revisions recommended are as follows:

- 1) Revision of provisions making reference to classes of magistrates such as *section 7 of the Criminal Procedure Code and the First Schedule in the Code*. The Magistrates Courts Act No. 26 of 2015 no longer contains a description of Magistrates Courts in terms of classes.
- 2) References to bailable and non-bailable offences in *section 123 of the Criminal Procedure Code* should be omitted as all offences are now bailable.
- 3) *Section 82 of the Criminal Procedure Code* should be reviewed to conform to Article 157(8) by indicating that the Director of Public Prosecution may not discontinue a prosecution without the permission of the court.
- 4) *Review the inappropriate terminology* used in reference to persons with mental disability such as imbecile, mental illness, lunacy and unsound mind.
- 5) *Review the provisions on inquiries and inquests* in light of the powers of the Director of Public Prosecution to institute proceedings.
- 6) *Review the sections in the Criminal Procedure Code where the term ‘complainant’ appears* to indicate clearly whether the term as used in the section refers to the victim or the prosecution.
- 7) *Review section 333(2) of the Criminal Procedure Code* to provide clarity on what is meant by the phrase to ‘take into account the term spent in detention’.
- 8) The procedures in dealing with persons with mental disabilities under *sections 166(2) and 167 Criminal Procedure Code* should be reviewed to provide clear responsibilities and an effective referral mechanism. Further, the supervisory role of the court over persons referred to institutions should be clearly spelt out to avoid indeterminate holding of persons in those institutions.



- 9) Under *section 15(1) of the Criminal Procedure Code*, a sentence of not more than two years imprisonment may be suspended for a period specified by the Court referred to as the ‘operational period’. There is need for guidance on how to determine the appropriate ‘operational period’, which might be through amendment of the Criminal Procedure Code, by decision of an appellate court, ideally the Court of Appeal, or through an institution such as a Sentencing Council which goes beyond the scope of this Report.
- 10) The requirement by *section 89(3) of the Criminal Procedure Code* for a Magistrate to reduce an oral complaint into writing should be reviewed.
- 11) Although section 89 of the Criminal Procedure Code is used in private prosecutions, it does not appear to have been intended for such prosecutions. For example *section 89(1), (3) and (4) of the Criminal Procedure Code* are not appropriate in relation to private prosecutions. There is need for clear provisions regarding the institution and prosecution of private prosecutions.
- 12) *Section 131 of the Criminal Procedure Code* provides a mechanism for attachment and sale of movable property. There is need for a similar provision for immovable property where the property was offered as security and it becomes necessary for the security to be realized.
- 13) To give effect to the *right of the accused to evidence provided under Article 50(2)(j) of the Constitution*, the Criminal Procedure Code should expressly require the prosecution to provide charge sheets and witness statements within a specified period once the case is fixed for hearing.
- 14) *The extent of the rights of the victim and the prosecution to evidence for the defence* should also be clearly provided for especially in view of the current provisions of the Victims Protection Act which give rights to the victim without corresponding rights to the prosecution.
- 15) There is need to *harmonise the provisions within the Criminal Procedure Code and the Coroners Act on inquiries and inquests*.
- 16) The Criminal Procedure Code should be reviewed to *provide adequate provisions on the handling and disposal of goods forfeited to the court as well as the disposal of exhibits*. Such provisions must be clear as to how goods produced as exhibits including those that are perishable, sensitive or poisonous are to be handled, preserved or disposed of by the court. The Criminal Procedure Code should also set out the procedure for the realisation of immovable property that is forfeited and how the funds realised are to be utilised.
- 17) *All sections in the Criminal Procedure Code referring to the ‘complainant’ should be reviewed* to expressly indicate whether reference is to the victim or the prosecutor.



4.2.2 Criminal Procedure Rules Committee

Criminal law and procedure particularly under the new constitutional dispensation is in a state of rapid and continuous development. There is also the attendant growth in the volume and complexity of litigation in criminal matters. The Committee finds that there is need for a Standing Committee to be established to be an active vehicle for the continuous development and improvement of criminal practice and procedure in the courts. Such a Rules Committee, similar to the Rules Committee established under the Civil Procedure Act for civil matters, will play a critical role in the system of criminal justice by ensuring that the rules and regulation on various facets of criminal procedure and practice are up-to-date, and enable the fair, just, efficient and expedient operation of the courts in criminal matters. The changes in the processing and management of court proceedings, and the tendency towards specialization of areas of litigation, place demands upon such Rules Committees to keep pace with the latest technological advances, new legislation and with procedural reform initiatives. The Criminal Procedure Rules Committee will assess practice issues and developments and innovate towards ensuring that rules and regulations on all aspects of criminal procedure simplify and expedite the litigation process in the interest of justice delivery.

The Committee therefore recommends an amendment to the Criminal Procedure Code to provide for a Rules Committee

4.2.3 Proposed Amendments to other Legislation

- 1) Harmonise the provisions of the *Legal Aid Act* and the *Children Act* concerning legal aid for children.
- 2) An effective model of diversion of cases for the juvenile justice system should be provided for in law to avoid implementation in a selective and disjointed manner. In particular, the link between the police and the children department should be strengthened to expedite diversion cases in suitable instances. Further, welfare cases should be separated from those of children in conflict with the law. The Committee supports the proposed *Children Justice Bill*, which incorporates the recommendations on diversion of child offenders.



- 3) Child offenders benefit from the conducive environment in Children's Courts but child victims are subjected to the unfavourable environment in the ordinary courts. It is proposed that the *Children Act* be amended to require that criminal trials involving child victims, particularly in sensitive cases such as those involving sexual offences, be tried by the Children's Courts. Alternatively, the law should provide specific measures to be taken by ordinary courts when dealing with child victims in criminal trials.
- 4) The fine for breaching a probation order as stipulated by *section 8 (3) of the Probation of Offenders Act* is too low and ought to be reviewed.
- 5) *Section 25 of the Penal Code* requires accused persons who committed capital offences while they were still minors but who are sentenced when they are adults to be detained at the President's pleasure, which has been held to be unconstitutional.⁷ This section should be amended to address the unconstitutionality. A provision for sentencing of adults who committed non-capital offences while they were minors should also be included.
- 6) The period of imprisonment in default of fines, particularly high fines, set out in section 28(2) of the Penal Code is not commensurate with the fines imposed. This provision is outdated and should be reviewed. Related to this, is the recommendation for all statutes creating offences punishable by fines, such as the Narcotic and Psychotropic Substances Control Act, to expressly set out sentences in default of fines.
- 7) *The Penal Code should be reviewed to provide further guidance on corporate criminal responsibility.* There is a lacuna on aspects such as who is to take plea. Further some of the offences that a corporate can be charged with carry penalties that cannot be imposed on a corporate such as imprisonment.
- 8) *Section 3 of the Anti-Corruption and Economic Crimes Act* lists Chief Magistrates and Principal Magistrates as being eligible to hold the position of a Special Magistrate under the Act. It omits Senior Principal Magistrates and should be amended to include them.
- 9) *The Contempt of Court Act* should be reviewed to ensure compliance with the Constitution, specifically the right to trial by an impartial tribunal (Art. 50(1)), the right to bail other than when compelling circumstances exist (Art. 49(1) (h)), as well as the rights of persons in custody.
- 10) *The Magistrates Courts Act of 2015* should be reviewed with regard to the courts' jurisdiction to provide remedies for enforcement of human rights, to ensure compliance with Article 23(2) of the Constitution.



4.3 Recommendations for Further Research

It is recommended that further research on the following areas be carried out with a view to identifying necessary amendments:

- 1) *Mandatory sentences under Sexual Offences Act.* Comprehensive research on the implementation and impact of this Act especially with regard to young offenders should be carried out.
- 2) *Traditional dispute mechanisms.* It is noted that the Taskforce on Informal Justice Systems was commissioned with respect to these matters.
- 3) *Use of pre-bail reports* pursuant to the Bail and Bond Policy Guidelines.

4.4 Recommendations for the Criminal Justice Agencies

The efficiency of the criminal justice system is dependent upon the performance of each criminal justice agency. Inter-agency cooperation also plays a critical role in enhancing the delivery of justice. The following recommendations relating to specific criminal justice agencies are proposed:

4.4.1 The Judiciary

It is recommended that the Judiciary:

- 1) Puts in place an effective mechanism in the management of partly heard matters when Judges and Magistrates are transferred to address inordinate delays in the conclusion of matters.
- 2) Streamlines the registration and certification of court interpreters to address the shortage and to also build the capacity of existing court interpreters.
- 3) Before the national legal aid scheme becomes fully operational, the Judiciary should rationalise and create incentives for *pro bono* lawyers.
- 4) Factors in facilitation of witnesses of the accused person.
- 5) Reactivates the prison visiting justices system to ensure continuous monitoring of prisoners' welfare.



4.4.2 National Council on the Administration of Justice

It is recommended that the National Council on the Administration of Justice (NCAJ) facilitates the enhancement of the cooperation in areas where there are weak links in the criminal justice system.

Being an issue that cuts across all the criminal justice agencies, it is recommended that NCAJ prompts all agencies to carry out assessments of their accessibility to persons with disabilities and their level of compliance with the legal requirements on the treatment of such persons.

4.4.3 National Police Service

There is need for:

1. Streamlining of coordination between remote police posts and the central police stations for production of accused persons before court within the stipulated 24 hour period.
2. Continuous sensitisation of officers on the constitutional requirements related to their duties.
3. Putting in place a mechanism for processing of bail in traffic offences. For instance, having a police paybill number would enable officers to process bail wherever they are stationed.

4.4.4 Kenya Prisons Service

It is recommended that the Kenya Prisons Service:

- 1) Improves coordination in the production in court of suspects held in their remand sections and convicts on appeal.
- 2) Continues to sensitize officers on the constitutional requirements on the treatment of persons in custody.
- 3) Supports and encourages the training and availability of paralegals in prison facilities.



4.4.5 Judiciary Training Institute

It is recommended that the Judiciary Training Institute's routine training programmes continue to pay particular attention to the following aspects of criminal justice:

- 1) Bail
- 2) Sentencing
- 3) Treatment of refugees in the criminal justice system
- 4) Treatment of children in criminal proceedings
- 5) Handling of sexual offences cases

It is also recommended that JTI works in conjunction with the NCAJ to organise for joint training sessions for actors in the criminal justice system on emerging areas of law.

4.4.6 Office of the Director of Public Prosecutions

Liaison between the Office of the Director of Public Prosecutions and the police investigators should be enhanced to ensure thorough and expeditious preparation of cases, and efficient prosecution.

The Office of the Director of Public Prosecutions should ensure that in all cases charge sheets and witness statements are availed to the accused person at the earliest opportunity without cost to the accused. Appropriate budgetary allocation should be made to facilitate this.

There should be improved communication between the Office of the Director of Public Prosecutions and officers on the ground to avoid delays in trials caused by failure to obtain appropriate instructions such as on withdrawals.

To enhance the independence of the Judiciary and that of the Office of the Director of Public Prosecutions, provision of infrastructure for prosecutors should be fast tracked to avoid use of judiciary facilities.

4.4.7 Department of Children Services

Close attention should be paid to facilities in which children in conflict with the law and those in need of care and protection are held such as remand homes, children homes and rescue centres. The Department should ensure that those facilities are in good condition; that children in conflict with the law are held separately from those in need of care and protection; and that the needs of the children at every stage are met.



4.4.8 Probation and Aftercare Services

Funding for this department should be enhanced to enable the department to cater for the growing demand for social enquiry reports. Oversight mechanisms should be put in place to ensure that the information submitted to the court is accurate.

4.4.9 National Committee on Criminal Justice Reforms

As noted, there is need to review substantive and procedural criminal law to align them to the Constitution. The Committee welcomes the appointment of the National Committee on Criminal Reforms, which bears the mandate to engage in this process.

4.4.10 Other Related Agencies

Government institutions such as mental hospitals, the Directorate of Criminal Investigations, and professionals such as pathologists, firearms and ballistics experts should prioritise court reports and other services requested for by the courts as they impact on the expeditious disposal of trials and the liberty of individuals.

4.5 Criminal Procedure Bench Book Digital Platform

Beyond the production and dissemination of an electronic version of the Bench Book complete with hyperlinks, the Committee recommends the development of an interactive, online digital platform for the Bench Book. There are three key objectives for this undertaking: improving accessibility and utility of the Bench Book; to provide an interactive platform through which judges, judicial officers, prosecutors, investigators, police officers, advocates, probation officers, paralegals, witness protection officers, all other actors in the criminal justice system, practitioners, students, and academics can discuss experiences, challenges and developments in criminal procedure; and to provide a portal through which the Bench Book can be constantly updated as new legislation is enacted, new rules and policies developed and as the courts develop criminal procedure through their decisions and judgments. This novel Criminal Procedure Digital Platform will improve efficiency in criminal procedure within and across institutions in the criminal justice system, increase access to legal information, improve timeliness of judiciary services, provide an efficient and effective platform for the reform and development of criminal procedure, and enhance performance and quality of judicial decisions. One of the partners of the Judiciary has indicated a willingness to support such a digital platform.



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