REPUBLIC OF KENYA

THE JUDICIARY

CRIMINAL PROCEDURE BENCH BOOK

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February 2018

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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. 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 Technical 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 extend 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.

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

FOREWORD

In January 2017, I launched my strategic blueprint for the Judiciary entitled, Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021. A key aspect of this agenda is to continue, improve, and deepen the transformation journey that the Judiciary has been on since the promulgation of the Constitution 2010 with a particular focus on enhancing service delivery for our clients. The completion of the Criminal Procedure Bench Book and the support given to the Technical Committee developing the Bench Book is a good example of this strategy. It is one of the initiatives started by the Hon. the former Chief Justice Dr Willy Mutunga that I have supported and seen through to completion, recognizing it as an important tool through which justice will be enhanced through improved jurisprudence, well explained and laid out court processes, and the continuous improvement of the manner in which we dispense justice in criminal proceedings.

The core objective of my strategy for the Judiciary is to enhance service delivery for our clients and court users. As such, I continue to support and emphasize mechanisms, processes and initiatives on the reform of the criminal justice system, both procedurally and substantively. In response to the findings and recommendations contained in the 2017 NCAJ commissioned audit of the criminal justice system, I immediately set up a multi-agency Committee on Criminal Justice Reform under the auspices of NCAJ and chaired by the Hon. Lady Justice Grace Ngenye, to examine all aspects of criminal justice reform. The findings and recommendations contained in the report of the Technical Committee shall be invaluable in our wider efforts to improve the dispensation of justice in our criminal justice system and will provide an appropriate springboard for the multi-agency committee. The Bench Book is readable and comprehensive, and will be of immense utility not only to our judges and magistrates, but also to prosecutors, advocates, probation officers, litigants, and other actors in the criminal trial process.

I wish to thank the Technical Committee so ably chaired by Honourable Lady Justice Hannah Okwengu for their efforts and commitment in producing a Bench Book of such practical relevance and quality and a Report containing many valuable and insightful findings and recommendations on policy and legislative reform on criminal procedure. I would also like to thank our development partners for their support in the development of this Bench Book, and for their continued partnership and assistance to the Judiciary in its continuing journey of transformation.

The Hon. Mr. Justice David K. Maraga, EGH
Chief Justice & President Supreme Court of Kenya

LIST OF ABBREVIATIONS

ACECA	Anti-Corruption and Economic Crimes Act
ADR	Alternative Dispute Resolution Mechanism
CA	Children Act
CoK	Constitution of Kenya
CCA	Court of Appeal (Organisation and Administration)
CPC	Criminal Procedure Code
CSOA	Community Service Orders Act
DPP	Director of Public Prosecutions
EACA	East African Court of Appeal
EACC	Ethics and Anti-Corruption Commission
eKLR	Electronic Kenya Law Reports
ICA	International Crimes Act
LAA	Legal Aid Act
NCSA	National Coroners Service Act
PC	Penal Code
POMA	Power of Mercy Act
PPDA	Public Procurement and Disposal Act
PWDA	Persons with Disabilities Act
SOA	Sexual Offences Act
VPA	Victim Protection Act

USER GUIDE

The Criminal Procedure Bench Book is a quick reference for judges and magistrates presiding over criminal proceedings. While it has been designed by and for judges and magistrates, it is hoped that other players in the criminal justice system such as prosecutors, defence counsel, probation officers, children officers, police officers, accused persons and academics will find it useful.

This Bench Book provides guidance on statutes, judicial authorities, and policy directions that are relevant in different stages of criminal proceedings. It provides not only a quick reference but also guidance for locating relevant law. The Bench Book is not intended to replace reference to primary sources such as statutes, judicial authorities, and policy directions. To facilitate access to the primary sources, the electronic version of the Bench Book provides hyperlinks for the user to retrieve judicial authorities. In the print version, a List of Cases at the end gives the internet address for every case mentioned in the Bench Book which is available on the internet. The law is presented as at the time of publication and the Bench Book does not discuss what the law ought to be.

Chapter One provides a brief overview of the principles that underpin criminal justice. These principles are then discussed throughout the Bench Book with detailed guidance provided in the chapters in which they apply. The subsequent chapters provide direction concerning the different stages of criminal proceedings. The Bench Book follows the order of a typical criminal trial from pre-trial matters to appeal. Chapter Two addresses pre-trial matters, that is, those that are dealt with before the trial commences. Chapter Three deals with the actual trial and starts with general matters that relate to all criminal trials. It then addresses the trial from opening speeches to the final submissions. Chapter Four deals with the delivery of judgment and sentencing. Chapter Five addresses appeals and other procedures that take place after sentencing. Chapter Six provides a reference point for matters that relate to processes that are subject to special procedures.

Categories of individuals who require special attention, such as children and persons with disabilities, are considered throughout the Bench Book as opposed to having standalone chapters.

CHAPTER ONE:

PRINCIPLES UNDERPINNING THE CRIMINAL JUSTICE SYSTEM

I. Introduction

1. The criminal justice system comprises agencies involved in apprehending, defending, sentencing, punishing and rehabilitating those suspected and convicted of offences. Among its aims is to secure the conviction of the guilty and acquittal of the innocent, the imposition of fair and effective penalties upon those who are convicted, and, if possible, the restoration of social harmony that has been disrupted by the criminal activity.

2. A just outcome is not just a matter of fairness to the accused and the victim. It is a matter of public importance. If the guilty are not convicted, or the innocent are convicted, public confidence in the system is likely to be undermined. Preventing impunity is an important purpose of the system.

3. Apart from just deserts, the criminal justice system also plays a restorative role. Restorative justice requires the participation of victims, taking into account their views and, to the extent possible, addressing the individual needs that arise when crimes are committed. Compensation, restitution, and reconciliation are examples of restorative processes undertaken in response to the needs of victims.

4. Criminal justice must not only be done but also be seen to be done. To this end, there should be no actual or apparent bias on the part of the judge, and the judiciary must be independent of the other arms of government and of other interested parties. Judges must give reasons for their decisions. And justice must be open, with hearings normally taking place in public (unless there is good reason not to), and able to be reported and commented upon.

5. The criminal justice system must operate within the Constitution. This includes the principle of fair trial, a key focus of this book.

6. The Constitution goes further, and provides an entire framework, particularly, but not only in the Bill of Rights[1], for the correct behaviour of state organs generally, including for the fair treatment of people, not only in relation to the justice system.

II. The Constitutional Framework for State Organs

7. Many constitutional provisions govern the behaviour of state bodies in the exercise of their authority. One important aspect that goes beyond the scope of this book is the issue of integrity, especially the provisions of Chapter Six. Issues of integrity that touch on criminal procedure include the principle that all state officers (which includes judges and magistrates) are required to exercise their authority in a manner that 'demonstrates respect for the people', 'brings dignity to the office' and 'promotes public confidence in the integrity of the office' (art. 73(1)(a)(ii), (iii) & (iv), CoK).

8. Courts must protect and promote the purposes and principles of the Constitution when exercising judicial authority (art. 159(2)(e), CoK). This implies ensuring that other people and institutions comply with the Constitution. The courts must also respect the Bill of Rights (which means not doing any act that positively violates the rights (art. 21(1), CoK)). Two fundamental rights are those of equality and dignity. They are closely connected, but not identical.

III. Equality and Dignity

9. Courts must deliver justice to everyone who appears before them irrespective of their status (art. 159(2)(a), CoK). All persons are equal before the law, and courts must afford equal treatment to all who come before them, in whatever capacity (art. 27(1), CoK). The Constitution prohibits direct or indirect discrimination on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin,

1 The application of the Bill of Rights is discussed in the relevant sections of the Bench Book.

colour, age, disability, religion, conscience, belief, culture, dress, language and birth. Indirect discrimination means discrimination in effect even if not intended.

10. Everyone has the right to have their dignity respected and protected (art. 28, CoK). Therefore, individuals in contact with the criminal justice system should not be treated in a manner that demeans them. In addition to this obligation to respect, the court also bears the obligation to protect individuals from violation of their dignity by other actors in the criminal justice system.

IV. Vulnerable and Disadvantaged Groups

11. Article 27 of the Constitution requires that positive efforts be made (that is, affirmative action) to rectify past injustices and protect vulnerable groups. The Constitution emphasizes the needs of vulnerable, marginalised, or minority groups (who must, for example, be given the assistance they need to participate in all spheres of life) (art. 56(a), CoK). Persons with disabilities, for example, have the right 'to reasonable access to all places, public transport and information'(art. 54(1)(c), CoK). Courts should be conscious of issues such as whether the facilities are accessible to the elderly and persons with disabilities. Children have certain right s relevant to their treatment in court, which are highlighted in relevant sections in this Bench Book. Overall the determining factor in any matter concerning the child is the child's best interests (art. 53(2), CoK).

12. Another relevant provision is Article 21(3) of the Constitution, which imposes a duty upon all state organs and public officers to 'address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities'. To address these

needs, however, one must first understand them. This Bench Book will discuss how at least some of these needs are addressed through criminal procedure.

V. Freedom from Torture, Cruel, Inhuman, and Degrading Treatment

13. The courts, with other state organs, bear the duty of ensuring that everyone's freedom from cruel, inhuman, or degrading treatment is protected (arts. 29(f) & 51(3)(a), CoK; s. 5(1) Persons Deprived of Liberty Act). There is a clear connection here to the right to silence, specific to the rights of arrested and accused persons. Torture, which can be used to extract not just confessions but evidence against someone else, is forbidden and can never be constitutionally justified (art. 25, CoK). The same is true of cruel, inhuman and degrading treatment in court.

VI. Privacy

14. The rights to privacy include the right not to be searched, not to have one's home or property searched, not to have one's possessions seized, not to be required unnecessarily to provide information relating to one's family or private affairs, and not to have communications (letters, phone calls, emails etc.) investigated. Most of these acts may be permitted by law, but that law must satisfy the requirements of Article 24 of the Constitution under which a limitation of the right to privacy can only be justified after taking into account the purpose to be achieved, how serious the interference with privacy is, whether the interference is justified by the purpose, and whether the purpose could be achieved by interfering less with privacy. Privacy might be relevant also to court proceedings, such as unnecessarily intrusive questioning of a witness.

VII. The Constitution and the Judicial Process Generally

Independence of the Judiciary: The Institution and the Court

15. Every person has the right to have any dispute that can be determined by law decided by either a court or an independent and impartial tribunal or body (art. 50(1), CoK).The importance of independence, that is, of being subject only to the Constitution and not subject to the direction of any other person or authority, is emphasised in Article 160(1) of the Constitution. Both the institution of the judiciary and the individual judges and judicial officers must be independent of any extraneous factors. Pressure, intimidation and influence from other sources, whether political, financial, familial, ethnic, religious, or other must be resisted.

Expeditious Trial

16. Having trials commenced and concluded within a reasonable time is in the public interest, as well as that of the accused and victims, and the Constitution includes the principle, 'Justice shall not be delayed' (art. 159(2)(b), CoK). The issue of speedy trial may come up at various stages; it is however important to ensure that speed does not defeat the accused's right to prepare a defence.

Undue Regard for Technicalities

17. The Constitution provides that justice must be administered without undue regard to procedural technicalities (art. 159(2)(d), CoK). Rules of procedure facilitate the dispensation of justice and play a critical role in maintaining the rule of law. They are therefore not redundant and ought not to be disregarded except when following the procedures would result in an injustice.

Transparency and Accountability

18. Transparency is a national value (art. 10(2)(c), CoK), and it is a general principle that trials must be held in open court. In Kenya, this is expressed as a right of the accused (art. 50(1), CoK). Public trials also serve the public interest: they educate the public about the consequences of crime and the legal system, and they aid accountability.

19. The requirement that courts must give reasons for their decisions is important for transparency and accountability (s. 169(1), CPC).

Promotion of Alternative Forms of Dispute Resolution

20. The emphasis in criminal justice is shifting somewhat towards restorative justice: an approach that focuses more on addressing the harm caused by crimes rather than punishing the offender. The emphasis on the rights of victims provides an example of how the Constitution has incorporated values of restorative justice; the Constitution requires Parliament to enact legislation 'providing for the protection, rights and welfare of victims of offences' (art. 50(9), CoK), which has been enacted in the form of the Victim Protection Act, 2014 (Cap. 17 of 2014).

21. The Constitution places particular emphasis on the facilitation of 'alternative forms of dispute resolution (ADR) which include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms' (art. 159(2)(c), CoK). This is also an aspect of the shift towards restorative justice. The emphasis on ADR applies to both criminal law as well as civil law. The existing law contemplates the use of ADR in criminal proceedings, including plea agreements (s. 137A(2),CPC), withdrawal (s. 204,CPC), reconciliation (s. 176, CPC), and sentencing.[1]

1 ADR is briefly considered when these various proceedings are discussed in Chapter Three paras. 36-37.

Statutes may limit the scope of certain provisions that open the way to ADR (for example, promotion of reconciliation under s. 176 of the CPC does not extend to felonies).[1]

22. The Victim Protection Act provides that participation in ADR must be voluntary on the part of both offender and victim (s. 15(2(a) & (b), Victim Protection Act).[2] The results of the ADR process, if they involve any agreement for redress, are incorporated in the court's judgment and are enforceable (s. 15(3), Victim Protection Act).[3] Finally, if the ADR process fails, the criminal trial proceeds to final determination (s. 15(2) (c),Victim Protection Act).

23. The ADR mechanism must adhere to the Bill of Rights; it must not be repugnant to justice and morality; it must not be inconsistent with any written law (art. 159(3)(a), CoK). This might bring in issues of dignity, cruel and inhuman treatment, and freedom of expression.

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1 In the absence of specific rules governing ADR mechanisms in criminal cases, decisions to invoke ADR mechanisms may be challenged for being incompatible with fundamental principles of criminal law. For instance, the decision in R v Leraas Lenchura High Court at Nakuru Criminal Case 19 of 2011in which the court ordered compensation of one camel and a suspended sentence of five years for manslaughter raises concerns as to whether ADR should be invoked in cases involving serious offences such as manslaughter. Emerging jurisprudencefromthecourtssuggeststhatcourtsdecidingcriminalcaseshavebeenreluctant to adopt ADR mechanisms, particularly with regard to felonies. This reluctance is pegged upon the premise that legal procedures have been developed for specific reasons, such as protecting the rights of the accused and ensuring equal protection of everyone including victims. ADR mechanisms do not always offer similar protection. Further, ADR mechanisms must be applied in a manner that does not undermine constitutional provisions. In R v Abdulahi Noor Mohamed (alias Arab)High Court at Nairobi Criminal Case No. 90 of 2013 thecourtrejectedanapplicationseekingthewithdrawalofmurderchargesforacasethatwas pending judgment after the families of the victim and the accused had reconciled. The court noted that criminal trials are matters of public interest instituted in the name of the State. Therefore, arrangements between the accused person and the victim to withdraw the charges to the exclusion of the prosecution are inconsistent with constitutional provisions bestowing prosecutorial powers on the Director of Public Prosecutions.

2 Seepara.7,UN Economic and Social Council (ECOSOC),UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 24 July 2002.

3 See also para. 15, UN Economic and Social Council (ECOSOC), UN Economic and Social CouncilResolution2002/12:BasicPrinciplesontheUseofRestorativeJusticeProgrammes in Criminal Matters, 24 July 2002.

Cruel and inhuman treatment incorporates issues of proportionality which are addressed in the Sentencing Policy Guidelines 2016(para. 3.1 of which states that sentencing should be neither excessively harsh nor excessively lenient). Most obviously the right to equality, age, gender, disability and status of an offender, must be respected, unless there is a need to take account of such factors, and Article 24 is satisfied. Courts must exercise caution when authorising ADR mechanisms in criminal cases to ensure that they are compatible with any other provision of the Constitution and fundamental principles of criminal justice, including fair trial, proportionality, and equality.

VIII. Constitutional Rights Related to the Criminal Process

24. The Constitution sets out the rights of persons from arrest through custody, trial, and beyond. Courts have a duty to observe, respect, protect, promote, and fulfil these rights in the exercise of their authority. The duty to respect requires the court to refrain from violating rights in carrying out its duties. The court must also ensure that others, for instance, the police and the prosecution, from violating rights. The duty to promote these rights requires the court to encourage and educate others on how best to observe them.

25. This section provides an overview of the rights which are then discussed in more detail in the substantive chapters where they apply.

IX. Rights of an Arrested Person

26. The rights of an arrested person reflect the fundamental principles that a person is innocent until proved guilty and that a person has a right to dignity. There is a corresponding obligation on the police and the court to ensure that these rights are respected.

Right to Information

27. Under Article 49 of the Constitution, a person arrested must be informed 'promptly' of the reason for the arrest (art. 49(1)(a), CoK). The information must be conveyed in language that the arrested person understands. This implies both speaking in a language that the person is conversant in as well using ordinary terms that a layperson can understand.

Right to Remain Silent

28. An arrested person has no obligation to provide information to the police (art. 49(1)(b), CoK). And when arrested, he or she must be informed of the right to remain silent and the consequences of not remaining silent.

Right to an Advocate and Communication with Others

29. Under the Constitution, the arrested person has the right to communicate with an advocate and other persons whose assistance is necessary (art. 49(1)(c), CoK). The Persons Deprived of Liberty Act goes further and provides that anyone deprived of liberty has the right to communicate with 'any person of his or her choice'—not just those whose assistance is useful (s. 8(1), Persons Deprived of Liberty Act).

Right not to be Compelled to Make a Confession or Admission

30. An arrested person must not be compelled to make a confession or admission that could be used in evidence against the person (art. 49(1)(d), CoK).This right is related to the privilege against self-incrimination.

Right to be Separated from Convicted Prisoners

31. Anyone arrested must be held separately from convicted persons pending trial (art. 49(1)(e), CoK). This recognizes the right to innocence until proven guilty, avoids stigmatisation of the accused, recognizes that

regimens for convicted prisoners are, or should be, different from those for the accused, and avoids the corruption of the accused by possibly hardened criminals. The Persons Deprived of Liberty Act expands the rules about separate accommodation to say that women, men, intersex individuals (those with both male and female reproductive organs), refugees, and children should be held separately from one another (s.12, Persons Deprived of Liberty Act).

32. The Persons Deprived of Liberty Act sets out a number of other requirements for the conditions in which persons may be detained. For example, detention facilities must be humane, hygienic, and include medical services and decent food (in fulfilment of art. 51(3), CoK).

Right to Appear in Court within Twenty-Four Hours

33. A person arrested must be brought before a court not later than twenty-four hours after arrest. If the twenty-four hours end outside the ordinary court hours, or on a day that is not an ordinary court day, the accused person must be presented to the court by the end of the next court day (art. 49(1)(f), CoK). During that first court appearance, the accused person must be charged or informed of the reason for the detention continuing, or be released (art. 49(1)(g), CoK).

Right to Bail

34. Article 49(1)(h) of the Constitution guarantees the right of an arrested person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released.

35. Some people should not be detained in custody at all—for example, if the offence for which a person is arrested is punishable by a fine only or by imprisonment for not more than six months (art. 49(2), CoK). Children should be detained only as a last resort. Persons accused of minor traffic offences ought not to be detained.[1]

X. Rights of an Accused Person

36. Article 50(2) of the Constitution sets out the main requirements of the right to a fair trial in criminal cases. The list is not exhaustive: a fair trial 'includes' these elements. Article 25 states that there can be no limitation on this right.

Right to be Presumed Innocent[2]

37. An accused person is considered innocent until proved guilty (art. 50(2)(a), CoK), and the burden of proving guilt lies on the prosecution.

Rights Connected with Preparation of Defence

38. Several rights are particularly connected to the need for the accused person to be able to prepare his or her defence. Firstly, accused persons have the right to be informed of the charge with sufficient detail to answer it (art. 50(2)(b) & (c), CoK).[3] This, and any other information required to be provided, must be conveyed in a language and in terms that are understood by the accused person. It must also be in a format that is accessible to the accused such as braille or sign language. Secondly, the accused person must be accorded enough time and facilities to prepare a defence (art. 50(2)(c), CoK).[4]

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1 'Guidelines on Handling of Traffic Matters' issued by the Judiciary, the National Council on the Administration of Justice and the National Police Service.
2 See Chapter Four, paras.6-8.
3 See Chapter Two, paras. 62-63, Chapter Three, paras.42
4 See Chapter Three, paras. 44 &162.

Right to Public Trial[1]

39. The accused has the right to a trial held in public (art.50(2)(d), CoK; s. 77(1), CPC). However, the press or the public may be excluded, if it is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order, or national security (art. 50(8), CoK).

Right to an Expeditious Trial[2]

40. An accused person has the right to have the trial concluded without unreasonable delay (art. 50(2)(e), CoK).

Right to be Present[3]

41. The accused person has a right to be present during trial, unless the accused person's own conduct makes it impossible for the trial to proceed (art. 50(2)(f), CoK).

Right to an Advocate[4]

42. There are two aspects to the right to be represented by an advocate. The first is the right to have one's own advocate, that is, not at public expense (art. 50(2)(g), CoK).

43. Additionally, there is a right to have an advocate assigned by the State and at the State expense, if 'substantial injustice' would otherwise result. The accused must be informed of this right promptly (, CoK). In the case of a child, the court must order that the child be granted legal representation (s. 43(3), Legal Aid Act).

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1 See Chapter Three, paras.1-3.
2 See Chapter Three, paras. 15-19 &23.
3 See Chapter Three, paras.4-9.
4 See Chapter Two, paras.46-54.

44. How far a court should go in assisting an accused who remains unrepresented is a matter of judgment for the court in the circumstances.

Right to Remain Silent[1]

45. Like an arrested person, the accused person has the right to remain silent. This means that the person may decide not to testify at all during the proceedings (art. 50(2)(i), CoK; s. 186(d) Children Act, 2001), or may decline to answer specific questions because they may incriminate the person (art. 50(2)(l) CoK).

Rights to Evidence

46. Related to the right to be informed of the charge is the right to be informed in advance of the evidence that the prosecution intends to rely on (art. 50(2)(j), CoK). The evidence should be provided within reasonable time to enable the accused to prepare the defence.[2]

47. The accused has the right to challenge any evidence that has been presented against him or her (art. 50(2)(k), CoK). This implies that the accused is at liberty to cross examine any prosecution witness.[3]

48. Finally, an accused person has the right to present evidence in defence (art. 50(2)(k), CoK).

Right not to Incriminate Oneself[4]

49. The accused person has the right to refuse to give self-incriminating evidence (art. 50(2)(l) CoK). This right resonates with the presumption of innocence and the prosecutor's duty to prove guilt beyond reasonable doubt.

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1 See Chapter Three, paras.159-161.
2 See Chapter Three, paras.42-44.
3 See Chapter Three, paras.149-151.
4 See Chapter Three, paras. 120, 142 &159.

Right to an Interpreter[1]

50. The accused person has a right to an interpreter if the trial proceedings are held in a language that he or she does not understand (art. 50(2)(m), CoK; s. 198(1), CPC; s. 186(e), Children Act).The right to an interpreter includes both language and sign interpretation. This right applies even if the accused person's advocate understands the language of the court.

51. If evidence is given in a language that is not understood by the advocate, it must be interpreted in English (s. 198(2), CPC).

The Principle of Legality[2]

52. The Constitution provides that a person should not be convicted for an act or omission that was an offence neither under Kenyan nor international law at the time it was committed or sentenced to punishment that was not provided for when the offence was committed (art. 50(2)(n), CoK). An accused may, however, be convicted of an offence that was crime under international law, even if not under Kenyan law.

Right to Protection from Double Jeopardy[3]

53. An accused person may not be convicted 'in respect of an act or omission for which the accused person has previously been either acquitted or convicted' (art. 50(2)(o), CoK). The provision does not say the conviction must be of the same offence, but for the same act or omission. But if the first trial was aborted and the accused discharged but not acquitted, a later charge on the same facts could be brought.

1 See Chapter Two, Paras.57-61.
2 See Chapter Four, paras.29.
3 See Chapter Two, paras.91-93.

Right to the Least Severe Punishment

54. Where the sentence for an offence has been changed between the commission of the offence and the time of sentence, the accused is entitled to the lesser sentence (art. 50(2)(p), CoK).

Right to Court Records

55. During the trial, an accused person is entitled to a copy of the records of the court proceedings on request. This right does not extend to persons charged with an offence that the court may try by summary procedures (art. 50(5)(a), CoK).

XI. Rights of a Convicted Person

Right to Court Records

56. When the trial is concluded, any accused person has the right to obtain a copy of the court proceedings within a reasonable time for a reasonable fee prescribed by law (art. 50(5)(b), CoK).

Right to Appeal or Review

57. The Constitution provides various rights of persons who have been convicted and are dissatisfied with the conviction or sentence. A convicted person has the right to appeal or apply for review by a higher court (art. 50(2)(q), CoK). The word 'review' may mean either the review or revision procedures provided by ss. 362-367 of the CPC or judicial review.[1]

1 See Chapter Five, paras.53-60.

Right to Apply for a New Trial

58. The Constitution further provides the right to apply for a new trial where new and compelling evidence has become available, either after a convicted person has exhausted the right of appeal or did not appeal within the stipulated time (art. 50(6)(a) & (b), CoK).[1]

1 See Chapter Five, paras.61-65.

CHAPTER TWO:
PRELIMINARY ISSUES

I. Jurisdiction of Courts in Criminal Matters

Magistrates' Courts

1. The jurisdiction of Magistrates' Courts is conferred by the CPC, and the Magistrates' Courts Act (s. 6, Magistrates' Courts Act). In practice, all crimes are heard by the Magistrates' Court in the first instance (see para. 4, below) with the exception of a few offences reserved for the High Court by law, namely murder, treason, genocide, war crimes, and crimes against humanity.

2. The fifth column of the First Schedule of the CPC sets out the different grades of the Magistrates' Court in which a particular offence created by the Penal Code (PC) is to be heard (s. 4, CPC). Further, section 7 of the CPC sets the limits of pecuniary jurisdiction and terms of imprisonment that may be imposed by different grades of the Magistrates' Courts. There are other statutes which give criminal jurisdiction to Magistrates' Courts for offences under those statutes. These include the Contempt of Court Act, Children Act, Sexual Offences Act, Anti-Corruption and Economic Crimes Act, and the Traffic Act. Where a statute creates offences and does not specify the court that has jurisdiction to try those offences, the High Court or a subordinate court of the first class, that is, one presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, or a Senior Resident Magistrate, may try the offence (s. 5(2), CPC; Attorney-General v Mohamud Hashi & Nine Others Court of Appeal at Nairobi No. 113 of 2011).

3. Additionally, Magistrates' Courts have limited jurisdiction to hear and determine claims of denial, violation or infringement of, or threat to the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, and to freedom from slavery or servitude (s. 8(1), Magistrates' Courts Act; Art. 23(2), CoK). Such claims may arise in the criminal trial process. The court may make a declaratory order or issue

an injunction or make a conservatory order (Art. 23(3), CoK). In the case of the magistrates' courts, this jurisdiction does not extend to hearing and determining claims for compensation for loss or damage suffered as a result of a violation, infringement or denial of a right or fundamental freedom in the Bill of Rights (s. 8(3), Magistrates' Courts Act).

The High Court

4. The High Court has both unlimited original and appellate jurisdiction in criminal matters (art. 165(3)(a), CoK). In practice, however, the High Court rarely exercises its original jurisdiction to hear cases that may go before a Magistrate Court. Instead, the original jurisdiction of the High Court is reserved for offences that are triable only by the High Court such as murder, treason, war crimes, genocide and crimes against humanity (s. 8(2), International Crimes Act). Further, the court has jurisdiction to hear allegations of human rights violations arising from criminal cases in subordinate courts (Art. 165(3)(b), CoK).

5. As an appellate court, the High Court has jurisdiction to hear appeals from subordinate courts (s. 347(2), CPC).[1] The High Court exercises supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function (art. 165(6), CoK). This supervisory jurisdiction may be exercised through either judicial review or revision (art. 165(7), CoK; s. 362, CPC) but not over a superior court (art. 165(6), CoK).[2] The High Court also has jurisdiction to hear applications in the nature of habeas corpus (Art. 51(2) CoK; s. 389 CPC, r.3, Criminal Procedure (Directions in the Nature of Habeas Corpus)(Rules)).[3]

1 See Chapter Five, paras.9-22.
2 See Chapter Five, paras.53-60.
3 See Chapter Six, paras.14-21.

6. The Supreme Court in R v Karisa Chengo & 2 Others (Petition No. 5 of 2015) held that the Environment and Land Court and the Employment and Labour Relations Courts cannot hear criminal matters. The court reasoned that, although they have the same 'status' as the High Court, according to the Constitution, Article 162, these are different and autonomous courts and have distinct jurisdictions that do not include criminal matters (paras.50-52).

The Court of Appeal

7. In criminal matters, the Court of Appeal has jurisdiction to hear appeals from the High Court (Art. 164(3), CoK).[1] It has original jurisdiction in any case of contempt in the face of the court (ss. 35(2)(a-c),(4)&(6), Court of Appeal (Organisation and Administration); s. 5, Contempt of Court Act). The courts below are bound by the decisions of the Court of Appeal (Nisha Sapra v Attorney-General High Court at Nairobi Petition No.291 of 2011;National Bank of Kenya Ltd v Wilson Ndolo Ayah Court of Appeal Civil Appeal No.119 of 2002; Mwai Kibaki v Daniel Toroitich Arap Moi Court of Appeal at Nairobi Civil Appeal No. 172 of 1999).

8. Decisions of the higher courts (on the issues of law necessary to the decision) bind the lower courts and their subsequent decisions (Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others Supreme Court Petition No. 4 of 2012; Joseph Njuguna Mwaura & 2 Others v R Court of Appeal at Nairobi Criminal Appeal No. 5 of 2008). The higher courts, in this case the Court of Appeal, may however depart from an earlier decision that was reached per incuriam (in ignorance of a binding statute or precedent) (Jasbir Singh Rai; Joseph Njuguna Mwaura).

1 See Chapter Five, paras.23-31.

The Supreme Court of Kenya

9. The Supreme Court has jurisdiction to hear and determine appeals from the Court of Appeal or any other court or tribunal as prescribed by national legislation (Arts.163(3)(b) & 163(4), CoK; s.16(2)(a), Supreme Court Act)[1] and exclusive original jurisdiction to hear and determine disputes relating to the elections of the President (Art. 163(3)(a), CoK).

10. It also has jurisdiction to give advisory opinions, when requested to do so by the national government, any State organ, or any county government, on matters relating to county government (Art. 163(6), CoK).

11. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court (Art. 163(7), CoK; Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others Supreme Court Petition No. 4 of 2012).

II. Jurisdiction

12. Kenyan courts have jurisdiction over any criminal act that is done within its borders (s. 5, CPC). Any acts that may have occurred partly within Kenyan jurisdiction and partly outside of it are treated as offences under Kenyan law for which the courts have jurisdiction (s. 6, CPC). The jurisdiction of the courts extends to trying offences committed on the high seas (Attorney-General v Mohamud Hashi & Nine Others Court of Appeal No. 113 of 2011).

13. Ordinarily, an offence is tried within the local jurisdiction in which it occurred (s. 71, CPC). If it is not clear where an offence occurred or the offence occurred in more than one area, the offence may be tried by any court having jurisdiction over one of those areas (s. 74, CPC).

1 See Chapter Five, paras.45-47

14. Any finding, sentence, or order of a criminal court may not be set aside merely because it took place in the wrong jurisdiction unless it is clear such an error prejudiced the accused (Paul Kimani v R Court of Appeal at Nairobi Criminal Appeal No. 172 of 2013; s. 380,CPC).

III. Transfer of Cases

Transfer of Cases between Magistrates

15. A subordinate court may transfer a case to another subordinate court when the complaint arose outside the limits of its jurisdiction (s. 78(1), CPC).

Transfer of Cases by the High Court

16. The High Court, on its own motion or on the application of any party, may order the transfer of a case to any competent subordinate court or for trial by the High Court itself (s. 81, CPC). The High Court may order transfer of cases in any of the following situations:

    i) Where a fair and impartial criminal trial cannot be held in a subordinate court (s. 81(1)(a), CPC).

    ii) Where some question of law of unusual difficulty is likely to arise (s. 81(1)(b), CPC).

    iii) Where it may be necessary to view the place in which or near which the offence took place (s. 81(1)(c), CPC).

    iv) Where an order of transfer would be for the general convenience of the parties or witnesses (s. 81(1)(d), CPC).

    v) Where an order of transfer is expedient for the ends of justice (s. 81(1)(e), CPC).

IV. Procedures before Presentation in Court (Pre-arraignment)

Arrest

17. An arrested person must be presented before the court as soon as reasonably possible, but not later than twenty-four hours after being arrested, unless the twenty-four hours end outside ordinary court hours or on a day that is not an ordinary court day (Art. 49(1)(f)). The phrase 'brought before the court as soon as reasonably possible' requires the court to take into account the circumstances in each case. For instance, a person arrested on Friday morning ought to be presented to the court before the end of the day, and the court should seek an explanation from officers for any delay. The continued detention before charging an accused must be sanctioned by the court (s. 36A, CPC), and any extension must be sought before the expiry of the twenty-four hour period (36A(8), CPC; Milen Halefom Mezgebo v Attorney-General & 2 Others High Court at Nairobi Petition 205 of 2011). The accused should be charged on this first court appearance, be informed of the reason for the continued detention, or be released (Art. 49(1)(g), CoK).

18. The phrase 'brought before the court as soon as reasonably possible' also implies that the time limits for presentment and continued detention are 'outerlimits'andtheprosecutionhasadutytosatisfytheserequirements at the earliest possible time. Lucas Omoto Wamari v Attorney-General & Another (High Court at Nairobi Petition No. 294 of 2012), held that, under the former constitution, the prosecution had a duty to take the arrested person to court as soon as was reasonably practicable and not at the last possible moment. It is presumed that the Wamari holding is still applicable under the 2010 Constitution.

19. If the right to appear before the court under Articles 49(1)(f) and (g) is violated, an accused has a right to seek a remedy, including compensation (Art. 22(1), 23(3)(e), CoK). In Fappyton Mutuku Ngui v

R (Court of Appeal at Nairobi Criminal Appeal No. 32 of 2013), the court, dismissing the appeal, stated that the violation of this right did not automatically entitle the accused to an acquittal or discharge. Instead, where it is established that there was a violation, a remedy in damages may be sought. Delaying an accused's appearance before court may, however, merit dismissal, such as when the delay resulted in the violation of other Constitutional rights or otherwise inhibited an accused's ability to present a defence.

Detention Beyond Twenty-Four Hours

20. Section 36A of the CPC and section 33 of the Prevention of Terrorism Act allow police officers to detain suspects beyond the twenty-four-hour limit, but only with leave of the court. To obtain leave, police officers must take the accused to court and make an application for an extension of time by affidavit, which must demonstrate that there are reasonable grounds for the continued detention of the suspect. If the court makes an order for the suspect to remain in custody, the period must not extend beyond thirty days (s. 36A (8), CPC; s. 33(9), Prevention of Terrorism Act). With respect to terrorism cases, the total period of detention must not exceed three hundred and sixty (360) days (s. 33(10), Prevention of Terrorism Act). Under the CPC, the total period must not exceed ninety (90) days (s. 36A(10), CPC).

Children in Custody

21. A child's best interests are of paramount importance in every matter concerning the child (Art. 53(2), CoK). In line with Article 49(1)(f) of the Constitution and rule 4(1) of the Child Offenders Rules, Schedule 5 of the Children Act ('Child Offenders Rules'), a child should not be held for more than twenty four hours without leave of the court (DMO & Another v R High Court at Nairobi High Court Petition No. 397 of 2012).

Further, in compliance with Article 53(1)(f) of the Constitution, a child should not be detained unless there are compelling reasons for the detention and only 'as a measure of last resort'. Any detention must be for the shortest period of time possible (art. 53(1)(f), CoK; CMK v R High Court at Kisii Criminal Appeal No. 27 of 2013).

22. If a child has been held in police custody, the court must ensure that the parents or guardians of the child and the Department of Children's Services have been informed (r. 4(2), Child Offenders Rules).

23. When dealing with children who have been detained, the court should enquire about the conditions of detention. The court should be satisfied that the children are held separately from adults in conditions that take into account the children's age and gender (Art. 53(1)(f)(ii), CoK; Child Offenders Rules, r. 6; s. 18(3), Children Act).

Persons with Disabilities

24. Disability is defined under the Constitution as including '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' (art. 260, CoK).

25. When dealing with persons with disabilities, the court must adhere to the principle of reasonable accommodation (arts. 7(3)(b), 21(3), 27(4), 54(1), CoK). This means making reasonable adjustments to ensure that individuals with disability can be accommodated physically and in other ways. The court should take into account the conditions of the holding facilities and ensure that, in view of the accused's disability, committal to the facilities would not amount to inhuman and degrading treatment.

Charge Sheet and Information

26. A trial is commenced by filing a charge sheet in the subordinate courts or information in the High Court, which sets out the allegations against an arrested person.

27. The charge or information must contain a statement of the specific offence(s) with which the accused is charged and enough information to demonstrate the nature of the offence charged (s. 134, CPC; Ibrahim v R [1984] KLR 596). The information should cite the correct section of the law under which the accused is charged (s. 137(a)(ii),CPC).

28. The framing of a charge or information should adhere to the rules set out in section 137 of the CPC. However, defects in the framing of a charge or information do not automatically vitiate the proceedings. Under section 382 of the CPC, the primary consideration is whether the defect occasioned a failure of justice. In John Irungu v R (Court of Appeal at Mombasa Criminal Appeal No. 20 of 2016), the Court of Appeal held that failure to refer to the section of the Act upon which a charge was based did not prejudice the accused because the particulars of the offence were clearly stated.

Joinder of Counts

29. Offences may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character (s. 135(1), CPC).

30. Where the accused is charged with more than one offence, the offences can be joined even if they do not arise from the same acts or form part of the same transaction so long as there is sufficient nexus[connection] between them. A sufficient nexus exists if the evidence of one offence is admissible in the trial of the other or where two or more offences exhibit similar features that they could conveniently be tried together in

the interests of justice. For example, in Evans Kalo Callos v R (Court of Appeal at Nairobi Criminal Appeal No. 360 of 2012) the court held that there was sufficient nexus between a charge of robbery with violence and a charge of possession of a firearm and ammunition without a firearm certificate to try offences together. The court held that both the offences, though committed at different times, were of similar character as envisaged by section 135(1) of the CPC because they both involved the possession and use of a firearm. Further, the joinder did not appear to prejudice the accused.

31. Where the court is of the opinion that being charged with more than one offence in a single charge or information may prejudice the accused, the court may order separate trial of any count or counts relating to that offence (ss. 135(3)&275(4), CPC; Hamisi Mungale Burehe v R Court of Appeal at Mombasa Criminal Appeal No. 37 of2013).

32. The Court of Appeal in Peter Ochieng v R(Court of Appeal at Kisumu CriminalAppealNo.10of1985) held that, typically, a charge sheet should not contain more than twelve counts. The court held that where a charge sheet has more than 12 counts, the excess counts may be withdrawn under section 87(a) of the CPC, which would entitle the prosecution to bring them again if necessary. In such a case, at the beginning of the trial the court should ask the prosecution to elect the counts upon which it wishes to proceed. The court in Richard Lenguro Ramacha & 2 Others v R (High Court at Nakuru Criminal Appeal No. 30 of 2010), held that having 17 counts on a charge sheet would be overloading the charge sheet. Courts show concern that including many counts may lead to complex and protracted trials, and may also prejudice the accused, presumably by imposing a heavy task in preparing the defence.

33. Where a charge sheet or information contains more than one count, the counts should be set out in separate paragraphs and numbered consecutively (s. 135(2), CPC). Where a charge sheet has an alternative charge, the alternative charge should be so described and laid immediately after the count.

Multiple Capital Charges and/or Capital Charges Together with Non-Capital Charges

34. Although a person may be charged with several capital charges, it has been held to be good practice to proceed with one of the charges at a time and leave the others in abeyance (Brown Tunje Ndago & Another v R Court of Appeal at Mombasa Criminal Appeal No. 249 of 2011; Okwaro Wanjala v R Court of Appeal at Nairobi Criminal Appeal No. 55 of 1978,(1979) KLR 46; Stephen Muiruri and 2 Others v R Court of Appeal at Nairobi Criminal Appeal No. 47 of 1979 (1980) KLR 70). When deciding whether to join separate charges, the overriding consideration is whether the joinder would prejudice the accused. In Brown Tunje Ndago & Another v R, the court held that proceeding with all the capital charges had not prejudiced the appellants.

35. Where a person is charged with a capital offence and non-capital offences, the court may proceed with the capital charge and hold the non-capital charges in abeyance (Hamisi Mungale Burehe v R (Court of Appeal at Mombasa Criminal Appeal No. 37 of2013).

Joinder of Accused Persons

36. Two or more accused persons can be charged jointly in any of the instances listed in section 136 of the CPC. Those are:

    i) persons accused of the same offence committed in the course of the same transaction;

ii) persons accused of an offence and persons accused of abetting or attempting to commit that offence;

iii) persons accused of offences that incur the same punishment under the same section of the Penal Code or any other law that they had committed jointly within a period of twelvemonths;

iv) persons accused of different offences committed in the course of the same transaction;

v) persons accused of an offence under Chapters XXVI to XXX of the Penal Code, of aiding or abetting an offence under these Chapters, or receiving or retaining stolen property;

vi) persons accused of an offence relating to counterfeit coin under Chapter XXXVI of the Penal Code, persons accused of a related counterfeit offence, or persons accused of attempting abetting the counterfeit offence.

37. Where two or more accused persons are charged together, the court has discretion as to whether to have joint or separate trials. In exercising this discretion, the court should balance the disadvantages, inconvenience, and expense of separate proceedings against the likelihood of prejudice to any of the accused persons(Dusara & Another v R Court of Appeal at Nairobi Criminal Appeal No. 59 of1980).

38. In Malebe v R(High Court at Nairobi Criminal Appeal No. 546, 547 and 548 of 1982), three accused persons were charged under a joint charge sheet with separate offences allegedly committed on different dates. The court held that the charge sheet was defective because the accused persons did not know which charges were filed against them jointly and which separately and did not know when each offence was alleged to have been committed. These defects prejudiced the accused persons. The court held that there should have been a separate charge for each person and separate count for each alleged offence committed on a different date.

39. When a joint trial causes undue delay because the different parties file continued applications for adjournments, the court may consider having separate trials.[1]

Objection against a Charge or Information

40. If an objection is raised against the charge (in the lower courts) or information (in the High Court) before plea, the court must deal with the objection before the accused is called upon to plead (s. 275(1), CPC). For instance, an accused may object to a charge on the basis of double jeopardy. An objection may also be raised on the ground that the charge sheet or information as framed does not disclose an offence in law(ESL v R High Court at Kakamega Criminal Appeal No. 316 of 2012). Should the need arise, the court may extend the summons and, in appropriate cases, release the accused on bail pending the determination of the objection. If the objection is dismissed, the accused will be required to enter a plea.

41. Courts should not pay undue regard to technicalities if substantive justice would be undermined. For instance in Isaac Nyoro Kimita v R (Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009) the court declined to hold that a defective charge rendered the trial unconstitutional where several accused had been accused of 'jointly' defiling a girl. This charge was defective, because such an offence was impossible, but the accused had not been disadvantaged.

Amendments and Substitution of the Charge

42. The court may order that a charge be altered at any time before the close of the prosecution's case if it is of the view that the charge is defective in form or substance (s. 214,CPC).

1 See Chapter Two, para.37.

With respect to an information (before the High Court), the court is obligated to make an order for the amendment of an information if a defect comes to its attention, unless such an amendment would result in an injustice (s. 275(2), CPC). If an information is amended, a note of the order of the amendment must be endorsed on the information.

43. If the charge is changed or substituted, the accused must be called upon to plead to the altered or substituted charge or information (s. 214(1)(i), CPC). The court has a duty, in all cases, to inform the accused of the right to answer to a substituted charge and to cross-examine witnesses who had already testified (Joseph Kamau Gichuki v R Court of Appeal at Nairobi Criminal Appeal No. 523 of 2010). However, the failure to answer to the fresh charges does not automatically vitiate the proceedings. The primary consideration is whether the accused was prejudiced by the failure to enter a new plea. In Benjamin Kariuki Wairimu v R (Court of Appeal at Nairobi Criminal Appeal No. 217 of 2008), for example, the court found that the failure to enter a new plea when the charge sheet was amended from a charge of simple robbery to aggravated robbery did not prejudiced the accused. The court noted that the amendment had been done before the hearing and the failure to plead did not occasion an injustice.

44. When the charge is changed, amended, or substituted, the court should allow the accused, if he or she so wishes, to recall and re-examine witnesses (Samuel Kilonzo Musau v R Court of Appeal at Nairobi Criminal Appeal No. 153 of 2013). The court must not only comply with the above conditions, but must also record that it has complied (Jason Akumu Yongo v R Court of Appeal at Nairobi Criminal Appeal No. 1 of 1983). Courts must not order an amendment to the charge sheet or information if it will occasion an injustice (s.275,CPC;JasonAkumu Yongo v R Court of Appeal at Nairobi Criminal Appeal No. 1 of1983).

45. If there is a discrepancy between the charge sheet and the evidence submitted about when an offence was committed, that discrepancy does not invalidate the charge, and the charge sheet need not be amended (s. 214(2), CPC). Obedi Kilonzo Kevevo v R (Court of Appeal Criminal Appeal at Nairobi No. 77 of 2015), for example, held that the fact that the charge sheet indicated that the offence occurred a month before the date established by the evidence did not prejudice the appellant and was curable under sections 275(2) and 382 of the CPC. Similarly, in Peter Ngure Mwangi v R(Court of Appeal at Nairobi Criminal Appeal No. 44 of 2010), a typographical error in the name of the complainant was held not to prejudice the appellant and was curable.

V. First Court Appearance

Legal Assistance

46. On the first appearance, the court must promptly inform the accused of the right to employ legal assistance (Art. 50(2)(g), CoK; s. 43(1)(a), Legal Aid Act (LAA); Felix Mwova Vaasya v R Misc Crim Application No. 48of 2016). The court should then record whether the accused will be represented by a lawyer or will be unrepresented.

47. If the accused is unable to hire a lawyer and substantial injustice would occur if the accused is unrepresented, the accused has the right to have an advocate assigned by the state at State expense (art. 50(2)(h), CoK). Section 43(1)(b) and (c) of the LAA directs that where substantial injustice is likely to result, the court must inform the accused of the right to legal aid and inform the National Legal Aid Service that it must provide legal aid. The language of the Act ('likely to occur') is both more realistic and more generous to accused persons.

48. In determining whether substantial injustice would result, the court must consider the following factors:

i) The severity of the charge and sentence;

ii) The complexity of the case; and

iii) The capacity of the accused to defend themselves (s. 43(1A), LAA).

49. In addition to these factors, the Supreme Court has held that the court should consider the literacy of the accused and whether the accused is a minor[1] (R v Karisa Chengo & 2 Others Supreme Court Petition No. 5 of2015).

50. Both the Constitution and the law require that a person charged with a capital offence be provided with an advocate at State expense. In David Njoroge Macharia v R (CourtofAppealatNairobiCriminalAppealNo.497 of 2007) the Court of Appeal held that substantial injustice would result if a person charged with a capital offence was unable to afford legal representation. In addition, section 43(4) of the LAA requires the court to order the National Legal Aid Service to provide legal aid to unrepresented persons charged with capital offences.

51. The Supreme Court, however, has held that the likelihood of suffering substantial injustice is not limited to capital offences (R v Karisa Chengo & 2 Others Supreme Court Petition No. 5 of 2015). In Thomas Alugha Ndegwa v R (Court of Appeal at Nairobi Criminal Appeal (Application) No. 2 of 2014), the Court of Appeal allowed an application for legal aid from an appellant who had not been represented in the proceedings before two lower courts. The Court of Appeal held that because he had not previously been represented and because he was serving a life sentence, substantial injustice might occur if he was not represented during the appellant proceedings.

1 A child must be provided legal representation (see Chapter Two, para.52).

52. A child charged with an offence must be provided with an advocate at state expense if he or she is unable to hire one (s. 186(b), Children Act). If a child is unrepresented, the court may order the National Legal Aid Service to provide legal aid to the child (s. 43(1), LAA). In Terry Goreti Wasike & Another v R (High Court at Bungoma Criminal Appeal No. 86 and 87 of 2009), the court held that a presiding judge should promptly inform a child of the right to legal assistance and ascertain whether the child is able to obtain legal assistance.

53. A person wishing to receive legal aid is required to write to the National Legal Aid Service (s. 40(1), LAA). To be eligible for legal aid, an applicant must be an indigent resident of Kenya who is either a Kenyan citizen, a child, a refugee under the Refugees Act, a victim of human trafficking, an internally displaced person, or a stateless person (s.36(1), LAA).

54. Lack of legal aid is not a bar to the continuation of court proceedings (s. 43(6), LAA). In R v Karisa Chengo & 2 Others (Supreme Court PetitionNo.5of2015),the Supreme Court noted that the court exercises discretion in determining whether substantial injustice will result if legal aid is not provided, and there will be instances where the substantial injustice test is not met and legal aid is not provided.

55. Where an accused is unrepresented, the court is expected to provide the accused with some guidance on the court process. In Simon Githaka Malombe v R (Court of Appeal at Nyeri Criminal Appeal No. 314 of 2010) the Court of Appeal held that the failure to invite an unrepresented person to cross examine a witness, as set out in section 208(3) of the CPC, was inconsistent with the court's role as an 'educator of process'.

Interpreter

56. At the first court appearance, the court must satisfy itself that the accused understands the language of the court. The official languages of the court are English and Kiswahili (s.33(1), Court of Appeal (Organization and Administration) Act; s. 34(1), High Court (Organization and Administration) Act). An accused has the right to an interpreter at State expense if the accused does not understand the language of the court (art. 50(2)(m), CoK). This includes both the right to language and, for the hearing impaired, sign interpreters.

57. In George Mbugua Thiongo v R(Court of Appeal Criminal Appeal Case No. 302 of 2007), the court held that where the record shows that the accused participated actively in the trial, he or she cannot be said to have been prejudiced by the failure to record the language used in the proceedings.

58. Violation of the right to an interpreter may result in a mistrial and the quashing of a conviction (Hawo Ibrahim v R Court of Appeal at Nyeri (sitting in Meru) Criminal Appeal No. 46 of 2014); Michael Nganga Kinyanjui v R Court of Appeal at Nairobi Criminal Appeal No. 230 of 2011). However, a violation of the right to an interpreter does not automatically lead to a retrial. The decision depends on the particular facts and circumstances of the case, and an order for retrial should only be made where the interests of justice require it (Julius Kaunga v R Court of Appeal at Nairobi Criminal Appeal No. 189 of2000).

59. The language used must be one that the accused understands but not necessarily the language the accused prefers. In Josphat Njue Solomon v R (High Court Criminal Appeal No. 187 of 2008), the court held that the language used need not be the accused's mother tongue. This holding was affirmed in Kyalo Kalani v R(Court of Appeal at Nairobi Criminal

Appeal No. 586 of 2010). Victims are also entitled to interpreters if they do not understand the language of the court (s.9(1)(f),Victim Protection Act).

60. Interpreters must subscribe to an oath and be impartial. In Farahat Ibrahim Ahmed & 2 Others v R (High Court at Kisumu Criminal Appeal No. 68 of 2016), the court emphasised that it is the duty of the court to ensure that an interpreter is qualified and competent. Further, if the court does not know whether the interpreter is competent, it should conduct an examination to determine whether the interpreter is competent.

Well-being of the Accused Person

61. From the first court appearance and throughout the trial, the court should take note of the physical state of accused persons who have been detained. Where it is evident to the court, or where accused persons inform the court that they are in need of medical attention, the court should direct officers in charge of detention facilities to provide medical treatment. If there are allegations of torture or physical assault, the court must inquire into the circumstances and make appropriate orders.

VI. The Plea

62. Once informed of the substance of the charge or information, the accused is called upon to plead (ss. 207 & 274, CPC).The court is required to explain the charge and all the elements of the offence to the accused in a language he or she understands (s. 207, CPC; Adan v R [1973]EA 445; John Muendo Musau v R Court of Appeal at Nairobi Appeal No. 365 of 2011). It is a fatal omission not to explain to the accused all the elements of a charge (Charo v R [1982] KLR 308). Particular attention should be paid to accused persons who are not represented, and the court should ensure that the charge and all the elements of the offence are thoroughly explained to unrepresented persons (Judy Nkirote v R High Court at Meru Criminal Appeal No. 48 of 2010).

63. The court must ensure that the prosecution furnishes the accused with a charge sheet or information. The particulars contained in the charge sheet or information must be sufficient to enable the accused to answer the charge and prepare their defence (art. 50(2)(b), CoK).

64. Where there is more than one accused person, each must be addressed individually, and their individual responses recorded as nearly as possible in their own words (Baya v R [1984] KLR657).

65. The accused must personally plead to the charge (Johnstone Kassim Mwandi & Another v R High Court at Garissa Criminal Appeal No. 1 of2014).

66. A corporate entity can be charged with a criminal offence (Paper House of Kenya Limited v R Court of Appeal at Nairobi Criminal Appeal No.468 of 2007; Mumias Sugar Co. Ltd. W. S. M. Adambo v R High Court of Kenya at Kakamega Criminal Appeal No. 11 of 2008). The court must satisfy itself that the person taking the plea is authorized to do so on behalf of the corporate entity (Manager, Nanak Crankshaft Ltd vRHighCourtatNairobiCriminalRevisionCaseNo.763of2007;
M. S. Sondhi Ltd. v R (1950) 17 EACA 143; Stephen Obiro v R [1962] EA 61). The officials of a corporate entity may also be charged in their personal capacity for offences attributed to the company based on their positions in the corporation and their conduct (s. 23, Penal Code; Clay City Developers Limited v Chief Magistrate's Court & 2 Others High Court at Nairobi Miscellaneous Application No. 6 of 2013; Otieno Kopiyo Gerald v R High Court At Nairobi Criminal Appeal No. 1226 of 1994).

Procedure on Taking Plea

67. After being read the charge, the accused must either admit or deny the charge. An accused may also opt to remain silent, in which case a plea of not guilty is entered, as discussed below.

Plea of Guilty

68. Where an accused admits the charge and the particulars of the offence, a plea of guilty should be entered. The procedure to be followed where an accused elects to plead guilty in a subordinate court is set out in section 207(2) & (3) and, in a High Court, in section 274 of the CPC. The case of Adan v R [1973] EA 445 sets out the procedure (John Muendo Musau v R Court of Appeal at Nairobi Appeal No. 365 of 2011). If the accused admits the charge, the court must record the admission as nearly as possible in the words used by the accused and then formally enter a plea of guilty (s. 207(2), CPC; Adan v R [1973] EA 445; John Muendo Musau v R Court of Appeal at Nairobi Appeal No. 365 of 2011).The aim is to ensure that the plea of guilty is unequivocal and that the plea as recorded cannot be interpreted in any way other than as admission of guilt. Where the accused is unrepresented, the duty of the court to ensure that a plea of guilty is unequivocal is heightened as emphasised. In Farahat Ibrahim Ahmed & 2 Others v R (High Court at Kisumu Criminal Appeal No. 68 of 2016), citing Adan v R ([1973] EA 445), the court held that 'the danger of a conviction on an equivocal plea is obviously grievous where the accused is unrepresented, is of limited education and does not speak the language of the court'.

69. The accused person's plea must be specific and not merely a general assertion of guilt. In Kariuki v R(Court of Appeal at Kisumu Criminal Appeal No. 22 of 1984); [1984] KLR 809, the trial court record read: 'Accused 1–story is correct; Accused 2–do; Accused 3–do; Accused 4–do; Court–plea of guilty entered for all' (presumably 'do' for ditto). The Appeal Court held that the court had failed to follow the procedure for recording a guilty plea as set out in s. 207(2) of the CPC and in Adan v R ([1973] EA445). It also noted that the use of the word 'do' by the trial court did not show an admission of facts and therefore ordered a retrial.

70. Where the accused is charged with more than one count, the court should record a plea on each count separately (Ombena v R Court of Appeal at Kisumu Criminal Appeal No. 36 of 1981). The court must be satisfied that the accused wishes to admit, without any qualification, each and every element of the offence charged (Elijah Njihia Wakianda v R Court of Appeal at Nyeri Criminal Appeal No. 437 of 2010; Lusiti v R High Court at Nairobi Criminal Appeal No. 319 of 1971). If satisfied, the court should record a plea of guilty.

71. The courts have held that for the accused to say 'It is true' is not necessarily a plea of 'Guilty', if it appears that the accused disputes some element of the offence (Jason Akhonya Makokha v R Court of Appeal at Kisumu Criminal Appeal No. 131 of2012).

72. Once an accused person admits the charge, the prosecutor is required to state the facts upon which the charge is based (Adan v R [1973] EA 445). It is not enough for the prosecutor to state 'facts as per charge sheet'. The statement of facts must be explained to the accused in a language that he or she understands. This implies not just a language which the accused understands but also use of ordinary words; technical words should be avoided.

73. The accused must admit the facts as stated for the court to satisfy itself that the plea is unequivocal. In Obedi Kilonzo Kivevo v R (Court of Appeal Criminal Appeal at Nairobi No. 77 of 2015), the court held that the statement of facts did not disclose an offence because it did not indicate the age of the victim in a defilement case. The plea of guilty was therefore not unequivocal. In Ombena v R(Court of Appeal at Kisumu Criminal Appeal No. 36 of 1981), the appellate court was not satisfied that the plea was unequivocal because the prosecutor had simply indicated that the 'facts were as per the charge sheet'.

74. The court must ensure that the accused understands the substance of the charge (Job Ntabo Ratemo v R Court of Appeal at Nairobi Criminal Appeal No. 96 of 2014). When an accused person facing a charge punishable by death wishes to plead guilty, the court ought to explain the penalty attracted by the offence. In such a case, it is good practice to adjourn the hearing and allow the accused to reflect on the plea before proceeding to convict (Wandete David Munyoki v R Court of Appeal at Malindi Criminal Appeal No. 56 of 2013). The court must be convinced beyond doubt of the intention of the accused to plead guilty.

75. Upon hearing the facts on which the charge is based, the accused should be given an opportunity to respond to the facts. If the accused denies the facts, or offers an explanation that amounts to a denial, a plea of not guilty should be entered (s. 207(3), CPC). If the facts are admitted, the court must convict the accused on the plea of guilty.

Plea of Not Guilty

76. A plea of not guilty is entered in the following instances:

    i) The accused does not admit the charge (s. 207(3), CPC);or

    ii) The accused does not admit the statement of facts (Adan v R [1973] EA 445; (John Muendo Musau v R Court of Appeal at Nairobi Appeal No. 365 of 2011); or

    iii) The accused refuses to plead (ss. 207(4) &280(1),CPC).

Plea Bargaining[1]

77. After an accused has been charged or at any time before judgment, the prosecutor and an accused person may negotiate and enter into an agreement for the reduction of a charge to a lesser offence, for the withdrawal of the charge, for a stay of other charges, or for a promise not to proceed with other possible charges (s. 137A,CPC).

79. The views of the victim must be sought in any plea bargaining (s.137D(c), CPC;s.9(1)(c), Victim Protection Act).The plea agreement may provide for the payment by an accused of any restitution or compensation. If the prosecution is undertaken privately, a plea agreement can only be entered with the consent of the Director of Public Prosecutions (s. 137A (4), CPC).

80. Plea agreements may not be used in relation to prosecutions under the Sexual Offences Act, offences of genocide, war crimes, and crimes against humanity (s. 137 NCPC).

81. The court should not interfere with the prosecutor's discretion to engage in plea negotiations. However, where the prosecutor is in breach of obligations under Article 157(11) of the Constitution, a party may apply to the High Court for appropriate orders (Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & Another High Court at Nairobi Petition No. 285 of 2016).

82. The court does not participate in plea negotiation. The plea agreement must be in writing and must adhere to the requirements set out in section 137E of the CPC.

1 The Office of the Director of Public Prosecutions has developed Rules on Plea Agreements pursuant to section 137(O) of the CPC, which mandate the Director of Public Prosecutions to make rules relating to plea negotiations and agreements (Legal Notice No. 47 of 2018, February 19th).

83. Before recording a plea agreement, the court is required to place an accused person under oath and personally address him or her. The court must inform the accused and ensure that the accused understands the rights pertaining to the trial and the implications of the plea agreement (137F(1), CPC). The court must also be satisfied that at the time of entering the agreement the accused was competent, of sound mind, and acted voluntarily (s. 137G,CPC).

84. When a court accepts a plea agreement, it must record the 'factual basis', that is, the facts informing the plea (s. 137H(1)(a), CPC). The facts that the accused admits to must be recorded in order to ensure that they support the offence. The agreement becomes binding on the parties and forms part of the court record (Alvin Kamande Njenga & Another v R High Court at Nairobi Miscellaneous Criminal Application No. 282 of2011; s. 137H, CPC). Where the agreement involves the reduction of a charge to a lesser included offence, the court must, upon accepting the plea agreement, convict the accused of that lesser offence (s. 137H(2), CPC).

85. Where a court rejects a plea agreement, it must record the reasons for the rejection and inform the parties. The plea agreement then becomes null and void and proceedings giving rise to it become inadmissible in a subsequent trial or in any future trial relating to the same facts. Where a plea agreement has been rejected and a plea of not guilty consequently entered, the prosecutor must institute fresh proceedings before another judge, unless the accused waives the right to have the trial proceed before another court. If a plea agreement has been rejected, then there can be no further plea agreement negotiations in relation to the same facts and, further, no party can appeal or apply for a review of an order rejecting a plea agreement (s. 137J,CPC).

86. An accused person may withdraw a plea of guilty resulting from a plea agreement for any reason before the court accepts the plea. The accused may also withdraw a plea of guilty after the court has accepted the plea agreement and entered a conviction but before sentencing. In this instance the accused must provide the court with a fair and just reason for requesting withdrawal (s. 137K,CPC).

87. A sentence passed by the court following a plea agreement is final, and no appeal lies from it except as to the extent or legality of the sentence imposed (David Irungu Muriithi v R Court of Appeal Criminal Appeal No. 379 of 2009). However, a conviction and sentence obtained pursuant to a plea agreement can be set aside on account of fraud or misrepresentation (s. 137L,CPC).

Procedure for Persons of Unsound Mind

88. All persons are presumed to be of sound mind until the contrary is proved (s. 11, Penal Code). When a person of unsound mind is charged, the court should proceed as follows:

i) The court must determine whether the accused is of sound mind by referring him or her to a psychiatrist. Thereafter, if the court is satisfied that the accused is of sound mind, the court must require the person to take plea.

ii) If the court finds the accused to be of unsound mind and consequently incapable of understanding and following the proceedings, the court should proceed as follows (ss. 162&280(1), CPC):

a. Postpone the trial;

b. Order either that the accused be held in custody in a location where he is safe and will not be a danger to himself or others, or that the accused be released on bail; and

c. If the person is held in safe custody, report the case for the order of the President.[1]

89. When making an order for an accused to be held in safe custody, the court should bear in mind the need to protect the accused and other persons.

90. Where an accused person subsequently becomes capable of making his defence, the medical officer must forward a certificate to that effect to the Department of Public Prosecutions (DPP) who must then inform the court and indicate whether the Republic intends to continue with the case. The court must then order the production of the accused and either discharge the person if the prosecution does not wish to proceed or continue taking the plea (s. 164,CPC).

Plea of Autrefois Acquit or Autrefois Convict

91. A person must not be tried for an offence in respect to an act or omission for which he or she has previously been acquitted or convicted by a competent court (art. 50(2)(o), CoK; s. 138, CPC; Nicholas Kipsigei Ngetich & 6 Others v R High Court at Nakuru Criminal Case No. 123 of 2010). However, a person may subsequently be tried for another offence that he or she could have been charged with in the former trial under section 135 of the CPC (s. 139, CPC). An accused person may also be charged with respect to an act whose consequences had not occurred or were not known at the time of the previous trial (s. 140, CPC). The plea of autrefois acquit or convict does not apply to instances where the accused was tried by a court that was not competent (s. 141,CPC).

1 See Karisa Masha v R Court of Appeal at Mombasa Criminal Appeal No. 78 of 2014; while itrelatestosection162 of the CPC, it is instructive as the procedure provided in s.280 of the CPC is similar to 162.

92. If the accused pleads that he or she has previously been convicted or acquitted of the same offence, the court is required to try that plea. If the plea of a previous conviction or acquittal is not established, the accused is required to plead to the charge (s. 207(5),CPC).

93. A previous conviction should be proved through a certified record of the court, a certificate signed by the officer in charge of the prison in which the accused had been detained, or a warrant of commitment to prison (s. 142, CPC).

Change of Plea

94. An accused person may change a plea of guilty to not guilty at any time before a sentence is imposed (John Muendo Musau v R Court of Appeal at Nairobi Criminal Appeal No. 365 of 2011; Munguti v R High Court at Nairobi Criminal Appeal No. 1815 of 1984; Boniface Kioko v R Court of Appeal at Nairobi Criminal Appeal Nos. 12 &112 of 1982). In John Musau, the court reiterated the obligation to register a plea of not guilty when an accused changes the plea or when the accused makes statements in mitigation that counter the guilty plea.

95. An accused may also change a plea of not guilty to a plea of guilty (Boniface Kioko v R Court of Appeal at Nairobi Criminal Appeal No. 12 &112 of 1982). The court should be careful to ensure that the accused understands the decision to change the plea just as the court would if the accused had entered a plea of guilty from the outset.

Disposal of Exhibits after Plea

96. Where the charge relates to perishable, dangerous, noxious or bulky exhibits, it is appropriate for the goods to be produced in court at the first appearance or soon thereafter. Such exhibits include foodstuff, chemicals, flammable petroleum products, and livestock.

97. These kinds of exhibits should be formally produced in court and an order made for release. Failure to produce exhibits that are the subject matter of the charge may be fatal, as the prosecution may not be able to prove its case beyond reasonable doubt without the exhibits. In John Bosco Kariuki v R High Court at Nairobi Criminal Appeal No. 272 of 2004, for example, the appellant was acquitted because the motor vehicle claimed to have been stolen was not produced at trial.

98. If it is not feasible to keep exhibits, then photographs of the exhibits are admissible. In John Mbugua v R, (High Court at Nairobi Miscellaneous Criminal Application No. 69 of 2014), the court ordered the release of a motor vehicle that had been held at a police station as an exhibit and allowed the production of photographic evidence.

VII. Release on Bail or Bond Pending Trial

99. Accused persons have the right to bail except where there are compelling reasons for denial of bail.[1]

100. An accused person need not make a formal application for bail; it should therefore be granted as a matter of right unless the prosecution raises an objection to release that is based on compelling reasons (art. 49(1)(h), CoK).

101. A court's decision as to whether to grant or deny bail should be guided by Article 49 of the Constitution, sections 123 and 123A of the CPC, and the Bail and Bond Policy Guidelines, 2015.

102. Determining whether to release the accused on bail must be distinguished from the determination of the person's guilt. Thus, the court should take care not to be influenced by statements of witnesses or any evidence that may have come to its attention.[2]

1 See art. 49(1(h), CoK.

2 For instance, documents similar to committal bundles for the abolished committal proceedings are sometimes placed in the court files in murder cases prior to the hearing.

Compelling Reasons

103. A compelling reason to deny release in this context is one that is weighty and persuades the court that the accused should not be released (R v Danfornd Kabage Mwangi High Court at Nyeri Criminal Case No. 8 of 2016).

104. The prosecution has the burden of proving that there are compelling reasons to deny release (R v Danson Mgunya & Another High Court at Mombasa Criminal Case No. 26 of 2008). To deny bail, the prosecution must provide cogent evidence and not mere allegations .In Job Kenyanya Musoni v R (High Court at Nairobi Criminal Application 399 of 2012), the court allowed a bail application and held that mere allegations that the accused was a flight risk did not suffice. The prosecution ought to have substantiated its claim.

105. Compelling reasons may include the likelihood that the accused will[1]:

    i) Fail to attend court (s. 123A (2)(a), CPC). In Job Kenyanya Musoni v R (High Court at Nairobi Criminal Application 399 of2012), the court stated that the key consideration when deciding the issue of bail is whether the accused will attend the trial or whether there is a likelihood of absconding. Reiterating this position, the court, in R v Salim Said Nassoro & 2 Others(High Court at Nairobi Misc. Criminal Application No. 351 of 2016), stated that the seriousness of the offence, per se, is not a ground for denying bail. An accused, a foreigner charged with a terrorism offence, who had no ties in Kenya and who failed to provide a Kenyan surety, was considered a flight risk in Oluseye Oledaji Shittu v R (High Court at Nairobi Misc. Criminal Application No. 130 of 2016).

1 See also para. 4.26, Bail and Bond Policy Guidelines.

ii) Commit, or abet the commission of, a serious offence. In R v Fredrick Ole Leliman & 4 Others (High Court at Nairobi Criminal Case No. 57 of 2016), the accused persons had been charged with four counts of murder. The first deceased was an advocate acting on behalf of the second deceased and prior to his death had filed a report at the Independent Policing Oversight Authority alleging that he had been harassed by the first applicant. The court denied the accused persons bail because it held that there was a real likelihood that they would commit further offences if released. In R v David Miningwo (High Court at Eldoret Criminal Case No. 44 of 2012), the accused had been charged with murdering his wife, and one of the witnesses was his eight-year-old daughter. The court denied bail, holding that, under the circumstances, there was a likelihood that the accused would harm the witness. The decision to deny an accused bail on this ground ought to be exercised with caution as it may amount to an assumption of guilt.

iii) Endanger the safety of victims, individuals or the public. In R v Richard David Alden (High Court at Nairobi Criminal Case No.48 of 2016), the court denied a claim that that an accused should be detained because the case was highly publicized and therefore releasing the accused would cause a breach of peace and public order. The court held that the prosecution's claims were speculative and that it had not provided evidence demonstrating the likelihood of unrest.

iv) Interfere with witnesses or evidence. In R v Richard David Alden (High Court at Nairobi Criminal Case No.48 of 2016), the court overturned the Magistrate Court's order detaining the accused and released him on bail. The High Court held that there must be evidence of actual interference or a likelihood of interference. The prosecution had argued that the employer/employee relationship between the accused and two of the witnesses suggested a

likelihood of interference with witnesses. The court, however, held that a mere relationship between the accused and the witness, especially one that was not filial, did not, standing alone, prove likelihood of interference. In K v R (High Court at Kabarnet Misc. Criminal Application No. 67 of 2017), the court held that the fact that the accused was the father of the complainant, a child, created a likelihood of interference. The court therefore upheld the suspension of bail, which was to be reinstated once the complainant had testified. In R v Fredrick Ole Leliman & 4 Others (High Court at Nairobi Criminal Case No. 57 of 2016), the court denied the accused persons bail on murder charges on the basis that there was a real likelihood of interference with witnesses. The court noted that the deceased persons were found dead after attending a trial involving one of the accused persons. Further, all the accused persons wielded influence because they were administrative police officers, and resided in the same area as the witnesses. The court also noted that some witnesses had been placed under witness protection and those who had not had expressed fear of imminent danger.

v) Endanger national security or public safety. In R v Diana Suleiman Said & Another (High Court at Mombasa Miscellaneous Criminal Application No. 55 of 2014), the accused was denied release because he had been charged with twelve counts of murder during attacks in Lamu County. The attacks were still ongoing at the time of his hearing, and the court held that releasing him would pose a threat to public safety. In R v Ahmad Abolafathi Mohamed & Another (High Court at Nairobi Criminal Revision No. 373 of 2012), the court denied the respondents bail in view of intelligence reports that linked 85kg of unrecovered explosive materials to the respondents. The court held that the threat to national security posed a compelling reason to detain the accused.

vi) Protection of the accused (s.123A(2)(b), CPC).In Mahadi Swaleh Mahadi v R (High Court at Mombasa Criminal Case No. 23 of 2014), the court took judicial notice of instances where persons charged with terrorism-related crimes had died under mysterious circumstances upon being released on bond. In view of this, the court denied the accused bail for his protection.

106. The fact that the accused has been supplied with witness statements does not warrant the denial of bail, unless there is evidence of a real likelihood of the accused interfering with witnesses (R v Peter Muia Mawia High Court at Machakos Criminal Case No. 48 of 2015). Bail should not, therefore, be denied on weak grounds but on real and cogent grounds that meet the high standard set in the Constitution. Allegations of witness interference must be supported by evidence (R v Anthony Mgendi Mbungu & Another High Court at Embu Criminal Case No. 34 of 2015). The court in R v Joktan Mayende & 3 Others (High Court at Bungoma Criminal Case No. 55 of 2009) indicated that intimidation of any kind aimed at influencing or compromising a witness amounts to interference with witnesses.

107. If compelling evidence arises after the accused has been released or granted bail, the court may properly review its earlier order and detain the accused (R v Daniel Ndegwa Wachira High Court at Nyeri Criminal Case No. 12 of 2015).

Bail in Minor Offences

108. A court may not detain an accused person who is charged with an offence that is punishable by a fine only or by imprisonment for not more than six months (art. 49(2), CoK). Read together with Article 49(1)(h), a person charged with an offence envisaged by Article 49(2) can have reasonable conditions attached to the release on bail.

Some of the reasonable conditions include requiring that the accused maintain good behaviour, attend court when required, provide security in the form of a bond or surety, and refrain from interfering with witnesses. The court may also impose restrictions on traveling out of jurisdiction.

109. Courts must ensure bail conditions are reasonable and not excessive, as this would lead to de facto imprisonment and amount to a violation of Article 49(2). What is reasonable should be determined in light of the facts and circumstances of each case (R v Taiko Kitende Muinya High Court at Nairobi Criminal Case No. 65 of 2010).

110. Offenders charged with minor traffic offences must not be detained but dealt with according to Article 49(2) of the CoK. Minor traffic offences must be fast tracked (Guideline 4, Guidelines on Handling of Traffic Matters).

Bail Considerations for Children

111. Considerations of bail in cases involving children must be guided by the best interests of the child (art. 53(2), CoK; s. 4(2), Children Act; para. 4.4(j) Bail and Bond Guidelines; J M K & 9 Others v R High Court at Garissa Criminal Appeal No. 24 of 2014).

112. Children should only be denied bail as a last resort, and when it is denied, the trial should be expedited (art. 53(1)(f), CoK).

113. Children's officers must be involved to provide information that may guide the court in making decisions affecting children.

114. If the child is not released on bail, the court should order the remand of the child in a children's remand home or, if there is none within reasonable distance, make any other order for the safe custody of the child. The period for remand should not exceed six months if the offence is punishable by death and not exceed three months for any other offence (r. 10, Child Offenders Rules).The court must ensure that the remand home is suitable for child taking into account the child's age and sex.

Sureties and Securities

115. To secure the attendance of an accused who is released on bail, the court may require the accused to provide one or more sureties (s. 131, CPC).

116. The suitability of the surety is determined by the court through an examination on oath. Factors to be considered by the court include(para. 4.40, Bail and Bond Policy Guidelines; R v James Kiarie Mutungei High Court at Kajiado Criminal Revision 1 of 2017):

    i) The surety's financial ability to meet the obligations of the terms of the bail;

    ii) Character of the surety;

    iii) Nature of the accused's relationship with the surety;

    iv) The surety's residence

117. Any other factor that may have a bearing on the surety's compliance with bail terms.

118. The court must be satisfied that a proposed surety understands the obligations of a surety and is willing to assume the role. During this process of approving the surety, the prosecution should be involved (para.4.40, Bail and Bond Policy Guidelines).

119. Examining the suitability of a surety is a judicial process and must be put on record. In R v James Kiarie Mutungei (High Court at Kajiado Criminal Revision 1 of 2017), the court held that the trial court must examine the surety and that examination must appear on record. The court noted that the record from the trial court provided no indication that an examination had taken place. The court also held that the prosecution ought to have been involved in the verification of information provided by the accused and the surety.

120. Upon approval of a surety, the court should explain clearly that, should the accused abscond or breach the bail terms, the surety would pay a penalty or forfeit the bail or bond amount. A surety may apply to the court to be discharged (s. 128(1), CPC). When this application is made in the absence of the accused, the court should issue a warrant of arrest against an accused (s. 128(2), CPC). The court should then order the accused to provide other sufficient sureties. If the accused fails to do so, he or she will be remanded into custody (s. 128(3), CPC).

121. Similarly, where a surety dies before the bond is forfeited, the court should discharge the person's estate and may require the accused to provide another surety (s. 129, CPC).

122. Where an accused is required to provide a security so as to be released on bond, the court must be furnished with a security document such as a title deed, motor vehicle log book, or an insurance bond. In addition to the security document, the court may require a valuation report revealing the value of the property being offered as a security, especially where the security is for a substantial amount.

123. Upon acceptance of a title deed or motor vehicle log book as a security document, the court should make an order to restrain the transfer of any interests in the secured property. The order should be served upon the land registrar or the registrar of motor vehicles, as the case maybe.

124. If the accused absconds, the surety must be ordered to attend court to pay a penalty or show cause as to why the penalty should not be paid (s.131(1), CPC).Should the surety fail to pay the penalty, the court may make an order for the attachment of the surety's movable property or, if the surety is deceased, the estate (s. 131(2), CPC).

CHAPTER THREE:

THE TRIAL PROCESS

GENERAL MATTERS RELATING TOTRIAL

I. Public Trial

1. As a general rule, criminal trials must be held in public (art. 50(1), CoK; s. 77(1), CPC), although there are limited circumstances in which closed proceedings are allowed (art. 50(8), CoK). The court must be convinced that there is no alternative measure that would protect the interest in question other than excluding the public. Sometimes only certain classes of person need be excluded. It is undesirable to have the whole trial in camera; where possible, and where the circumstances of the case so demand, part of a trial may be held in private and part of it in public.[1] A trial does not cease to be public because not everyone who wishes to be present is able to do so.[2]

2. Article 50(8) of the Constitution recognizes the following grounds upon which a court can exclude the public from atrial:

   i) To protect witnesses or vulnerable persons (r. 2(2),Sexual Offences Rules of Court, 2014): In some cases, it may be necessary to hold a trial in camera for the safety or privacy of victims, witnesses or accused persons. In Application for Orders of Witness Protection(High Court at Nairobi Misc Case No. 30 of 2014), the court allowed witnesses to testify in camera as the accused persons were alleged to be members of a dangerous gang and, together with their accomplices, had allegedly issued threats against anyone who would testify during their trial. In R v Amos Gichuhi Kimeria (High Court at Nakuru Criminal Appeal No. 49 of 2012), in an application to exclude the public from hearings, the court reiterated the right to a public trial but noted that the negative media coverage made the accused person vulnerable.

1 Guardian News and Media Ltd v E Incedal & M Rarmoul-Bouhadjir [2014] EWCA Crim 1861 Court of Appeal (Criminal Division).

2 R ex p. O'Connor v Aldershot Magistrates Court [2016] EWHC 2792 (QB Divisional Court).

While the application to exclude was not allowed, the court ordered the media to report the proceedings accurately without inflammatory conclusions. The court further ordered that media houses that violated the order or any member of the public that threatened the accused would be excluded from the proceedings. The law does not require that the trial of a child is held in private, but the court will bear in mind the requirement of respecting the best interests of the child as the paramount consideration (R v Ali Hassan High Court at Nairobi Criminal Case No. 11 of 2013).

ii) To protect morality: The court has discretion to exclude the public if it is satisfied that the evidence being adduced would offend morals. Not all cases involving such evidence will require the exclusion of all members of the public. For instance, the court may exclude children from a trial in which obscene evidence is to be presented.

iii) To protect public order: where criminal trials are likely to cause disruptions of public order, the public may be excluded. In R v Amos Gichuhi Kimeria (High Court at Nakuru Criminal Appeal No. 49 of 2012), for example, the court directed that the cases should be reported in manner that does not 'draw conclusions that are likely to incite or influence public outrage against the [accused] or his counsel' and stated that, if the orders were violated, the media houses would be excluded from the trial.

iv) To protect national security: A trial may be held in camera in criminal proceedings involving evidence that would compromise national security.

3. As noted, a public trial is central to the rule of law and the discretion to hold a trial in camera must be used with caution.

II. Attendance of Parties

Attendance of the Accused Person

4. The accused person has a right to be present throughout the trial (art.50(1) (2)(f), CoK). The court may issue a summons to ensure the attendance of an accused person (s. 91, CPC). Where an accused or appellant who is in custody is not produced for trial by the authorities, the court should issue a Production Order directing the authority to produce the accused or appellant in court on a date specified in the Order (s. 116,CPC).

5. The court may waive the presence of an accused if, after receiving a summons to appear for a misdemeanour charge, the accused either pleads guilty in writing or is represented by an advocate (s. 99(1),CPC). The court may, however, direct that the accused attend any subsequent proceedings. If the offence is punishable only with a fine or no more than three months imprisonment, the court has no discretion: presence must be waived if the accused pleads guilty or is legally represented

6. A warrant of arrest may be issued for an accused person who was served with a summons to appear but failed to do so (s. 101, CPC). Such a warrant may also be issued at any time before the time appointed in the summons (s. 100, CPC).

7. An accused's failure to appear for a hearing is treated differently depending on whether the case is a misdemeanour or a felony. If the accused is charged with a misdemeanour, the court may proceed with the hearing as if the accused were present (s. 206(1), CPC). If the accused is charged with a felony, the court must issue a warrant of arrest for the accused to be brought before the court (s. 206(4), CPC). Where an accused charged with a misdemeanour is tried and convicted in the accused's absence, the conviction may be set aside if the court is satisfied that there were legitimate reasons for the failure to appear that were beyond the accused's control and that the accused had a viable

defence (s. 206(4), CPC). The court may, however, proceed in the absence of the accused if the accused's conduct makes it impossible for the trial to be conducted in his or her presence (art. 50(2)(f), CoK). In Daniel Karuma alias Njaluo v R(Court of Appeal at Nairobi Criminal Appeal No. 157 of 2014), for example, the Court of Appeal affirmed the trial court's decision to exclude the accused from the proceedings due to his disruptive behaviour, which included making loud noises, banging a metal door, turning his back to the court, and cursing.

8. In Aggrey Mbai Injaga v R(Court of Appeal at Nairobi Criminal Appeal No.150 of 2013),the Court of Appeal held that a trial court may proceed with the trial in the absence of an accused person who declined to participate and left the courtroom of his own volition. In the United Kingdom case, Regina v Jones ([2002] UK HL 5), the House of Lords held that a trial court could try, in absentia, accused persons who had absconded after being released on bail.

9. However, the discretion to proceed in the absence of the accused must be exercised with caution. The court must satisfy itself that there are sufficient grounds to conclude that the person has absconded and is unwilling to participate in the trial (R v Solomon Locham High Court at Kapenguria Revision of Criminal Case No. 718 of 2013). Further, possible measures to procure the attendance of the accused must have been exhausted.

The Complainant's Attendance

10. When an accused person appears for a hearing, but the complainant, who had notice of the time and place appointed for the hearing, fails to appear, the court has the discretion to acquit the accused (s. 202, CPC). This power to acquit must be exercised judicially.

11. The word 'complainant' refers to either the Republic or the person who filed the complaint. Specifically, in section 202 the word 'complainant' has been interpreted to mean the Republic in whose name all criminal prosecutions are brought and not the victim of the crime, who is merely the chief witness on behalf of the Republic (Roy Richard Elirema & Another v R Court of Appeal at Mombasa Criminal Appeal No. 67 of 2002). Accordingly, the accused cannot be acquitted under section 202 when the prosecutor is in court even though the case cannot proceed because the person making the complaint and other witnesses are absent (R v Mwaura Ikego (1979) KLR209).

12. If necessary, a victim can be provided with reasonable out of pocket and travel expenses to attend trial. (s. 394, CPC; r. 2,Criminal Procedure (Remuneration of Witnesses and Assessors) Rules).

13. The court may, for reasons it considers to be proper, adjourn the hearing of the case until some other date and on such terms as it deems fit (s. 202, CPC). If the complainant still fails to appear in court after an adjournment, the court has the discretion to dismiss the charge with or without costs (s. 206(1),CPC).

14. The power to dismiss a charge or acquit the accused person following the failure of the complainant to attend court should be exercised with caution. The court should only exercise such power where it is evident that the complainant's absence is deliberate or repeated (R v Mwaura Ikego High Court at Kisumu Criminal Appeal No. 46 & 47 of 1979; R v Mike Ole Nkoruma & 2 Others High Court at Homa Bay Criminal Appeal No. 93 of 2014).

III. Expeditious Conduct of Trial

15. A trial must be concluded without unreasonable delay (art. 50(2)(e), CoK). The court's decisions throughout the trial should be exercised in a manner that upholds this right. Court proceedings should be carefully

planned and organized with the intention of avoiding unnecessary delays in the processing of cases. Expeditious determination or conduct of criminal trials is an accused person's right and is in the public interest and in the interests of justice (Eliphaz Riungu v R Misc. Criminal Application No. 472 of 1996). The requirement to dispose of cases expeditiously should be taken into account when setting the hearing dates.

16. Whether a trial has been concluded without unreasonable delay is determined on a case by case basis (Julius Kamau Mbugua v R Court of Appeal at Nairobi Criminal Appeal No. 50 of 2008, [2010] eKLR 19). However, it should be borne in mind that a hasty trial carries with it the risk of prejudicing an accused person and thus resulting in an unfair trial (Joseph Ndungu Kagiri v R High Court at Nyeri Criminal Case No.62 of 2012, where the trial of unrepresented accused proceeded only six days after they were arraigned).

17. Courts are obligated to conclude expeditiously cases that involve vulnerable persons such as children, the elderly, and persons with intellectual disabilities (s. 38(4), Persons With Disabilities Act (PWDA)). Such vulnerable persons may have unique needs or limitations. For example, they may have difficulty recalling information over a long period of time or may not be able to endure an unduly long trial. The Children Act (CA), as well, requires that trials of children be held without unnecessary delays (s. 186(c), CA; r. 12, Child Offenders Rules;[1] Kazungu Mkunzo & Swaleh Kambi Chai v R Court of Appeal at Mombasa Criminal Appeal No. 239 of2004).

1 In view of the old Constitution's requirement to conclude within 'reasonable time' the time limits for trials of child offenders set by rules 12(2)-(4) of the Child Offender Rules were declared unconstitutional (as well as ultra vires the Act): Kazungu Kasiwa Mkunzo v R Criminal Appeal at Mombasa No. 239 of 2004.

18. The Anti-Corruption Court is required to hold a trial on a daily basis until its conclusion as far as it is practicable to do so (s. 4, Anti-Corruption and Economic Crimes Act). Where this is not practicable, the court may direct that the trial proceeds daily within designated 'block dates' that have been agreed upon by the parties (Practice Directions for the Anti- Corruption and Economic Crimes Division of the High Court). In fixing such dates, the gravity, urgency, complexity of the case, and considerations of national interest should be taken into account.

19. With respect to election offences, the court is required, as far as practicable, to proceed on a daily basis until completion of the trial (s. 23, Election Offences Act).

IV. Adjournment of Hearing

20. The court's discretion to grant or refuse an adjournment (ss. 205& 283, CPC) has to be exercised judicially depending on the circumstances of each case (FUM v R Court of Appeal at Nyeri Criminal Appeal No.139 of 2010; R v Mwaura Ikego High Court at Kisumu Criminal Appeal No. 46 & 47 of 1979; Francis Otieno Joseph v R Misc. Criminal Application No. 19 of 2015).

21. Adjournments are available both to the prosecution and to the defence but neither the prosecution nor the defence is entitled to indefinite adjournments, as this would undermine the right to trial within a reasonable time. In FUM v R (Court of Appeal at Nyeri Criminal Appeal No. 139 of 2010), the court upheld the decision of the trial judge who denied an application for an adjournment by an accused person who had already requested numerous adjournments and who appeared unwilling to proceed. Similarly, in Aggrey Mbai Injaga v R (Court of Appeal at Nairobi Criminal Appeal No.150 of 2013), the Court of Appeal affirmed the trial court's decision to deny a request for an adjournment by an accused person who had been granted four adjournments previously. In

Wycliffe Kisanya Lusigi v R (Court of Appeal in Eldoret Criminal Appeal No. 64 0f 2005), the prosecution had obtained many adjournments and had taken five years to present five witnesses. The Court of Appeal allowed the appeal, and observed that trial courts must refrain from granting unwarranted adjournments. Having previously stated that it would not allow any further adjournments, the court in R v John Gachathi Gitau (High Court at Nairobi Criminal Case No. 15 of 2011) denied an application by the prosecution for another adjournment to obtain a death certificate. The court stated that another adjournment was unwarranted, and that it would have been acceptable for the prosecution to present an affidavit from the relevant government officer and a burial permit in lieu of the death certificate.

22. On the other hand, adjournments ought not to be denied in warranted cases. (Mugema v R [1967] EA 676; R v Mwaura Ikego High Court at Kisumu Criminal Appeal No. 46 & 47 of 1979) - in which the judge commented that the prosecution had not requested adjournments previously, that the accused were on bail, and that case could be adjourned until the next day; Stephen Odede v Court Martial at Kahawa Garisson & Another (High Court at Nairobi Petition 149 of 2016) - in which the court noted that the accused should not be required to proceed without having the chance to prepare his defence when counsel for the accused, not the accused himself, was responsible for the delay.

23. The court must balance the right to adequate time for preparation of the defence and the right to a trial within a reasonable time (R v Misheck Muyuri High Court at Meru Criminal Appeal No. 204 of 2005). There is no requirement that each party have an equal number of adjournments (Patrick Kihara Mwangi v R High Court at Naivasha Criminal Appeal No. 64 of 2015). Where a case has been adjourned to a date fixed by the court in the presence of the parties, the hearing date ought not to be altered without the involvement of all the parties (Sammy Macharia Ruhi v R High Court at Nairobi Criminal Appeal No. 428 of 1985).

Mention of Cases

24. Section 205 of the CPC requires that a case should not be adjourned or longer than thirty days and, in respect of an accused person on remand, fifteen days (s. 205, CPC). As a result, courts have established a practice of mentioning cases every fortnight when an accused person is in custody or every thirty days for those released on bail.

25. The purpose of mentioning a case is to enable the court to keep track of the case, to ensure that accused persons are not detained in custody for longer than necessary, and to assess the condition of the accused person. Mentions provide an opportunity for accused persons, particularly those in custody, to raise grievances or complaints and for the court to make necessary orders. During mentions, courts make orders for further remand of the accused persons until the next mention or hearing date. Courts should ensure that accused persons are in attendance for mention of their cases.

Part-heard Cases

26. Once a trial begins, the judge or magistrate should hear the case to conclusion (Abdi Adan Mohamed v R Court of Appeal at Mombasa Criminal Appeal No. 1 of 2017). However, where a judge or magistrate ceases to exercise jurisdiction before the case is finalised, the case may be taken over by another judge or magistrate(ss.200 & 201(2),CPC).In such a case, a succeeding judge or magistrate may proceed as follows:

    i) If a judgment had been written and signed by the predecessor but not delivered, the succeeding magistrate should deliver it(ss.200(1)(a) & 201(2),CPC),

    ii) If a judgment had been delivered, pass a sentence or make any other appropriate order (ss. 200(2)&201(2),CPC)

    iii) Start the trial afresh (ss. 200(1)(b)&201(2)), CPC),or

iv) Proceed with the trial from where the predecessor had reached (ss. 200(1)(b)&201(2),CPC).

27. In Charles Ogero Bosire v R(Court of Appeal at Kisumu Criminal Appeal No. 152 of 2011), it was held that a case should be heard de novo where the judge or magistrate is unable to understand the evidence as recorded. In Peter Karobia Ndegwa v R (Court of Appeal at Nakuru Criminal Appeal No. 125 of 1984), the succeeding magistrate took over the case when evidence had been tendered halfway. The Court of Appeal held that the hearing should have been started de novo because the witnesses were available, and the trial had only recently commenced.

28. Where the succeeding judge or magistrate opts to continue the trial and the predecessor had already recorded part of the evidence, the accused person has the right to have a witness re-summoned and re-heard. The judge or magistrate must inform the accused of this right (ss. 200(3)& 201(2), CPC). The right to re-summon witnesses is consistent with the right to a fair trial and is intended to give the succeeding magistrate the opportunity to personally evaluate the demeanour and credibility of witnesses (Abdi Adan Mohamed v R Court of Appeal at Mombasa Criminal Appeal No. 1 of 2017). This right, however, must be exercised in good faith and should not be demanded when it is futile to do so because, for example, the witness is deceased or who, despite all efforts, cannot be located (Abdi Adan Mohamed v R Court of Appeal at Mombasa Criminal Appeal No. 1 of 2017). The prosecution has the burden of proving that a witness is not available to be re-summoned. Abdi Adan Mohamed v R stated that section 200 of the CPC should be invoked sparingly, holding that a magistrate who had heard five of the six trial witnesses should have returned to complete the trial.

V. Termination of Cases

Termination by the Director of Public Prosecution

29. Article 157(6)(c) of the Constitution empowers the DPP to discontinue, at any stage before judgment is delivered, any criminal proceedings instituted either by the DPP or by another person or authority. In the latter case, the DPP must first take over the criminal proceedings with the consent of the person or authority (arts. 157(6)(b) & (c), CoK).

30. The DPP is required to obtain the court's permission before discontinuing prosecution (art. 157(8), CoK). In R v Enock Wekesa & Another(High Court at Kitale Misc. Criminal Revision No. 267 of 2010), the court reiterated that this requirement applies to all cases. When exercising such powers, the DPP is required to give due regard to the public interest, the interests in the administration of justice, and the need to prevent and avoid abuse of legal process (art. 157(11, CoK; Helmuth Rame v R High Court at Nairobi Misc. Application No. 530 of 2012). The court is required to interrogate the reasons given by the prosecutor to determine whether the application meets the threshold set out in Article 157(11). Withdrawal should not be permitted if it is oppressive to the accused person, if the DPP is acting maliciously or in bad faith, or is otherwise abusing court process (R v Muneh Wanjiku Ikigu High Court at Kiambu Criminal Case No. 1 of 2016). In Ikigu, the prosecution had conducted the trial for four years and ten months, during which the accused was in custody. The prosecution had been unable to trace witnesses and sought to withdraw the case. The court held that there was no reasonable likelihood that the witnesses would be traced, and therefore acquitted the accused.

31. In the magistrates' courts, the prosecutor, with the court's permission, can withdraw proceedings at any time before judgment (arts. 157(6)(c) &157(8), CoK;s.87,CPC).If the case is discontinued after the close

of the prosecution's case, the accused person is acquitted (art. 157(7), CoK; s. 87(b),CPC). If discontinued before the accused has had the opportunity to present a defence, the accused must be discharged. However, the discharge does not bar the DPP from bringing subsequent proceedings against the accused on the same facts (s. 87(a), CPC).

32. In both the magistrates' courts and the High Court, the DPP, with the permission of the court, may discontinue the proceedings by entering a nolle prosequi either orally or in writing (s. 82(1),CPC; arts. 157(6)(c) & (8), CoK). Upon entering a nolle prosequi, the accused is discharged. If in custody, the accused is released, and if on bail, the recognizances are discharged or released (s. 82(1), CPC). Where the accused is not present when the nolle prosequi is entered, a notice must be served on the accused. If detained, the notice must be served on the person in charge of the prison (s. 82(2), CPC).

33. The entry of a nolle prosequi is not a bar to subsequent proceedings against the accused on the same facts (s. 82(1), CPC). However, Article 157(7) of the Constitution provides that if proceedings are discontinued after the close of the prosecution's case the accused must be acquitted.

Withdrawal of Complaint by Complainant

34. Under section 204 of the CPC, the complainant may withdraw the complaint before the court passes a final order in the case. The court has discretion as to whether to allow or reject the withdrawal. In exercising this discretion, the court must be satisfied that there are sufficient grounds for permitting such a withdrawal (R v Malek Abdulla Mohamed High Court at Kisumu No. 113 of 1978; Ceretta Medardo v R High Court at Malindi Criminal Appeal No. 73 of 2004, [2004] 2 KLR 433).

35. In R v Faith Wangoi (High Court at Kajiado Criminal Misc No. 1 of 2015), the court held that if a victim requests that a case be withdrawn, the victim must seek withdrawal from the prosecutor.

Alternative Dispute Resolution Mechanisms in Criminal Cases

36. Section 176 of the CPC allows the court to promote reconciliation or to encourage and facilitate the amicable settlement of proceedings on terms of payment, compensation or other terms approved by the court. Article 159(2)(c) of the Constitution places a responsibility on the courts to promote alternative forms of dispute resolution, including reconciliation. The power under section 176 is restricted to common assault and other offences of a personal or private nature that do not amount to a felony and do not include any aggravating factors (Ceretta Medardo v R High Court at Malindi Criminal Appeal No. 73 of 2004, [2004] 2 KLR 433). Where section 176 is invoked, the court may stay or terminate proceedings. Reconciliation of parties serves the broader objective of reducing backlog and, where possible and appropriate, courts should encourage it (Shen Zhangua v R Misc. High Court at Nairobi Criminal Application No. 396 of 2006).

37. Pursuant to Article 157 of the Constitution, the role of the DPP in criminal proceedings is maintained even where alternative dispute resolution mechanisms are invoked (art. 157(6)(b) & (c), CoK). In Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & Another (High Court at Nairobi Petition No. 285 of 2016), the court directed that while the court may allow alternative dispute resolution mechanisms, the DPP must concur and the parties must agree. In Rukwaru, the court rejected an agreement by the parties to terminate criminal charges because the DPP did not concur with the decision. The DPP's participation is necessary, the court held, because it has the responsibility to consider the public interest (art. 157, CoK).

Death of Accused

38. If the accused dies before the conclusion of the trial, the criminal proceedings are terminated. The court must be provided with the Certificate of Death or any other acceptable evidence of the death of the accused.

VI. Case Management

39. Before a trial begins, the court should hold a pre-trial conference to address preliminary matters and make necessary arrangements for the trial. Pre-trial conferences limit unnecessary adjournments, interlocutory applications, and promote determination of cases without undue delay. Upon the entry of a plea of not guilty, a pre-trial conference should be held as soon as possible.

40. At the pre-trial conference, or at the beginning of the trial, if a pre-trial conference is not held, the court should address the following issues in preparation for the trial:

    i) Disclosure of evidence

    ii) Protection of vulnerable witnesses

    iii) The number of witnesses to be called

    iv) Whether expert witnesses will be called

    v) Use of an interpreter

41. If for any reason a party wishes to submit that the presiding judge or magistrate should recuse himself or herself, it should be done at this stage.

VII. Disclosure of Evidence

Disclosure by the Prosecution

42. Accused persons have the right to be informed in advance of the evidence that the prosecution intends to rely on (art. 50(2)(f), CoK). The accused person is also entitled to reasonable access to that evidence (art. 50(2)(j), CoK) for purposes of preparation of his or her defence (Thomas Patrick Gilbert Cholmondeley v R Court of Appeal at Nairobi Criminal Appeal No. 116 of 2007; George Ngodhe Juma & 2 Others v Attorney-General High Court at Nairobi Misc. Criminal Application No. 345 of 2001). This includes access to the charge sheet and the witness statements. The prosecution must disclose all the evidence in its possession regarding the case, including evidence that the prosecution does not intend to rely upon.

43. The prosecutor has a duty to disclose evidence at the pre-trial stage and this duty continues throughout the trial (art. 50(2)(j), CoK; Hussein Khalid & 16 Others v Attorney-General & 2 Others High Court at Nairobi Petition Number 324 of 2013; Thomas Patrick Gilbert Cholmondeley v R Court of Appeal at Nairobi Criminal Appeal No. 116 of 2007).

44. The interests of justice may sometimes demand non-disclosure of specific evidence at the pre-trial stage. Where the prosecution has good reason for not disclosing evidence in the pre-trial stage, it must obtain leave of court to temporarily withhold the evidence until the hearing. However, the evidence would have to be produced at the hearing stage as an accused is entitled to disclosure of full evidence (Thomas Patrick Gilbert Cholmondeley v R Court of Appeal at Nairobi Criminal Appeal No.116 of 2007).Whenever a disclosure is made during trial, an accused person must be given adequate time and facilities to prepare a defence, including adjourning the hearing if necessary (Dennis Edmond Apaa & 2 Others v Ethics and Anti-Corruption Commission & Another High

Court at Nairobi Petition No. 317 of 2012). In Felix Mwova Vaasya v R (High Court at Machakos Misc Crim App No. 48 of 2016), the court held that providing the accused person with copies of statements by witnesses only a day before the trial did not give the accused sufficient time to prepare his defence.

Disclosure by the Accused Person

45. Generally, the accused person does not have a duty to disclose his or her evidence to the prosecution in advance (Thomas Patrick Gilbert Cholmondeley v R Court of Appeal at Nairobi Criminal Appeal No. 116 of 2007). However, section 9(1)(e) of the Victim Protection Act (VPA) entitles the victim to disclosure of the evidence that both the prosecution and the defence intend to rely on. In R v IP Veronicah Gitahi & Another (High Court at Mombasa Criminal Case No. 41 of 2014 (unreported)), the court relied on section 9(1)(e) to require the accused persons to disclose the defence witnesses and their statements to the victim.

46. An accused who wishes to rely on an alibi defence is, however, required to disclose it at the earliest opportunity (Athuman Salim Athuman v R Court of Appeal at Mombasa Criminal Appeal No. 44 of 2015; Karanja v R Court of Appeal at Kisumu Criminal Appeal No. 65 of 1983).

Recusal of the Presiding Officer

47. In a matter where there may be perceived or actual bias on the part of a judge or magistrate, the matter should be heard by another court or presiding officer. The test as to whether the trial judge or magistrate should recuse him or herself is not whether an actual bias exists, but instead whether the circumstances could raise a reasonable perception that the ends of justice would not be met if the judge or magistrate were to continue to hear the case (John Brown Shilenje v R High Court at Nairobi Criminal Application No. 180 of 1980; Barnaba Tenai v R High Court at Eldoret Misc. Application No.82 of 2013). Mere claims that the

accused person may not have an impartial and fair trial do not suffice; the court should be satisfied that the accused person's apprehension is based on reasonable grounds (R v Raphael Muoki Kalungu High Court at Nairobi Criminal Case No. 77 of 2014; Kinyatti v R Court of Appeal at Nairobi Criminal Appeal No. 60 of 1983).[1]

48. Whether recusal is justified depends on the circumstances of the case. In Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others(Supreme Court Petition No. 4 of 2012), the Supreme Court noted that the circumstances in which recusal may be ordered are not fixed. The primary consideration, it held, is whether the participation of the judge or magistrate compromises the 'perception of fairness, of conviction, of moral authority to hear the matter.' Further, the court noted that the purpose of recusal is to ensure that the rights to justice and due process are both satisfied and are seen to have been satisfied.

49. A magistrate or judge may be disqualified on his or her own motion (Kinyatti v R Court of Appeal at Nairobi Criminal Appeal No. 60 of 1983; R v Raphael Muoki Kalungu High Court at Nairobi Criminal Case No. 77 of 2014) or on application or by order of a higher court.

50. In cases where the judge or magistrate has an interest or is intimately known or related to the parties, the judge or magistrate ought to disqualify himself or herself (Jasbir Singh Rai & 3Others v Tarlochan Singh Rai & 4 Others Supreme Court Petition No.4 of 2012). This also applies where one of the advocates is the judge's or magistrate's close relative.

51. Where an accused person seeks a recusal of the judge or magistrate, the burden is on the accused to show that circumstances exist that would make a reasonable person believe that a fair and impartial trial cannot

1 See also R v Hashmi [1968] KLR 656; Masha & Others v R [1971] EA 201; Makinda & Another v R [1979] KLR 134;R v Samson Ochieng Nyambura & Others, High Court at Kisumu Criminal Application No.39 of 1991 (unreported); R v Kiprop Koech, High Court at Nakuru Criminal Application No. 280 of 1992 (unreported).

be held before that judge or magistrate (John Brown Shilenje v R High Court at Nairobi Criminal Application No. 180 of 1980; Kinyatti v R Court of Appeal at Nairobi Criminal Appeal No. 60 of 1983).

52. The judge or magistrate should record the reasons for recusal or refusal. (art. 10(2)(c), CoK).

VIII. Witnesses

Swearing of Witnesses

53. Under section 151 of the CPC, every witness in a criminal matter must be examined on oath or affirmation. For example, in Samwel Muriithi Mwangi v R (Court of Appeal at Nyeri Criminal Appeal No.39 of 2005), the court held that the appellant was prejudiced because he was convicted and sentenced based on unsworn evidence. Every court before which a witness appears has full power and authority to administer an oath (s.14, Oaths and Statutory Declarations Act). A judgment, however, may not be dismissed merely because a witness has been sworn informally (s. 328, CPC).

54. If a witness stands down, but resumes giving evidence later, it is good practice for the court to remind them that they are under oath when proceedings resume (Samuel Mwangi Gitahi & Another v R High Court at Nyeri Criminal Appeal No. 178 of 2010).

Credibility of Witnesses

55. The court is entitled to consider the demeanour of a witness in assessing their trustworthiness, reliability, and integrity (Ndungu Kimanyi v R (1979) KLR 282 and Kiilu v R (2005) 1 KLR 174). In assessing the demeanour, the court should be sensitive to cultural differences, such as the lack of eye contact, which, in some cultures may be construed as evidence of untrustworthiness but in other cultures may be construed as a sign of respect.

56. Section 199 of the CPC requires that the magistrate record his or her remarks (if any) regarding the demeanour of witnesses whilst under examination (Rebecca Mwikali Nabutola & 2 Others v R High Court at Nairobi Criminal Appeal No. 232 of 2012). However, this does not permit the court to form a view as to the credibility of the witness at that stage; the determination as to credibility should be made in view of the totality of the evidence (Gregory Muli Masau v R High Court at Nairobi Criminal Appeal No. 549 & 550 of 1979, [1980] KLR 54(HC)).

Refractory Witnesses

57. A refractory witness is an uncooperative witness who: refuses to be sworn; or having been sworn refuses to answer questions; or refuses to produce any document or other evidence required of them; or refuses to sign a deposition which they made (s. 152(1),CPC).

58. If a witness refuses to cooperate, the court may adjourn the proceedings for a period not exceeding eight days during which the witness may be committed to prison unless the witness consents to do what is required (s. 152(1), CPC). This may be repeated until the witness complies (s. 152(2), CPC). The committal to prison under section 152 of the CPC does not preclude the witness from any other form of punishment for which he or she may liable (s. 152(3),CPC).

59. The court may proceed with the case while a refractory witness remains in custody (s. 152(2),CPC).

60. The court should take into consideration a refractory witness's refusal to cooperate when evaluating the probability and reliability of the evidence (Daniel Odhiambo Koyo v R Court of Appeal at Kisumu Criminal Appeal No. 182 of 2010).

Hostile Witnesses

61. A witness who contradicts his or her former statements, whether oral or written, is termed a hostile witness (s. 163(1)(c), Evidence Act; Abel Monari Nyanamba & Another v R Court of Appeal at Nairobi Criminal Appeal No. 86 of 1994).

62. A party who calls a witness may apply for the witness to be declared hostile and request to cross-examine that witness (s. 161, Evidence Act). The intention of the cross-examination is to demonstrate that the witness is not reliable (Patrick Macharia v R High Court at Nairobi Criminal Appeal No.1277 of 2001).The court should be satisfied that the witness is deliberately being dishonest.

63. The evidence of a hostile witness should be treated with caution (Daniel Odhiambo Koyo v R CourtofAppealatKisumuCriminalAppealNo.182 of 2010; Patrick Macharia v R High Court at Nairobi Criminal Appeal No. 1277 of 2001). Thus, a conviction cannot be supported solely by the evidence of a hostile witness (Abel Monari Nyamamba & Another v R Court of Appeal at Nairobi Criminal Appeal No. 86 of 1994).

Commission for Examination of Witness

64. When in the course of trial, it becomes evident to the court 'that the examination of a witness is necessary for the ends of justice but the attendance of such witness cannot be obtained without unreasonable delay, expense or inconvenience in the circumstances of the case, the court may issue a commission to any court within the local limits of whose jurisdiction the witness resides to take the evidence of such witness' (s. 154(1), CPC).

65. When a commission for the examination of a witness has been issued, the parties may examine the witness in two ways. They may either send a list of questions that have been reviewed and approved by the trial court to the court commissioned to examine the witness. These

questions are referred to as interrogatories. The commissioned court will then examine the witness upon these interrogatories. Alternatively, the parties may choose to appear, either in person or through an advocate, before the commissioned court and examine the witness (s. 155, CPC).

66. Sections 154 -157 of CPC on the issuance of a commission do not apply outside of Kenya (Thuita Mwangi & 2 Others v R High Court at Nairobi Criminal Revision Case No. 202 of2015).

67. Where the witness is overseas, a request to examine the witness may be made by a 'Competent Authority' to the country in which the person resides (ss. 7(1)&14(1), Mutual Legal Assistance (MLA)). The 'Competent Authority' is defined as the Attorney-General, any criminal investigation agency established by law, or any other person designated as such by the Attorney-General by notice in the Gazette (s.2,MLA).The Director of Public Prosecutions was designated a Competent Authority by Gazette Notice 1847 of February 7th 2013 (Gazette Vol. CXV No. 22). Any law enforcement agency, prosecution, or judicial authority competent under Kenyan law may make a request to the Competent Authority for mutual legal assistance (s. 7(2),MLA).

Vulnerable Witnesses

68. Vulnerable witnesses in court proceedings are persons who require support and special measures to effectively participate in the court process.

69. A vulnerable victim is defined as one who may need support or special measures due to age, gender, disability or other special characteristics that may be prescribed by regulations under the Victim Protection Act (s. 2, VPA). At the time of publishing the Bench Book regulations under the Victim Protection Act have not been made.

70. The court of its own motion or on application by any party may declare witnesses vulnerable because of: physical, intellectual, or psychological impairment;age;dependencyontheaccused;trauma;disability;cultural or religious differences; gender; language; race; the nature of the offence committed against them; or health status (s. 17, VPA). With respect to trials under the Sexual Offences Act (SOA), a witness may be declared vulnerable on the basis of the possibility of intimidation, the relationship of the witness to any party to the proceedings, the nature of the subject matter of the evidence, or any other factor the court considers relevant (s. 31(2), SOA).

71. The court should determine whether a witness is vulnerable under the VPA during the pre-trial conference, or at the commencement of trial if a conference is not held, in order to ensure that necessary support and protection mechanisms are put into place. For instance, where intermediaries are required, or witnesses need to be placed under the witness protection scheme, orders should be made prior to trial to prevent unnecessary delay of the trial. However, applications or orders for protective and support measures for vulnerable witnesses can be made at any time during the trial (See for instance Rule 9(b), Sexual Offences Rules of Court).

Persons with Disabilities

72. Persons with disability are individuals who bear 'a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation' (s. 2, PWDA). The court must ensure that persons with disabilities are treated with dignity and are addressed in a manner that is not demeaning (art. 54(1)(a), CoK; s. 186(h),CA).

73. The court must be guided by the principle of reasonable accommodation of persons with disabilities, which requires 'necessary and appropriate modification and adjustments to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others all the human rights and fundamental freedoms'.[1] The court's obligation to ensure this reasonable accommodation is hinged on the right to dignity (art. 28, CoK), freedom from direct and indirect discrimination (art. 27, CoK) and the State's obligation to ensure access to justice (art. 48, CoK). Certain practices, which are broadly applied, may without intention hinder persons with disabilities from engaging meaningfully in the court processes. For instance, requiring a person to address the court personally without the help of an intermediary might, even if unintentionally, affect the participation of a persons with mental disabilities. Similarly, where special measures are not taken to accommodate persons with disability their dignity may be undermined. Courts must therefore seek to accommodate persons with disabilities as much as possible.

74. Persons with disabilities are entitled to reasonable access to all places (art. 54(1)(c), CoK). The right to access to justice encompasses physical access to courts (art. 48, CoK; Paul Pkiach Anupa & Another v Attorney-General & Another High Court at Nairobi Petition No. 93 of 2011). Where the physical infrastructure is an impediment, courts should adopt measures to enhance accessibility to courtrooms (s. 21, PWDA).

75. Courts should provide necessary facilities and assistance for persons with disabilities to ensure their participation. Such facilities and assistance include sign language interpreters, braille services, physical guide assistance and intermediaries (art.54 (1), CoK; s. 38(2)(b), PWDA; s. 3(2), Court of Appeal (Organization and Administration) Act).

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1 UN General Assembly, Convention on the Rights of Persons with Disabilities(adopted by the General Assembly, 24 January 2007),A/RES/61/106, art. 2. Kenya ratified the Convention on 19 May 2008.

76. Attention should be given to cases involving disabled persons to ensure that they are dealt with expeditiously, bearing in mind their particular disability (s. 38(4), PWDA).

Children

77. A child is any person under the age of eighteen (s.2, CA). Where the age of the witness is unknown, the court should request an age assessment.

78. Where a child is called as a witness in proceedings in which a child is the accused, a child is the victim, or that involves conduct contrary to decency or morality, the court may instruct persons who are not members or officers of the court, or parties to the case, to be excluded from the court (s. 75, CA; R v Ali Hassan High Court at Nairobi Criminal Case No. 11 of 2013). However, it is not mandatory to hear all proceedings involving children in camera; the court has the discretion to determine when it is in the best interest of the child to do so (art. 50(8), CoK; s. 75, CA;R v Ali Hassan High Court at Nairobi Criminal Case No. 11 of 2013).

79. The court should adopt measures to protect a child when necessary. These measures include allowing the child to give evidence in a witness protection box or through an intermediary, concealing the identity of the child, using pseudonyms, or providing testimony via videolink (s. 31(1), SOA; s. 4(3), WPA).

80. Children who require assistance to communicate with the court must be allowed to give evidence with the help of intermediaries (art. 50(7), CoK). The court environment should be friendly to enable children to participate fully without fear. Simple language that can be understood by children giving evidence should be used; technical terms should not be used.

Victims of Sexual Offences

81. A victim of a sexual offence is a person who has suffered physical and emotional harm as a result of an offence of a sexual nature.

82. The court may declare a witness vulnerable if the witness is the victim of a sexual offence (s. 31(a), SOA). A vulnerable witness may be protected through various means including:

    i) Being allowed to give evidence from behind a witness protection box;

    ii) Giving evidence through an intermediary;

    iii) Conducting proceedings in camera;

    iv) Prohibiting publication of information that may lead to the identification of the witness or the witness's family; or

    v) Any other measure which the court may deem appropriate (s. 31(4), SOA; r. 6 Sexual Offences Rules of Court; R v Patrick Mutisya Muthiani High Court at Nairobi Misc. Criminal Application No. 207 of 2015; Joseph Kipkoech Boyon v R Criminal Appeal No.70 of 2012 High Court at Kericho).

83. The court may allow the expedited testimony of a witness where the interests of justice so demand (r. 3, Sexual Offences Rules of Court). For instance, where the witness is in court, an adjournment ought not to be granted unless the interests of justice so demand. Also, to the extent possible, the testimony of such a witness should take place in a single hearing.

84. Victims of sexual offences are likely to use terms used in ordinary language as opposed to the use of legal terms, such as 'defiled'. Trial courts are guided to record the precise words used by the victim (Samson Oginga Ayieyo v R Court of Appeal at Kisumu Criminal Appeal No. 165 of 2006).

Witness Protection

85. The Witness Protection Agency has established measures to ensure the safety and welfare of protected persons (s. 4(1) & (2), WPA).

86. Witnesses are entitled to protection under the Witness Protection Act if they face a potential threat or risk because of their testimony (s. 3, WPA). Family members of the witness may also be protected (s. 3(2)(a), WPA).

87. To ensure protection during court proceedings, the court may be requested to hold proceedings wholly or partially in camera; use pseudonyms; redact information that may lead to the identification of a witness; conduct proceedings via video link; or employ measures to obscure or distort the identity of the witness (s. 4(3), WPA; In the Matter of Application for orders for Witness Protection High Court at Nairobi Misc. Case No. 30 of 2014).

High Court Orders of Protection

88. The High Court may order that a new identity be created for a witness or relatives in need of protection. This may include ordering that the new identity be listed in the registers of births or marriages and the old identity be listed in the register of deaths (s. 14, WPA). To make such an order, the court must be satisfied that the witness, or a person related to or associated with the witness, is in need of protection. The court must also be satisfied that, pursuant to section 7 of the WPA, the person has entered into the requisite memorandum of association with the Witness Protection Agency on the terms of the protection and that the person is likely to adhere to those terms (s. 16, WPA; Application for orders of Witness Protection High Court at Naivasha Criminal Application No.45 of 2015; In the Matter of Application for orders for Witness Protection High Court at Nairobi Misc. Case No. 30 of 2014).

IX. Taking Evidence

Language of the Trial

89. The language used in the trial must be indicated in the court record (Swahibu Simiyu & Another v R Court of Appeal at Kisumu Criminal Appeal No.243 of 2005). Further, the language used must be understood by the accused and, if not, be interpreted to a language understood by the accused (s. 198(2), CPC). If the accused is represented by counsel and the evidence is presented in a language other than English that counsel does not understand, the evidence must be interpreted into English (s. 198(2), CPC).

Taking the Evidence of Children

90. Section 19 of the Oaths and Statutory Declaration Act sets out the procedure for taking evidence from a 'child of tender years'. Although the Act does not define the term 'child of tender years', the Children Act section 2 defines this as a child under the age of ten. The definition in the Children's Act, however, has been held not to apply to section 19 of the Oaths and Statutory Declaration Act (Maripett Loonkomok v R Court of Appeal at Mombasa Criminal Appeal No. 68 of 2015; Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014; Samuel Warue Karimi v R Court of Appeal at Nyeri Criminal AppealNo.16of2014).The courts have held that a child of tender years for purposes of this Act is one under the age of fourteen (Kibageny Arap Kolil v R(1959) EA82; Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014).

91. Where a child under the age of fourteen is called as a witness, the court must first conduct a *voir dire* examination before allowing the child to testify in order to:

i) Determine whether the child understands the nature of an oath, in which case evidence may be received on oath.

ii) Ascertain whether, if the child does not understand the nature of an oath, the child possesses sufficient intelligence and understands the duty to tell the truth. If in the affirmative, the evidence may be received though not given on oath (s. 19(1), Oaths & Statutory Declarations Act; Maripett Loonkomok v R Court of Appeal at Mombasa Criminal Appeal No. 68 of 2015).

92. There is no particular format for conducting and recording a voir dire. It could be a dialogue in which the court records questions posed to the child and the child's answers are recorded verbatim in the first person. Alternatively, the court may choose to omit the questions put to the witness but record the answer verbatim in the first person (James Mwangi Muriithi v R Court of Appeal at Nyeri No. 10 of 2014; Maripett Loonkomok v R Court of Appeal at Mombasa Criminal Appeal No.68 of 2015).

93. Examples of questions that may be put to the child in a voir dire examination include:

i) the name and age of the child,

ii) the child's school and class,

iii) whether the child attends church or mosque or other religious institutions,

iv) whether the child knows the importance of telling the truth or the consequences of not being truthful.

94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, Evidence Act). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the Oaths and Statutory Declarations Act is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK).

Taking the Evidence of Persons with Mental Disabilities

97. Section 125(2) of the Evidence Act recognizes that generally a person suffering from a mental disorder is a competent witness unless such person, because of the mental illness, is prevented from understanding the questions put to him or her and giving rational answers to the questions.

98. When persons with mental disabilities are giving evidence, it is good practice for them to be supported by an intermediary, unless their condition does not require such assistance. The court should also observe the conduct of the witness to determine whether, with the support of an intermediary, the person understands the questions put to them and whether the witness's response is understood. In David Ndumba v R (Court of Appeal at Nyeri Criminal Appeal No. 272 of 2012) the court noted that the trial court had rightly made observations as to whether the complainant, who had mental disabilities, understood the questions and gave rational responses.

Taking Evidence through Intermediaries

99. Article 50(7) of the Constitution recognizes the use of intermediaries. They are essential in ensuring due process and equal access to justice by vulnerable persons. Possible intermediaries include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker (s. 2, SOA).

100. An intermediary is a medium through which the accused person or complainant communicates to the court (art. 50(7), CoK; ss. 31(4) & 31(7), SOA). The intermediary may, for instance, point out that a question is too complex for a person with an intellectual disability. In such a case, the intermediary may offer suggestions on how to frame it better. The intermediary does not take the place of the vulnerable witness but simply communicates what the witness wishes to say. Further, the intermediary must not instruct the witness on what evidence to give (r. 7(10), Sexual Offences Rules of Court). Since the intermediary acts as a mouthpiece for the vulnerable witness, the implication is that an intermediary can also be an independent witness giving his or her own version of the evidence in respect to the same case (MM v R Court of Appeal at Nairobi Criminal Appeal No. 41 of 2013). Evidence from an intermediary who is also a witness should be taken before the person acts as an intermediary.

101. In addition to facilitating communication, an intermediary may provide other forms of support such as requesting for a break when the vulnerable witness needs one. An intermediary may also assist a vulnerable witness, such as one with a psychosocial disability, to overcome anxiety.

102. Both the complainant and the accused person can be assisted by an intermediary (art. 50(7), CoK). The use of an intermediary may be at the request of the prosecutor, witness, or on the court's own motion (s. 31(4) (c), SOA; rr. 7(1) & 7(2), Sexual Offences Rules of Court; Prevention of Torture Act, s. 16(5)).

103. The appointment of an intermediary should be done before the testimony of the intended witness (MM v R Court of Appeal at Nairobi Criminal Appeal No. 41 of 2013). In MM v R, the court held that before appointing an intermediary, the court must establish and put on record the vulnerability of the witness and ascertain the 'expertise, possession of special knowledge or relationship' of the prospective intermediary. Further, before acting as an intermediary, the person must take an appropriate oath or affirmation to communicate the vulnerable witness's evidence correctly. The court also stated that the trial court must provide guidance as to the extent of the intermediary's participation in the proceedings.

Expert Evidence

104. Where the court is required to form an opinion on matters specified in section 48 of the Evidence Act, the court may receive evidence from experts who are 'specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions' (Maina Thiongo v R High Court at Nyeri Criminal Appeal No. 83 of 2015). Expert witnesses should satisfy the court that they are specially skilled (Samson Matoke Machoka v R Court of Appeal at Kisumu Criminal Appeal No. 291 of 2012; Mutonyi v R Court of Appeal at Nairobi Criminal Appeal No. 92 of 1981; [1983] KLR).

105. The opinion evidence given by an expert is not binding on the trial court. In Samson Tela Akute v R(High Court at Nairobi Criminal Appeal No. 844 of 2004), the court held that a magistrate had abandoned his duty to make an independent finding when he relied wholly on the opinion of the expert.

106. Where the court receives conflicting expert evidence, the court is required to assess the evidence and form its own opinion. In doing so, the court must state the reasons informing its opinion (Kenya Ports Authority v Modern Holdings [E.A.] Limited Court of Appeal at Mombasa Civil Appeal No. 108 of 2016).

Electronic and Digital Evidence

107. In any legal proceedings, electronic messages and digital material are admissible as evidence (s. 78A(1)&106B(1), Evidence Act). The fact that such electronic and digital evidence is not in its original form does not by itself render the evidence inadmissible (s. 78A(2), Evidence Act). The weight accorded to electronic and digital evidence depends on its reliability. Reliability, in turn, depends on how the evidence was generated, stored, communicated and maintained (s. 78A(3)(a) & (b), Evidence Act). Further, the identification of the originator of the evidence impacts on the weight attached to the electronic and digital evidence (s. 78A(3)(c), Evidence Act). When determining the weight of the evidence, the court may also be informed by any other relevant factors (s. 78A(3)(c), Evidence Act).

108. 'Computer outputs' are defined as 'any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer' (s. 106B(1), Evidence Act).

109. The conditions for admissibility of computer outputs are set out in section 106B(2) of the Evidence Act (R v Mark Lloyd Steveson High Court at Kiambu Criminal Revision 1 of 2016). When producing computer outputs as evidence, a certificate confirming compliance with the conditions in section 106B(2) of the Evidence Act is required (s. 106B(4)(c), Evidence Act). The certificate must also identify the electronic record and provide particulars of any device involved in the

production of that electronic record (s. 106B(2)(a) & (b), Evidence Act; R v Mark Lloyd Steveson High Court at Kiambu Criminal Revision 1 of 2016;R v Barisa Wayu Mataguda High Court at Mombasa Criminal Case No.6 of 2008). The certificate must be signed by a person in a responsible position relating to the operation of the device or management of the relevant activities (s. 106B(4)(d), Evidence Act).

Teleconferencing and Video Conferencing

110. A court may receive oral evidence through teleconferencing (s. 63A, Evidence Act). In Livingstone Maina Ngare v R High Court at Nairobi Criminal Revision No. 88 of 2011 the court allowed witnesses to give evidence through videolink.

111. There are special circumstances where public policy and the interests of justice may dictate that a witness does not have to appear in person and, thus, video conferencing would be the best alternative. Special circumstances might involve instances where there are vulnerable witnesses who might be intimidated by the hearing, where the witnesses fear for their lives, or where securing the personal attendance of such witness will unduly delay the proceedings.

112. Admission of electronic evidence is a matter that needs to be determined in each trial. Under section 63A of the Evidence Act, a party must submit an application to the court requesting that evidence be provided through video or teleconferencing. If possible, the decision to allow video or teleconferencing evidence should be done at the pre-trial conference to enable the court to make the necessary arrangements, such as provision of the video conferencing equipment.

113. Where the court allows video conferencing, it must put in place measures to ensure that the videoconferencing session is as similar as possible to the usual practice when evidence is given in open court. The court should also ensure that there are procedures in place to assist with the

administering of oath, production of exhibits, and the non-interference of the witness at the remote site. The examination and cross examination of a witness at the remote site should follow as closely as possible the practice adopted when a witness is in the courtroom.

Exhibits

114. Exhibits marked for identification must be formally produced for them to be considered evidence. In R v Amani David Dena (High Court at Mombasa Criminal Case No. 3 of 1999), the court said that exhibits should be produced by either the Officer who took them into his custody or the Investigating Officer. Once marked for evidence, the exhibits must then be produced; it is during the production that their authenticity and relevance are established.

115. The court should ensure that the record of exhibits is prepared simultaneously and accurately during the trial (Joshua Karianjahi Waiganjo v R High Court at Naivasha Criminal Appeal No.141 of 2015).

116. Exhibits should not be released until the right of appeal has been exhausted (Simon Okoth Odhiambo v R High Court at Nairobi Criminal Appeal No. 223 of 2003). In Simon Okoth Odhiambo the court held that it was wrong for the trial court to have ordered the release of documents even before it had delivered judgment. It is good practice for photographic evidence to be obtained in a bid to preserve evidence; courts should encourage photographic evidence particularly where the other evidence cannot be stored on the court premises.

117. It is necessary to produce exhibits physically in court. However, there are instances where it may be impossible to do so. Such instances, as pointed out in Andrea Nahashon Mwarisha v R (Court of Appeal Criminal Appeal No.50 of 2013), include exhibits that 'are immovable, perishable or on transit, a tool of trade…those which may pose logistical or health challenges, for instance, a dead body'. In R v John Nganga

Mbugua High Court at Nairobi Misc. Criminal Application No. 69 of 2014, the court allowed an application to release an income-generating motor vehicle and ordered that photographic evidence of that exhibit be obtained.

118. Production of narcotics and psychotropic substances as exhibits should comply with section 74 of the Narcotic Drugs and Psychotropic Substance (Control) Act, which requires an analyst to weigh the substances in the presence of the accused and the advocate representing the accused. During trial, a sample of the substance and the analyst's certificate are to be tendered as evidence. However, in Moses Banda Daniel v R (Court of Appeal at Mombasa Criminal Appeal No.62 of 2015) the court held that this procedure is more relevant in cases involving large consignments of drugs, and it was unrealistic to subject the drugs in question, which were a small quantity valued at Kshs. 2300, to this rigorous procedure.

Confession

119. A confession means words from which inference of guilt of the maker may be made (s. 25, Evidence Act). In R v Mark Lloyd Steveson (High Court at Kiambu Crim. Revision No. 1 of 2016) the court highlighted a distinction between self-incriminating statements or conduct made after the commission of a crime and similar statements or conduct made during the commission of a crime. The former may amount to confessions while the latter do not. The court explained that, for instance, statements heard by an investigating officer which amount to hate speech, for which the person is charged, cannot be termed as a confession.

120. An accused has the right not to be compelled to make any confession or admission that could be used in evidence against him or her (art. 49(1)(d), CoK).Generally, confessions made by an accused person are not admissible in Kenya unless they are made strictly in accordance with the law. The statement must be made either in court before a judge or

a magistrate, or made to a police officer (other than the investigating officer) with a rank above Inspector of Police in the presence of a third party of the person's choice (s. 25A(1), Evidence Act).

121. Where the confession is not made in court, there cording officer must ensure that the accused person:

i) chooses his or her preferred language of communication;

ii) is provided with an interpreter free of charge where he or she does not speak Kiswahili or English;

iii) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

iv) is informed of the right to have legal representation of his or her own choice; and

v) nominates a third party to be present during the confession (r. 4, Evidence (Out of Court Confessions) Rules, 2009).

122. A confession obtained from a person arrested outside Kenya, for the purposes of being arraigned in a Kenya, must be obtained in a manner that substantially conforms to the law in Kenya. The Kenyan Court will be the final determinant of the admission of such evidence (r. 12, Evidence (Out of Court Confessions) Rules, 2009).

123. At the conclusion of the recording, the accused must certify that the recorded confession is made of his or her free will and that he or she has been granted an opportunity to make clarifications, if any (r. 8, Evidence (Out of Court Confessions) Rules, 2009).

124. Confessions obtained in contravention of the safeguards set out in sections 25 to 32 of the Evidence Act and under the Evidence (Out of Court Confessions) Rules are inadmissible (Caroline Wanjiku Wanjiru & Another v R High Court at Nairobi Criminal Appeal No. 87 of 2012). Similarly, confessions obtained in violation of the accused's rights

must be excluded if the admission of that evidence would render the trial unfair, or undermine the administration of justice. In R vElly Waga Omondi (High Court at Nairobi Criminal Case No. 24 of 2012), a confession allegedly obtained through torture was held inadmissible. The court also reiterated that where it is alleged that a confession has been obtained illegally, the prosecution bears the burden of proving that it was obtained in compliance with the law.

125. To satisfy itself that a confession complies with the Evidence Act and the Evidence (Out of Court Confessions) Rules, the court should conduct a voir dire to determine whether the confession was obtained voluntarily. Where an accused retracts a confession, the prosecution bears the burden of proving that the laws regarding confessions were complied with. In R v Elly Waga Omondi (High Court at Nairobi Criminal Case No. 24 of 2012), the court held that the recording officer violated the rules governing confessions because a third party was not present when the confession was taken and because the officer had failed to prove compliance with the law.

126. The safeguards to ensure that confessions are obtained voluntarily apply to confessions received out of court as well as those received in court. In Kanini Muli v R (Court of Appeal at Nairobi Criminal Appeal No. 238 of 2007), the court was not satisfied that the confession made in court during an inquest was voluntary. The accused person claimed to have made the confession following threats from clan elders. The court held that confessions taken in court are not exempt from section 26 of the Evidence Act, which renders a confession inadmissible if it was obtained by a person in authority through inducement, threat, or promise relating to the charges.

127. Evidence demonstrating that a confession was not obtained voluntarily should still be received even if the court had already held that the confession was admissible (Kanini Muli v R Court of Appeal at Nairobi Criminal Appeal No. 238 of 2007).

X. Participation of Victims During Proceedings

128. A victim is any natural person who suffers injury, loss, or damages as a consequence of an offence (s.2, VPA). A victim includes both the primary victim and the family victim (s. 329A, CPC). A victim is required to establish their personal interest in the proceedings in order to participate (Mary Kinya Rukwaru v Raghunathan Santosh & Another High Court at Nairobi Criminal Application No. 169 of 2014).

129. When dealing with victims, courts must adhere to the general principles set out in section 4 of the VPA in order to accord adequate support to the victim and to treat the victim with dignity.

130. Courts should allow victims to express their views before any decision that affects them is made (s. 4(2)(b), VPA). For instance, decisions on whether to release the accused on bail, sentencing, withdrawal of the prosecutions, and whether to grant an adjournment affect victims. Victims may express their views and concerns during the trial at appropriate stages determined by the court (s. 9(2)(a), VPA; Sentencing Policy Guidelines pp. 22.27–22.30; I.P. Veronica Gitahi & Another v R Court of Appeal at Mombasa Criminal Appeal No. 23 of 2016).

131. Victims may be heard personally or through the public prosecutor or intermediary (art. 50(7), CoK; I.P. Veronica Gitahi & Another v R Court of Appeal at Mombasa Criminal Appeal No. 23 of 2016).

132. In addition, victims may participate indirectly in a criminal trial through private legal counsel who hold a 'watching brief' on their behalf (s. 9(1)(a), VPA; I.P. Veronica Gitahi & Another v R Court of Appeal at Mombasa Criminal Appeal No. 23 of 2016).

133. Victims have a 'right to privacy-from the media, unreasonable intrusion from health professionals, of confidentiality of their communication with victim support service providers or from any other person, and confidentiality' (s.8, VPA). The court should protect victims from undue intrusion into their personal affairs in the course of the proceedings. The court may hold proceedings *in camera* where necessary to protect the privacy of the victims (s. 31(4)(c), SOA).

134. Further, victims should be treated with respect and dignity (s. 4, VPA). The court, for example, should take into account the vulnerabilities of the victim.

135. Courts should also create an environment that is conducive for the victims to testify freely and without intimidation.

136. The court should consider the views and concerns of the victims (s. 9(2)(a), VPA), including during sentencing (s. 12(1), VPA) The court, however, is not obliged to accept those views and concerns. And the court must ensure that the views are presented in a way that is neither prejudicial to the rights of the accused nor inconsistent with a fair trial (s. 9(2)(b), VPA).

XI. Criminal Responsibility of a Child

137. The Penal Code states that a person under the age of eight cannot be held criminally responsible for any act or omission (s. 14(1), PC).

138. A person under the age of twelve cannot be held criminally responsible for any act or omission, unless it is proved that the person had capacity to know that the act or omission was wrong (s. 14(2), PC).

139. Section 14(3) of the Penal Code sets out an unrebuttable presumption that a male under twelve is incapable of having any carnal knowledge (R v E M High Court at Embu Criminal Revision Case No. 14 of 2015).

Therefore, a boy under 12 cannot be convicted of any offence, such as rape or defilement, that requires proof of penile penetration. However, he could be convicted of a lesser offence, such as indecent assault.

XI. The Hearing

Conduct of the Prosecution Case

140. The prosecution must prove the guilt of the accused beyond reasonable doubt (Sawe v R Court of Appeal at Nairobi Criminal Appeal No. 2 of 2002; DPP v Woolmington [1935] AC 462). The expression, 'burden of proof', entails two different concepts: 'legal burden of proof' and 'evidential burden' (Peter Juma & Others v R High Court at Bungoma CriminalAppealNo.144of2011). Generally, the legal burden of proving guilt is borne by the prosecution and it never shifts to the accused. In certain instances however, the law places the evidential burden on the accused to explain specific matters within his or her knowledge, such as when the defence of insanity is raised, where the doctrine of recent possession applies (David Mutune Nzongo v R Court of Appeal at Nairobi Criminal Appeal No.536 of 2010), or the accused raises an alibi defence (Wilson Wanjala Mkendeshwo v R Court of Appeal at Nakuru Criminal Appeal No. 97 of 2002). Even when the evidential burden is placed on the accused, it is incumbent upon the prosecution to discharge the legal burden of proof, taking the evidence as a whole (s. 111, Evidence Act).

141. The accused's decision to remain silent should not give rise to any inference as to guilt, which must always be proved by the prosecution. Reasonable doubt may result from gaps in the prosecution's evidence. Therefore, an accused person may remain silent and still be entitled to an acquittal. In Dickson Nyakundi v R (High Court at Nakuru Criminal Appeal No.29 of 2014), the High Court disagreed with the trial court,

which convicted the accused person on the basis that 'the accused's silence had not created reasonable doubt'. The conviction was quashed as the prosecution had not proved guilt beyond reasonable doubt.

142. Related to the right to silence is the right to refuse to give self-incriminating evidence. However, this latter right does not protect the accused person from forensic examinations, such as DNA testing and finger printing. For example, in Boniface Kyalo Mwololo v R (Court of Appeal at Nairobi Criminal Application No. 1 of 2016) the court held that where a person is charged with a sexual offence, a court may direct an appropriate forensic sample for purpose of forensic and other scientific testing, including a DNA test (r. 5, Sexual Offences (Medical Treatment) Regulations).

Opening Speech

143. The prosecution may make an opening address when it opens the case against the accused person (s. 300, CPC). The opening address sets out facts which the prosecution seeks to prove and ought not to contain any reference to evidence whose admissibility is open to challenge (Kanyoro Kamau v R [1965] EA 501). Section 300 of the CPC is merely directory, and the failure of the prosecution to start its case with an opening address is not fatal (Kenga Chea Thoya v R Court of Appeal at Mombasa Criminal Appeal No. 375 of 2006).

144. However, it is good practice for the prosecution to deliver a clear and succinct opening statement that presents a good overview of the case and provides focus for the trial. Courts should not treat matters raised in the opening statement as evidence.

Choice of Witnesses

145. The prosecution has a duty to call all witnesses necessary to establish the truth, even though the evidence may be inconsistent (Bukenya & Others v Uganda [1972] EA 549). The prosecution need not call all witnesses who may have relevant factual information (s. 143, Evidence Act). In Kossam Ukiru v R Court of Appeal at Kisumu Criminal Appeal No.266 of 2011,for example, the court held that the prosecution should exercise its discretion in deciding the witnesses that are relevant to prove the guilt of the accused. In Oluoch v R (1985) KLR 549, the court noted that a fact may be proved by a single witness. But an identification that is supported by a single witness must be treated with the greatest care.

146. In John Waweru Njoka v R Court of Appeal at Nyeri Criminal Appeal No. 115 of 2001 (2005) KLR 175 and Bare Mohamed v R(High Court at Garissa Criminal Appeal No. 106 of 2014), the courts, however, noted that where the prosecution evidence is insufficient to support a conviction and a material witness is not called, the court may infer that the evidence of that witness would not have favoured the prosecution.

Order of Witnesses

147. The prosecution determines the order in which the prosecution witnesses are to appear (Roy Richard Elirema & Another v R Court of Appeal in Mombasa Appeal No. 67 of 2002). There is no law requiring witnesses to be called in any particular order. However, it is desirable to have the complainant or a key witness give evidence first and lay the basis for the prosecution case. The matter may proceed even without the evidence of the complainant.

Examination in Chief

148. The DPP starts by presenting witnesses in the examination in chief. The witnesses testify on the facts that the prosecution intends to rely on. At this stage, leading questions are not allowed except in the formal introductory part of the testimony, like the witness's name (s. 150, CPC). Leading questions are questions that suggest the desired answer or assume the existence of disputed facts about which the witness has been called to testify.

Cross examination by Defence

149. Upon giving the evidence-in-chief, the witness is cross-examined by the accused person or the defence advocate (s. 145(2), Evidence Act). The right of the accused or the accused's advocate to cross-examine witnesses called by the prosecution is guaranteed by the Constitution (art. 50(2)(k), CoK). A denial of this right will vitiate a conviction (Simon Githaka Malombe v R Court of Appeal at Nyeri Criminal Appeal No. 314 of 2010). In a joint trial, all accused persons have the right to hear all evidence and cross-examine all witnesses (Stephen v R (1973) EA22).

150. Where an accused person is not represented by an advocate, the court must, at the close of examination, enquire whether the accused wishes to put any questions to the witness, and the court must record the answer (s. 208(3), CPC; Jairus Mukolwe Ochieng v R Court of Appeal at Nairobi Criminal Appeal No.217 of 2007; Simon Githaka Malombe v R Court of Appeal at Nyeri Criminal Appeal No. 314 of 2010).

151. Leading questions are allowed in cross examination.

Re-examination

152. After cross-examination, the witness may be asked further questions (s. 145(3), Evidence Act). Re-examination must be confined to matters that arose in cross-examination. New matters can only be introduced with leave of the court.

153. Once the prosecution has called all its witnesses, it closes its case. The prosecution may also request for an adjournment to call further witnesses. Where the court denies such an application, it must note that fact on the record.

Questions from the Court

154. The court may put any question to the witnesses that are necessary for the just decision of the case. The court's questions should clarify issues and not fill gaps in the evidence; they should be posed cautiously so as not to lead evidence.

Prima Facie Case or No Case to Answer

155. Upon the close of the prosecution's case, the court should invite the accused person to make submissions if he or she wishes. The court is then required to make a determination as to whether a prima facie case has been established by the prosecution. If it finds that a prima facie case has been made out against the accused person, the hearing of the defence case then commences (ss. 211&306,CPC).

156. A prima facie case is 'one on which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence' (Ramanlal Trambaklal Bhatt v R [1957] EA 332; Anthony Njue Njeru v R Court of Appeal at Nairobi Criminal Appeal No. 77 of 2006).

157. If the court concludes that a prima facie case has been made, it should not give reasons for that finding, because it may appear as if the court has made up its mind even before hearing the defence (Eustace Kibera Karimi v R High Court at Nairobi Criminal Appeal No. 911 of 1978; Festo Wandera Mukando v R[1980] KLR 103;Anthony Njue Njeru v R Court of Appeal at Nairobi Criminal Appeal No. 77 of 2006).

158. If a prima facie case is not established at the close of the prosecution case, the court must acquit the accused person (ss. 210 & 306(1), CPC). R v Wachira [1975] EA 262 noted that a court should only acquit at that stage 'if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict'. The court should pay attention to the evidence before putting an accused on their defence; there must be a legal basis for doing so (Murimi v R 1967 EA 542, R v Wachira, above and R v Kidasa [1973] EA 368).

Conduct of Defence Case

159. Upon finding that the accused has a case to answer, the court must inform the accused person of the following rights (ss. 306(2) & 211, CPC; Hawo Ibrahim v R Court of Appeal at Nyeri Criminal Appeal No. 46 of 2014):

i) To address the court personally or through an advocate
ii) To give sworn or unsworn evidence
iii) To call witnesses
iv) To remain silent (art. 50 2(i), CoK).

160. The court must explain to the accused person that, if he or she opts to give evidence under oath from the witness box, he or she would be cross-examined. If the accused person opts to make an unsworn statement from the dock, he or she would not be cross-examined but may be

asked questions by the court (s. 211, CPC). If the accused person elects not to give evidence, make an unsworn statement or adduce evidence, the prosecutor may sum up the prosecution case against the accused (s. 306(3), CPC). The accused's response in electing how to proceed must be recorded (John Waweru Njoka v R Court of Appeal at Nyeri Criminal Appeal No. 115 of 2001 (2005) KLR 175). Where the accused gives an unsworn statement, the statement should be recorded in full by the court.

161. No adverse inference should be drawn by the court if the accused person opts to give unsworn evidence (Amber May v R Court of Appeal at Nairobi Criminal Appeal No. 24 of 1979; Winston s/o Mbaza v R [1961] EA 274; Johnson Muiruri v R [1983] KLR 445; Odongo v R [1983] KLR 301). Further, the court should not prompt the accused person to either add or subtract from an unsworn statement. Generally, an unsworn statement has limited probative value because its veracity has not been tested through cross examination (Mercy Kajuju & 4 Others v R High Court at Meru Criminal Case No. 186 of 2006). However, the statement is not worthless and should be taken into consideration in relation to the whole evidence.

Defence Witnesses

162. The accused retains his or her right to call witnesses. The accused person must be availed adequate time to prepare a defence in accordance with Article 50(2)(c) of the Constitution. If the accused person is the only witness, then he or she is called as a witness upon the finding of the case to answer (s. 160,CPC).

163. Where the accused elects to call other witnesses, the accused should give evidence first, followed by the witnesses who should remain outside the court as the accused gives evidence. This is important in order to

maintain the reliability of the evidence. The defence is subject to the same rules as the prosecution in terms of examination in chief, cross examination, and re-examination.

Close of the Defence Case

164. Where the defence closes its case prematurely, for example because of denial of an adjournment to call further witnesses, or for want of attendance of witnesses or for other reason, the court should note that fact on the record.

Evidence in Reply

165. If the accused provides evidence in his or her defence that introduces new matters that the prosecution, having exercised due diligence, could not have reasonably foreseen, the court may allow the prosecution to adduce evidence in rebuttal (ss. 212&309,CPC).

XIII. Calling of Witnesses by the Court

166. The court may, at any stage of the trial or other proceedings, call any person as a witness or examine any person in attendance though not summoned as a witness, if the court considers such a person's evidence essential for a just decision. The court can also recall and re-examine any person (s. 150, CPC). In Juma Ali v R ([1964] EA 486), the court cautioned that this power must be exercised judicially and reasonably, and not in a way likely to cause prejudice to the accused. Therefore, when the court calls its own witness, it must give both the prosecutor and the accused person an opportunity to cross-examine the witness, and it may accordingly adjourn to allow the parties more time to prepare for the cross examination (s. 150,CPC).

167. The court may recall a prosecution witness for further cross-examination even after the close of the defence case (s. 150, CPC). In Murimi v R ([1967] EA 542), the Court of Appeal for East Africa held that this provision should not be used to empower the trial court, immediately after the prosecution has closed its case, to call a witness in order to establish the case against the accused, except possibly when the evidence is of a purely formal nature. The court should examine whether it is indeed essential to recall a witness (Omar Abdulla Awadh Maalim v R [1964] EA 672).

168. In appropriate cases, section 150 of the CPC can also be invoked by the prosecution to rebut evidence. In Stephen Mburu Kinyua v R (High Court at Kiambu Crim. Revision No. 4 of 2016) the court held that the prosecution can only call rebuttal witnesses when the following conditions are satisfied:

    i) Such evidence must have arisen suddenly to the extent that no human ingenuity or reasonable diligence could reasonably have anticipated, or foreseen the possibility of its being adduced by the defence;

    ii) The evidence must have probative value, particularly regarding the process of assessing the innocence or culpability of the accused;

    iii) It must relate to a significant issue arising from the defence case for the first time;

    iv) The prosecution must demonstrate that:

        a. the calling of evidence in rebuttal is not a ploy to reopen its case in order to cure perceived defects or shortcomings in the prosecution case.

        b. the rebuttal evidence is not being called to merely confirm or reinforce the prosecution's case, or to respond to contradictory evidence adduced by the defence.

c. the rebuttal evidence is not being called on a collateral issue related to the credibility of a witness.
d. granting permission to adduce the evidence will not violate the constitutional obligation to ensure a fair and expeditious trial without unduly jeopardizing the rights of the accused.

XIV. Inability to Raise a Defence Due to Mental Disability

169. If during the trial, the court has reason to believe that an accused person has mental disabilities that impede his or her capacity to raise a defence, the court must proceed as follows (s. 162(2), CPC):

i) Determine whether the person is of unsound mind and, if so, the extent of the disability.

ii) If satisfied that the mental disabilities make the accused person incapable of making a defence, the court must postpone the proceedings.

iii) The court may release the accused person on bail on condition that there is sufficient security to ensure the safety of the accused person and other persons and to secure court attendance or appearance before any other officer ordered by the court.

iv) If bail is unsuitable, the court must give an order as to where the accused person should be detained for safe custody.

v) Submit the court record, or copy thereof, to the Cabinet Secretary responsible for the Kenya Prison Service for consideration by the President (Karisa Masha v R Court of Appeal at Mombasa Criminal Appeal No. 78 of 2014; Nyama Mwajowa v R Court of Appeal at Mombasa Criminal Appeal No. 46 of 2015; D M v R Court of Appeal at Malindi Criminal Appeal No. 62 of 2014).

170. An accused person found to be of unsound mind may be detained in a mental hospital or any other suitable place of custody, through an order made by the President and addressed to the court. The accused will be

detained until the President makes any other order or until the court orders him to be brought back to court (s. 162(5), CPC; D M v R Court of Appeal at Malindi Criminal Appeal No. 62 of 2014).

171. To ensure that such an accused person is not detained indefinitely, it is good practice for the court to set a mention date to monitor the status of the accused person.

172. If, in the course of the detention, a medical officer finds that the accused can make a defence, the officer is obligated to forward a certificate confirming the same to the Director of Public Prosecutions. The Office of the DPP is then required to inform the court whether it intends to proceed with the prosecution (ss. 163(1) & (2), CPC; D M v R Court of Appeal at Malindi Criminal Appeal No. 62 of 2014; Nyawa Mwajowa v R Court of Appeal at Mombasa Criminal Appeal No. 46 of 2015). The court may either have the person removed from the place of custody and resume trial or order a discharge (s. 163(3), CPC). The discharge does not bar later proceedings (s. 163(3), CPC).

XV. Visit to Locus in Quo

173. The court may visit the scene of a crime only if necessary to understand the evidence given; it may not visit in order to form its own opinion (Nzioka v R [1973] EA 91). A visit should not be held in order to obtain additional evidence, but only to clarify doubts that may have arisen during trial. Such doubts include, for example, the nature of the terrain. In Yang Weimin & 3 Others v R (High Court at Nairobi Criminal Appeal No. 556, 557, 558 & 559 of 2006), the Court of Appeal held that the trial court had erred in visiting the locus in quo to ascertain facts that had not been set out during in-court proceedings.

174. A court may view the locus at any time during a trial, but a viewing must take place in the presence of the accused, defence counsel (if any), the prosecutor, and any witnesses that may be required or purposes of any

demonstration or explanation. The court must be mindful to maintain, and be seen to maintain, its neutrality during such visits. For instance, the judge or magistrate should make use of independent transport to the scene, as travelling with one party to the scene may raise doubt as to the impartiality of the court.

175. Upon arrival at the scene, the party that made an application for the visit addresses the court first, followed by the other party. Where the visit is conducted on the court's motion, the court addresses the parties on the purpose of the visits and asks questions. The accused must be given an opportunity to cross-examine on matters raised. The court should tell the parties what observations it has made. The court record of the visit must include the parties present, what took place during the visit, the observations made, and whether any additional matter has come to light (Kuyate v R [1967] EA 815; Stephen v R [1973] EA22).

XVI. Final Submissions

176. At the close of the case, both the prosecutor and the accused are entitled to present submissions to the court on both the evidence and the law (ss.213,310&311CPC).The prosecution has a right to reply where the defence calls evidence by a witness other than the accused, and where the DPP personally appears as advocate for the prosecution (s. 161 CPC).

177. Written submissions should only be accepted with the express consent of the accused. In Henry Odhiambo Otieno v R(Court of Appeal at Kisumu, Criminal Appeal No. 83 of 2005) the court held that in light of sections 210 and 213 of the Criminal Procedure Code and the right to public trial under section 77(2) of the repealed Constitution of Kenya, written submissions, in the absence of express consent of the accused, rendered the proceedings null and void. In John Mugisha v R (High

Court at Nairobi Criminal Appeal No. 162 of 2013), the court noted that the practice of written submissions is acceptable so long as the accused has consented.

178. If the accused consents to written submissions, the court, upon receiving the submissions, should further enquire whether the parties also wish to make any oral submissions. These oral submissions should form part of the court record. When written submissions have been submitted, it is good practice for the parties to highlight important points contained in the submissions.

CHAPTER FOUR:
JUDGMENT, ORDERS AND SENTENCING

I. The Judgment

Introduction

1. After hearing a case in its entirety, the court must render a reasoned, written determination on the guilt or innocence of the accused.

2. Judgment can be pronounced either immediately upon termination of the trial or at a subsequent time (ss. 168(1) & 322, CPC). If the court intends to pass judgment at some subsequent time, it must give notice of the date and time to the parties and their advocates, if any (s. 168(1), CPC). While the CPC does not prescribe a period within which judgment should be pronounced, the right to a speedy trial demands that the trial court issue a judgment without unreasonable delay, especially if the accused is detained.

3. The accused should be present during the pronouncement of the judgment unless either personal attendance has been dispensed with during trial and the sentence is a fine, or the accused is acquitted (s. 168(2), CPC). However, the absence of a party at the delivery of the judgement or failure to notify the accused person of the date of delivery of judgment does not invalidate the judgment (s. 168(3), CPC). In Joseph Kamau Githu v DPP(High Court at Nakuru Criminal Appeal No. 34 of 2013), the accused had repeatedly failed to attend court when judgment was scheduled to be delivered and warrants of arrest had been issued against him. The trial court subsequently delivered the judgment in his absence, and the Court of Appeal, relying on section 168(3) of the CPC, held that the accused's absence did not invalidate the judgment.

4. The substance of the judgment must be explained in open court (s. 168(1), CPC). The whole judgment should be read out in open court if either party requests.

5. If the accused applies for a copy of the judgment, he or she is entitled to one without delay (s. 170, CPC). An accused is also entitled to a translation of the judgment in their own language upon request, if practicable. Any person affected by a judgment or order passed by a superior court is entitled, on application and payment, to a copy of the judgment, order, deposition or other part of the record. The court may, for special reasons, provide them free of charge (s. 392, CPC).

Determination

6. Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved (art. 50(2)(a), CoK). For the court to convict an accused, the prosecution must prove beyond reasonable doubt that the accused is guilty (Stephen Nguli Mulili v R Court of Appeal at Nairobi Criminal Appeal No. 90 of 2013; Miller v Ministry of Pensions [1947] 2 All ER 372; DPP v Woolmington (1935) UKHL 1).

7. To arrive at its determination, the court should analyse and weigh the prosecution and defence evidence in its totality. The court should not look at the prosecution and the defence cases separately, but as a whole, while bearing in mind the burden on the prosecution. In Okethi Okale & Others v R ([1965] EA 555), the court held that the failure to consider the defence case is contrary to natural justice. Reiterating this position, the Court in Karura v R (Court of Appeal at Nairobi Criminal Appeal No. 170 of 1984) proceeded to consider the defence case which ought to have been considered by the trial court.

8. The court must not convict on the basis of mere inferences or conjecture without credible evidence proving the guilt of the accused person. In R v Danson Mgunya (Court of Appeal at Mombasa Criminal Appeal No. 21 of 2016), the appellate court rejected the prosecution's claim that the trial court ought to have drawn an inference that the accused shot and

killed the deceased, even though there was no evidence that the gun belonged to the accused. The court in Joan Chebichii Sawe v R (Court of Appeal at Nairobi Criminal Appeal No. 2 of 2002) drew a careful distinction between circumstantial evidence and suspicion: even strong suspicion by itself cannot justify conviction. It cited R v Kipkering arap Koske & Another ((1949) EACA 135) stating that 'to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt'.

Contents of the Judgment

9. Section 169 of the CPC sets out the contents of a judgment. Every judgment must be written by or under the direction of the presiding judge or magistrate, who must sign at the last page. The judgment will then be dated at the time of delivery by the presiding officer or any other person who delivers the judgment in open court. When the judgment is delivered, a person who is convicted must be informed of the right of appeal, and the time frame for appealing, which starts to run immediately.

10. The court in Peter Mwangi Waithaka v R(Court of Appeal at Nairobi Criminal Appeal No. 3 of 2013) emphasised that the court is required to sign and date the judgment. The judgment should include:

    i) name of the accused.

    ii) the charge or charges.

    iii) a summary of the evidence adduced by both prosecution and defence.

    iv) the point or points for determination.

    v) the decision made on each point.

    vi) the reasons for the decisions clearly set out.

    vii) in the case of conviction:

a. specify each offence and relevant section of the law, of which the accused is convicted.
b. punishment imposed for each count for which the accused is convicted (s. 169(2), CPC).

viii) in the case of acquittal (s. 169(3), CPC):

a. state any offence of which he/she is acquitted.
b. an order to set accused at liberty.

11. The pages of the order should be numbered consecutively.

12. In the case of a child dealt with in the Children's Court, the words 'conviction' and 'sentence' must not be used. The court should refer to a 'finding of guilt', and a consequent 'order' (s. 189, Children Act (CA)).

13. While the court is obligated to comply with section 169 of the CPC, non-compliance does not automatically invalidate a conviction, and a determination is premised upon the merits of each case. The consideration is whether, in all the circumstances, non-compliance has caused injustice.

14. In R v George Onyango Anyang & Another (High Court at Siaya Criminal Appeal No. 53 of 2016), the trial court considered the evidence and made a general conclusion rather than setting out the points for determination as required by section 169(1) of the CPC. The appellate court noted this failure, but then proceeded to evaluate the evidence and consider the points for determination. Having done this, it acquitted the appellants.

15. Failure to indicate the specific count that each accused was convicted of was held to be incurable in Nyanamba v R (Court of Appeal at Kisumu Criminal Appeal No. 121 of 1983), where the two accused had been charged jointly with two counts of robbery and one separate count against each accused. The conviction was quashed because the omission had caused injustice.

16. If a joint trial involves more than one accused, the court must consider the evidence against each separately and arrive at a separate decision for each of them (Morris Gitonga Njeru v R High Court at Embu Criminal Appeal No.16 of 2013; Munyole v R Court of Appeal at Kisumu Criminal Appeal No. 97 of 1985).

17. The judgment must be written in either English or Kiswahili (s. 169(1), CPC; s. 34, High Court (Organization and Administration) Act); s. 33, Court Of Appeal (Organization and Administration) Act);s. 198, CPC).

18. The judgment should not contain derogatory language. In Didacus Ollack Diego v R (High Court at Nairobi Criminal Appeal No. 1079 of 1983) the court reiterated the caution given in Okeno v R ([1972] EA 32): 'a dispassionate approach and clear finding of fact, are more indicative of judicial approach, and do not lay the magistrate open to a charge of possible bias'. The court may express strong condemnation of the conduct of the accused, but it must be careful not to be abusive or, for example, imply that the conduct is what might be expected of those belonging to a particular race, religion etc.

Conviction for Offences Other Than Those Charged

19. If the evidence tendered does not disclose the offence charged, but instead proves commission of a lesser offence, the court may convict the accused person for the proved lesser offence (s. 179, CPC; Robert Mutungi Muumbi v R Court of Appeal at Malindi Criminal Appeal No. 5 of 2013). This is true even if the charging papers did not include the lesser offence. For example, if an accused is charged with murder and the prosecutor proved all elements except malice aforethought, the accused can be convicted of manslaughter (R v Nicholas Ngugi Bangwa High Court at Nairobi Criminal Case No. 49 of 2011). Similarly, a person charged with robbery can be convicted of stealing if it is proved that the person fraudulently and without right took an object, but it is not proved

that the person used or threatened to use actual violence. Paul Njagi Mugambi v R (Court of Appeal at Nairobi Criminal Appeal No. 75 of 1979).

20. The substituted offence must be both lesser than and cognate with the offencecharged.Theterm‘cognate’referstooffencesthatare‘relatedor alike; of the same genus or species’ (Robert Mutungi Muumbi v R Court of Appeal at Malindi Criminal Appeal No. 5 of 2013). For example, an accused charged with defilement can be convicted of sexual assault (John Irungu v R Court of Appeal at Mombasa Criminal Appeal No. 20 of 2016). In Lawrence Omondi Otieno v R (Court of Appeal at Kisumu Criminal Appeal No. 368 of 2006), the court held that causing grievous bodily harm was cognate with robbery with violence. The offence of affray was held not to be cognate to the offence of assault in Janet Nyoroka v R (High Court at Meru Criminal Appeal No. 73 of 2009). It held that affray requires proof of involvement in a fight in a public place, which is not an element of assault.

21. If the facts support a conviction for attempt but not the completed offence, an accused charged with committing an offence may be convicted of having attempted to commit it even if attempt was not included in the charges (s. 180, CPC).

II. Sentencing

General Principles in Sentencing

22. When sentencing, courts are guided by the Sentencing Policy Guidelines (p. 3) to observe the following principles:

    i) Proportionality: The sentence imposed must match the offence committed. In Susan Peter Ebei v R (High Court at Kabarnet Criminal Appeal No. 79 of 2017), the court reiterated this principle and held that a sentence of four years imprisonment was not proportionate to theft of one sheep. The court, in Baraka

Kazungu Mangi v R (High Court at Malindi Criminal Appeal No. 9 of 2016), held that life imprisonment for an accused convicted of trafficking cannabis worth Kshs. 540 was not proportionate to the offence.

ii) Equality/uniformity/parity/consistency/impartiality: The principle of equality demands equal treatment of offenders during sentencing. Thus, offenders who have committed the same offences in similar circumstances should serve similar sentences. Guided by this principle, the court, in R v Jackson Maina Wangui &Another(High Court at Nairobi Criminal Case No.35 of 2012), highlighted that it had taken note of authorities on the offence of manslaughter, to determine the appropriate sentence in the case before it.

iii) Accountability/transparency: The reasoning informing the sentence imposed must be evident in the judgment. Section 169 of the Criminal Procedure Code requires the court to provide the reasons for its decision.

iv) Inclusiveness: Apart from hearing the offender in mitigation, the court may consider victim impact statements (s. 12(1), Victim Protection Act (VPA)). Victims have a right to submit information for consideration during sentencing (s. 20(2)(1)(b), VPA; I P Veronica Gitahi & Another v R Court of Appeal at Mombasa Criminal Appeal No. 23 of 2016). The sentencing hearing set out in the Sentencing Policy Guidelines (para. 23) provides a process through which the court can involve the offender and the victim in sentencing. During the hearing, the court also receives information from the prosecution, probation and children officers (where need be) to reach a well-reasoned decision.

v) Respect for human rights and fundamental freedoms: The court must ensure that the sentences imposed do not violate human rights and fundamental freedoms. Sentences should not be cruel,

inhuman, or degrading (art. 29(f), CoK). Other rights include the right of children not to be detained except as a measure of last resort (art. 53(1)(f), CoK). Imposing a custodial sentence on a child is, therefore, a violation of child rights in a case where a non- custodial sentence is available. Further, any detention imposed on a child must be as short as possible (art. 53(1)(f), CoK). The court therefore declared section 25(2) of the Penal Code, which requires children convicted of capital offences to be held in custody at the presidential pleasure, unconstitutional (AO & 6 Others v Attorney- General & Another High Court at Nairobi Petition No. 570 of 2015). This Bench Book sets out human rights and fundamental principles relating to all the stages of the criminal trial; the court is guided to adhere to them.

vi) Adherence to domestic and international law with due regard to recognised international and regional standards on sentencing.

23. The sentences imposed should be geared towards achieving the following objectives set out in the Sentencing Policy Guidelines (para.4.1):

i) Retribution.

ii) Deterrence.

iii) Rehabilitation.

iv) Restorative justice.

v) Incapacitating the offender.

vi) Denouncing the offence, on behalf of the community.

General Rules on Sentencing

24. Generally, a maximum sentence should not be imposed on a first offender unless there are aggravating circumstances (Arissol v R [1957] EA 447; Charo Ngumbao Gugudu v R Court of Appeal at Mombasa Criminal Appeal No.358 of 2008;James Ng'ang'a Njau v R Court of

Appeal at Nairobi Criminal Appeal No. 28 of 2015). Paragraph 23.7 of the Sentencing Policy Guidelines sets out a non-exhaustive list of aggravating circumstances.

25. For each count on which an accused is convicted, there must be a separate sentence. Omnibus sentences are illegal (Musa Majole v R [1956] EACA 576; Kiarie v R [1980] KLR52).

26. If the subordinate court convicts an accused of an offence and, after obtaining information on his or her character and antecedents, it believes that a more severe punishment should be imposed than it has authority to inflict, it may transfer the accused to the High Court for sentencing (s. 221, CPC; Katungo Mbuki v R [1962] EA682).

27. When passing a sentence, the court should only take into account matters that are relevant to the case. If the court considers irrelevant matters, it commits an error of law. In Clement Kiptarus Kipkurui v R(Court of Appeal at Nakuru Criminal Appeal No. 183 of 2008), the Court of Appeal held that the trial court had not only failed to take some relevant considerations into account, but in observing that the offence in question was 'prevalent' and imposing a deterrent sentence, it had taken into account an irrelevant consideration.

28. If two or more people have been convicted of the same offence, there should be no disparity in the sentences imposed without good reasons. If the court does impose disparate sentences, it should state its reasons on the record. (Walter Marando v R Court of Appeal at Kisumu Criminal Appeal No. 16 of 1980; Luka Kingori Kithinji & Another v R Court of Appeal at Nyeri Criminal Appeal No. 130 of 2010).

29. The convicted person has the right to the benefit of the least severe punishment if the prescribed punishment for the offence committed has changed between the time the offence was committed and at the time of sentencing (art. 50(2)(p), CoK; Joseph Lolo v R Court of Appeal at Kisumu Criminal Appeal No. 241 of 2012).

30. Where a penalty is prescribed, unless the contrary is expressed, the penalty must be construed as the maximum sentence (s.66, Interpretation and General Provisions Act).

31. Thus, the phrase 'shall be liable to' contained in many sentencing sections of the PC does not prescribe a minimum and mandatory sentence. Instead, it specifies the maximum sentence that can be imposed. The court has the discretion to impose a sentence up to, but not beyond, the maximum. (Daniel Kyalo Muema v R Court of Appeal at Nairobi Criminal Appeal No. 479 of 2007, citing s. 66(2), PC; Caroline Auma Majabu v R Court of Appeal at Mombasa Criminal Appeal No. 65 of 2014).

32. If the law prescribes a maximum sentence, the court must not impose a sentence above that maximum (Kasongo v R High Court at Nairobi Criminal Appeal No. 1573 of 1984; Abdikadir Hussein Mberwa v R High Court at Garissa Criminal Appeal No. 43 of 2014).

33. If the offence specifies a minimum sentence, the court must not impose any sentence below that minimum (Rotich v R[1983] KLR 541; David Kundu Simiyu v R Court of Appeal at Eldoret Criminal Appeal No. 8 of 2008). A mandatory sentence cannot be challenged as harsh or excessive because the court has no discretion to impose a different sentence (Johnson Muiruri v R [1983] KLR 445; Joseph Njuguna Mwaura & Others v R Court of Appeal at Nakuru Criminal Appeal No. 5 of 2008). These cases, however, were decided prior to the implementation of the 2010 Constitution, and may be subject to a challenges under various articles of the Constitution, including the prohibition against cruel, inhumane or degrading treatment (art. 29(f), CoK), a violation of the limitations imposed on fundamental rights and freedoms (art. 24, CoK), or a violation of the independence of the judiciary (art. 160(1), CoK).

Forms of Sentences

34. The following sentences can be imposed (subject to the rules for children set for in Section VII):

i) death

ii) imprisonment

iii) suspended sentence

iv) fine

v) forfeiture

vi) payment of compensation

vii) security to keep peace and be on good behaviour

viii) absolute and conditional discharges

ix) probation

x) community service, or

xi) any other sentences that may be set out by other laws (s. 24(i), PC), such as suspension of a certificate of competency in traffic offences (s.39, PC); restitution (s.178, CPC); or police supervision (s. 344A, CPC).

Death Sentence

35. The death sentence is prescribed for murder (s. 203, PC), treason (s. 40, PC), robbery with violence (s. 296(2), PC) and attempted robbery with violence(s.297(2), PC).In Charles Mulandi Mbula v R (Court of Appeal at Nairobi Criminal Appeal No. 123 of 2010), the court confirmed that the death penalty was a proper sentence for attempted robbery with violence as expressly provided for in section 297(2) of the Penal Code. Section 389 of the Penal Code, which relates to sentencing offenders convicted of attempted offences with no sentences expressly prescribed by statute, did not apply.

36. In Francis Karioki Muruatetu & Another v R (Supreme Court Petition No. 15 & 16 of 2015), the court declared the mandatory death sentence unconstitutional and remitted the petitioners' cases to the High Court for resentencing. The decision specifically relates to the mandatory death sentence but affirms the validity of the death penalty as a discretionary sentence. The remission of the cases to the High Court for sentencing in the Muruatetu case applied strictly to the two petitioners. The Supreme Court ordered that a committee be established to develop a framework for the resentencing of all persons who were sentenced under the mandatory death penalty provision. The Muruatetu case related to murder, but the court's reasoning, especially as concerns the wide range of circumstances of convicted persons, applies with equal or greater force to robbery with violence.

37. The death penalty may not to be imposed upon a child offender or an offender who committed the offence while a child (s. 25, PC). Section 25(2) of the Penal Code, which requires a child convicted of murder to be detained at the President's pleasure was held unconstitutional (A O & 6 Others v Attorney-General & Another High Court at Nairobi Petition No. 570 of 2015).

38. Expectant mothers cannot receive the death penalty and, instead, are to be sentenced to life imprisonment (s. 211, PC).

39. If an offender is convicted on several counts of capital offences for which the court chooses to impose the death penalty, the court must pass sentence on each count and direct that the offender serve out the first sentence while the others are held in abeyance (Peter Njagi Muchangi & 3 Others v R Court of Appeal at Nyeri Criminal Appeal No.613 of 2010; Stephen Muiruri & 2 Others v R Court of Appeal at Nairobi Criminal Appeal No. 47 of 1979, (1980) KLR70).

40. Similarly, if the accused is convicted of a capital offence as well as non-capital offences, the court must sentence the accused on each count for which he or she has been convicted. It should then order that the capital sentence be imposed while the sentences for the non-capital offences are held in abeyance (Hamisi Mungale Burehe v R Court of Appeal at Mombasa Criminal Appeal No. 37 of 2013).

41. Whilst the death penalty is still a lawful sentence, no one has been executed since 1987.

III. Imprisonment

42. If the maximum sentence provided is life imprisonment, the court has discretion to impose a shorter term of imprisonment (s. 26(2), PC; s. 66(1), Interpretation and General Provisions Act). In M K v R(Court of Appeal at Nairobi Criminal Appeal No. 248 of 2014), the court substituted a term of twenty years imprisonment for a sentence of life imprisonment for an offender convicted of incest. The court noted that the trial court had erred when it construed the words 'shall be liable to life imprisonment' in section 20(1) of the Sexual Offences Act to mean that a life sentence was mandatory.

43. Except when a minimum sentence is required, the court has discretion to determine the term of imprisonment in light of the relevant factors and circumstances of the case (Cecilia Mwelu Kyalo v R Court of Appeal at Nairobi Criminal Appeal No. 166 of 2008; Nelson Ambani Mbakaya v R Court of Appeal at Mombasa Criminal Appeal No. 1 of 2016). The Sentencing Policy Guidelines provide guidance on reaching the appropriate term of imprisonment (para. 23.3 - 23.10, Sentencing Policy Guidelines).

44. Section 26(3) of the Penal Code states that, unless the statute requires a minimum sentence, the court has the option of imposing a fine, in addition to or instead of, a prison term. In keeping with this provision,

the court, in Arthur Muya Muriuki v R (High Court at Nyeri Criminal Appeal No. 31 of 2010) reduced a sentence of four years to one and a half years with the option of a fine of Kshs. 25000 for the offence of arson.

45. The sentence imposed by the trial court begins on the date on which it is pronounced (s. 333(2), CPC). The court must take into account the time already served in custody before sentencing (s. 333(2), CPC; para. 7.10, Sentencing Policy Guidelines). In Bethwel Wilson Kibor v R(Court of Appeal at Eldoret Criminal Appeal No. 78 of 2009), the offender was convicted of manslaughter and sentenced to five years imprisonment. The trial court did not indicate whether it had taken into account the nine years that the offender had already served in custody. Guided by section 333(2) of the CPC, the appellate court reduced the sentence to time served. Section 333(2) does not specify how the court is to 'take into account' the time in custody.

46. Section 14 of the CPC provides that multiple sentences should run consecutively unless the court directs otherwise. Nevertheless, the court ought to specify whether the multiple sentences are to run concurrently or consecutively. The general rule is that sentences relating to offences committed in the same transaction should be served concurrently (Peter Mbugua Kabui v R Court of Appeal at Nairobi Criminal Appeal No. 66 of 2015; BMN v R Court of Appeal at Nyeri Criminal Appeal No. 97 of 2013).

47. Upon imposing a prison term, the court must issue a warrant ordering that the sentence be carried out in Kenya. The warrant gives the officer in charge of the prison the authority to carry out the sentence (s. 333(1), CPC).

48. Upon sentencing, the court no longer has jurisdiction over the case. However, it bears a supervisory role over prisons. The resident magistrate in any district is a visiting justice of the prisons in that district

(s. 72(2), Prisons Act (PA)). This role extends to inspecting the prison, assessing the living conditions and receiving complaints from prisoners. The magistrate is also required to determine whether the prisons comply with the Prisons Act, the rules made thereunder, and the prison standing orders. Should there be any irregularities, the magistrate is required to draw the attention of the officer in charge to them (s. 72(4), PA).

Non-Custodial Sentences

49. The primary objective of non-custodial sentences is rehabilitation of offenders. By serving these sentences, offenders take responsibility for their actions and, at the same time, remain in the community, which provides an environment conducive to rehabilitation. Some non-custodial sentences such as paying compensation and restitution deliver restorative justice to the specific victims

50. The following considerations, which are setout in the Sentencing Policy Guidelines (para. 7.18 and 7.19) should be taken into account:

    i) Gravity of the offence.

    ii) Criminal history of the offender.

    iii) Age of the offender.

    iv) Character of the offender.

    v) Protection of the community.

    vi) Offender's responsibility to third parties.

Suspended Sentences

51. If a court imposes a sentence of imprisonment for any offence for a term not exceeding two years, it can suspend the sentence for a specified period (s. 15(1), CPC). In R v Lina Mkunde David Kiritta (High Court at Nairobi Criminal Revision No.62 of 2008), the court held that the suspension of sentences was intended for offenders who have committed

relatively minor offences. It, therefore, reversed a suspended sentence imposed on an offender convicted of trafficking heroin of a market value of Kshs. 2,000,000.

52. If the offender is convicted of any offence during the specified period, the suspended sentence takes effect, and the sentence for the subsequent offence runs consecutively to the suspended sentence (s. 15(3), CPC; para. 15, Sentencing Policy Guidelines).

Fines

53. If imprisonment is provided as a penalty for an offence and a fine is not specified, a fine may be imposed on a person convicted of the offence, instead of or in addition to imprisonment (s. 26(3) PC). This does not apply if the sentence of imprisonment is expressed as a minimum. If the offence is punishable by a fine or a term of imprisonment, the court has discretion to impose such a fine or imprisonment (s. 28(1)(b), PC).

54. If the law sets a fine as a sentence for a specific offence, the maximum amount will usually be specified, but if the law is silent on the amount, the court has discretion as to the amount (s. 28(1)(a), PC). The amount, however, must not be excessive.

55. In the absence of aggravating factors or circumstances that militate against the imposition of a fine, the court should consider imposing a fine (para. 11.5, Sentencing Policy Guidelines). In Khali Abdiaziz Mohammud & Others v R(High Court at Nairobi Criminal Appeal No. 325 of 2007, 326 of 2007), for example, the Court of Appeal substituted the trial court's sentence of one-year imprisonment for a fine for first-time offenders convicted of being in the country illegally.

56. When the court decides to impose a fine, it should ensure that there is a reasonable correlation between the fine and the offence. The court should also take into account the ability of the offender to pay. In R v Benjamin Ogweno Koyier (High Court at Nairobi Criminal Case No.

75 of 1978), [1978] KLR 158), the court noted that it was pointless to impose a fine that the offender could not pay. The real test, however, is whether, given all the circumstances of the case, it would be in the interests of justice to impose a fine as opposed to imprisonment.

57. When an offender starts to pay the fine within a given period, the court should allow payment in instalments, provided that the offender submits a bond to ensure the payment (s. 336(3), CPC). To enforce payment, the schedule of payment should be included as part of the court record, and mention dates should be set to monitor payment (para. 11.6-11.8, Sentencing Policy Guidelines).

58. When imposing a fine, the court should specify a term of imprisonment to be served in default of payment. The term of imprisonment must be within the scale below (s. 28(2), PC):

Amount	**Maximum Period**
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 500	One month
Exceeding Sh. 2500 but not exceeding Sh. 15000	Three months
Exceeding Sh. 15000 but not exceeding Sh. 50000	Six months
Exceeding Sh. 50000	12 months

59. If the offender does not pay the fine or pays it late, the offender must serve either the default imprisonment term or the balance of the term, taking into account any instalments of the fine already paid (s. 28(1)(c), PC). A sentence of imprisonment in default of a fine cannot be served concurrently with any other sentence of imprisonment (s. 37, PC; John Chege Mwangi v R High Court at Nairobi Criminal Appeal No. 267 of 2007; R v Ofurrya [1970] EA 78). Imprisonment in default of a fine ends once the fine has been paid. In such a case, the amount payable is reduced to take into account the period of imprisonment already served.

60. The court can issue warrants for distress and for sale of an offender's moveable and immovable property to satisfy a fine. Such an order should not be made if the offender has served the whole term of imprisonment in default, except for special reasons. These reasons must be recorded in writing (s. 28(1)(c)(ii) Proviso, PC). As at the time of printing this Bench Book, there is no authority explaining what special reasons might be.

Forfeiture

61. Forfeiture may serve several purposes. One purpose is to restore property to the rightful owner. Further, through forfeiture, the convicted person is deprived of the benefits of the crime. The court may not order forfeiture unless the law expressly provided for it (Munyo Muu [1957] EA 891). The Proceeds of Crime and Anti-Money Laundering Act, for example, grants the court this power. A court that imposes forfeiture should specify the provision under which it is made.

62. Statutes provide for forfeiture either in mandatory or in discretionary terms. For example, forfeiture under the Customs and Excise Act is mandatory. The same is true of Section 22 of the Animal Diseases Act on forfeiture of animals with which an offence has been committed, and section 19 of the Narcotics and Psychotropic Substances Act. Section 105 of the Wildlife Conservation and Management Act gives the court a discretion as to whether to order forfeiture.

63. Under section 389A of the Criminal Procedure Code, covering discretionary forfeiture where the law providing the power does not specify the procedure for forfeiture, the court should first order service of a notice on the owner of the property. The notice must give time and place, state that it will order forfeiture unless good cause for not ordering forfeiture is shown. If the owner of the goods cannot be found, the notice should be published in a newspaper, or in any other suitable mode of

service deemed fit by the court (s. 389A (1), CPC). In Justus Kiprono Langat v R (High Court at Kajiado Criminal Misc. Application No.48 of 2016) the court held that it was unlawful for the trial court to have made an order of forfeiture without giving the offender to proceedings relating to the forfeiture an opportunity to be heard.

64. Forfeiture should not be ordered for property belonging to an innocent owner who was neither aware, nor had reason to believe, that the property was used in connection with the offence and who exercised reasonable diligence to prevent it from being so used (s. 389A(2), CPC). If the property in question is partly owned by such an innocent party, the court may order the forfeiture and sale of the property from which fair share of the proceeds of sale would be given to the part owner (s. 389A(2), CPC).

Payment of Compensation

65. Under section 24(g) of the Penal Code, payment of compensation is one of the discretionary punishments that a court may inflict upon a convicted offender (para. 10, Sentencing Policy Guidelines). Under section 175A of the Criminal Procedure Code, the court may make an order for compensation if it finds that the convicted person has civil liability to anyone as a result of the offence committed.

66. Section 23 of the Victim Protection Act provides that victims have 'a right' to compensation or restitution for the losses they suffer as a result of the offence committed. The compensation may cover personal injury, economic harm or medical expenses (s. 23(2), VPA).

67. An award of compensation covers what would be recovered as damages in civil proceedings (s. 175(2), CPC). In Ezekiel Mjomba Katu v R(High Court at Voi Criminal Appeal No. 52 of 2014) the court set aside the award of Kshs. 100,000 compensation, as the trial court had not demonstrated how the liability accrued. In Musili Muthui Mutemi v R

(High Court at Garissa Criminal Revision No. 5 of 2013) the court set aside an award for compensation for destroyed crops for want of proof of ownership of the crops.

68. The amount awarded is recoverable as a judgment debt in civil proceedings (s. 175(6), CPC; s. 23(4), VPA). Such an order for compensation, however, should not be made if the court considers that it would be prejudicial to the convicted person because: the evidence was too complicated to sufficiently determine the amount of damages; the evidence was not sufficient to establish either that damages were incurred or the amount of those damages; rules existed that limited the application of damages; or for any other reason.[1] In such a case, the victim is left to seek civil remedies unless barred by limitation of time. Further, the CPC provides that the amount awarded must be within the usual civil jurisdiction of the court.

69. An order of compensation against a convicted offender is not a bar to civil proceedings against the offender (s. 25, VPA). But any compensation awarded would be deducted from any award in a subsequent civil case (s. 175(7), CPC).

Security for Keeping the Peace

70. A person convicted of an offence, other than an offence punishable by death, may, in addition to, or instead of, any other sentence, be ordered to enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period to be fixed by the court (s. 33, PC). Such a person may be imprisoned pending the entering into a recognizance, but this period of imprisonment should not exceed one year.

1 See Sentencing Policy Guidelines, paras. 10.7-10.11 for further guidance on compensation orders.

71. Security for keeping the peace under section 33 of the Penal Code must be distinguished from a similar order provided for in sections 43 to 61A of the Criminal Procedure Code for suspected persons or habitual offenders. The latter, which is an order made prior to conviction, was declared unconstitutional in Anthony Njenga Mbuti & 5 Others v Attorney-General & 3 Others (High Court at Nairobi Constitutional Petition No. 45 of 2014).

Absolute and Conditional Discharge

72. The court may discharge the offender unconditionally if, after having considered all the circumstances of the case, including the nature of the offence and the character of the offender, it finds that it is inappropriate to inflict punishment and, further, that an order of probation would not be suitable, (s.35 (1), PC). Section 191(1)(a) of the Children Act recognizes this sentence as one of the orders that can be imposed on a child found guilty of an offence.

73. The accused person may also be discharged with the condition not to commit any offence within a period fixed by the order but which must not exceed 12 months. When imposing this order, the court must explain to the offender, in 'ordinary language', that committing any other offence within the specified period would render them liable to be sentenced for the original offence (s. 35(2), PC). This contrasts with the suspended sentence (s. 15, CPC) where the offender knows from the beginning the consequences of re-offending.

74. In R v Maxwel Musundi (High Court at Busia Criminal Appeal No.17 of 2016) the court noted that this sentence is meant for offenders who have committed minor offences. It, therefore, held that the trial court had erred in discharging an offender who had been convicted for the offence of escape from lawful custody. Similarly, in Paul Mutuku Munyoki v R (High Court at Nairobi Criminal Appeal No.56 of 2006) the court set

aside the discharge of the appellant who had been convicted of grievous bodily harm. Holding that the discharge was not proportionate to the offence, the court substituted the discharge with ten years imprisonment.

75. The Court may order an offender who has been discharged to pay compensation and all or any part of the costs incidental to the prosecution (s. 35(3), PC).

Probation[1]

76. Probation aims to reform and rehabilitate the offender. Once a charge has been proved, the court may convict the person and impose a probation order or may place the person on probation without convicting the person (s. 4(1),Probation of Offenders Act (POA)). The latter approach may, for instance, be used in accordance with Section 191(1)(c) of the Children Act, which does recognise probation as one of the orders that can be made against children when the court finds they are guilty.

77. Before a probation order is imposed, it must be shown that the offender is remorseful and willing to reform (Elijah Munee Ndundu & Another v R High Court at Nairobi Criminal (Revision) No. 18 of 1978).

78. A probation officer's report has to be given to the court before a probation order is made. This report should provide personal information about the offender, which the court is required to take into account when making its decision (s. 4(2), POA). Relevant personal information includes age, character, health, mental condition, family background, and antecedents. The word antecedents in this context means whether the offender has any criminal record. The probation report guides the court but is not binding (Haron Mandela Naibei v R High Court at Bungoma Criminal Appeal No. 116 of 2013).

1 See part 9, Sentencing Policy Guidelines for further guidance on probation orders.

79. The offender may be required to enter into a recognisance with or without sureties and must comply with all the terms of the probation order (s. 4(1), POA).

80. A probation order may include conditions that contribute towards reformation of the offender, such as undergoing counselling or abstaining from alcohol (s. 5(1), POA).

81. If an offender breaches the terms of the probation order, the offender should be brought before the court that issued the order. If the offender admits to the violation, or the court, having inquired into the matter and given the offender the opportunity to make a statement and call witnesses, finds that a violation occurred, it may impose a fine (s. 8(3)(a), POA). Alternatively, the court may revoke the probation order and impose any sentence that it could have imposed at the time of conviction (s. 8(3)(a)(i) & (ii), POA).

82. If the offender commits a subsequent offence during the term of the probation order, the court may impose sentences for both the previous and subsequent offences (s. 7(4), POA). If the offender was placed on probation without a conviction having been recorded (s. 4(1), POA), the court may proceed to convict and sentence the offender.

Community Service Orders

83. Community service under the Community Service Orders Act (CSOA) comprises unpaid public work within a community for the benefit of that community. Community service may be imposed for a period not exceeding the term of imprisonment for which the court would have sentenced the offender. Section 3(2)(b) of the CSOA provides a non-exhaustive list of public work.

84. Community service orders are limited to offenders whose offences either would result in sentences of three years or less, or to offenders who may be subject to a higher sentence, but the court determines that

the circumstances of the case justify a sentence of three years or less (s. 3, CSOA). Community service orders must be distinguished from probation orders, which are not subject to this limitation (s. 4, POA).

85. Community service orders emphasise restorative justice, which requires the offender to take responsibility by serving the community within which the offence was committed. As a member of that community, the victim benefits from the work done by the offender. Because it is a non-custodial sentence, the offender is less likely to lose his or her job and, therefore, less likely to commit crimes upon release.

86. The community service order must indicate the specific place in which the service will occur and the conditions the offender must observe (Jonathan Kasaine Mbutu & Another v R High Court at Machakos Criminal Revision No. 336 of 2014). The probation officer, who serves as the community service officer (s. 12, CSOA), must be served with a copy of the order (s.3 (7), CSOA). The probation officer must then give a copy of the order to the supervising officer, who is the person appointed to supervise the offender on a day to day basis. A supervising officer is an employee of the institution in which the offender will carry out the community service. Examples of institutions in which offenders serve community service are the Kenya Forest Service, schools, hospitals, and Probation and Aftercare Services. However, for one-day community service orders, offenders may also be supervised by probation officers, community volunteers, or anyone else appointed by the Probation and Aftercare Services.

87. Before imposing community service, a proper inquiry into the offender's circumstances must be made and recorded. The factors that the court should take into account in determining whether to impose community service include:

    i) whether the offender has a fixed residence,

ii) whether the offender has obligations, such as taking care of children, the elderly, or people with disabilities (R v Florence Chelagat High Court at Kabarnet Criminal Appeal No. 128 of 2017 and Margaret Wanjiku Muthoni v R High Court at Nairobi Criminal Appeal No. 60 of2005),

iii) whether and where the offender is employed, his or her working hours, and the nature of the offender's skills,

iv) whether the offender is a first offender,

v) the age of the offender,

vi) the distance to the nearest community service institution from the offender's home,

vii) the status of the offender and the nature of work available, and

viii) the health of the offender.

88. These factors are important because they help determine whether the offender can successfully serve a sentence. For instance, if the workstation is too far, or if the offender has demanding caretaking obligations, the offender may not be able to meet the requirements of a community service order.

89. In appropriate cases, the court can impose the community service order in addition to another order. For instance, the court may order community service as well as compensation (s. 31, PC). The court may also impose community service on condition of good behaviour (s. 33, PC).

90. Before imposing community service, the court should determine whether the offender is willing to perform community service. The court should also carefully explain to the offender what community service entails, the aims and objectives of community service, the obligations of the offender under the order, and the consequences of failure to comply with the order (s. 3(8), CSOA).

91. Before it can impose a community service order, the court must be satisfied that there is an institution available and willing to supervise the offender (s. 3(5), CSOA; para. 8.7, Sentencing Policy Guidelines). The probation officers coordinate with the institutions that are assigned to supervise offenders and advise the court on the availability of suitable placements. Upon receiving a copy of the community service order, the designated institution gives the offender duties and keeps records of the offender's performance.

92. Community service orders can be reviewed and varied by a court either on the application of the probation officer, by request of the offender made the through the probation officer, or by request of the offender directly (s. 6, CSOA).

93. If an offender breaches a community service order, the court must hold a hearing in which the offender has the opportunity to speak. Following the hearing, the court may either caution the offender to comply with the order, amend the order, or revoke the order and impose any other sentence available under the law (s. 5, CSOA).

94. The court receives feedback on the implementation of the community service orders in its jurisdiction through the Community Service Orders Case Committees, which are chaired by judicial officers (paras. 8.8-8.10, Sentencing Policy Guidelines).

Restitution

95. If a person is convicted for offences that are related to appropriating property (s.178, CPC), the court must order the offender to pay restitution for the property to the owner or the owner's representative (s.178, CPC; part 17, Sentencing Policy Guidelines).An order of restitution may be made summarily if the property is traceable and can be easily transferred back to the owner (s. 178(2), CPC). In Kagiri v R (Court of Appeal at Mombasa Criminal Appeal No.18 of 1988), the court held that the

various transactions that had taken place concerning the negotiable instrument in question made it necessary to have its value determined in a civil suit. It therefore set aside the order of restitution.

96. The court may order that money taken from the offender be given to a person who had purchased the property in good faith not knowing it had been stolen and who had subsequently been ordered to restore it to the rightful owner (s. 178(3), CPC).

97. A person aggrieved by an order of restitution, other than the offender, may appeal to the High Court (s. 178(4), CPC).

IV. Sentencing Hearing

98. Sentencing Policy Guidelines require courts to hold sentencing hearings in which they receive submissions that would have an impact on the sentence (para. 23.1, Sentencing Policy Guidelines). Sections 216 and 329 of the CPC empower the convicting court to hear evidence before sentencing that it thinks necessary to determine the appropriate sentence or order. Such evidence may, for example, be contained in probation reports, community service reports, or general social enquiry reports from the probation officers. The offender may also present mitigating evidence to the court. The court ought to establish the history, character, and antecedents of the person convicted, as well as all matters relevant to punishment, before imposing a sentence. While requesting such additional information is discretionary (R v Nasanairi Nsubuga (1950) 17 EACA 130), it is desirable to do so.

99. During the sentencing hearing, the court receives submissions from the prosecution, the convicted person, the victim (voluntarily), the probation officer and, where relevant, the children's officer.

The Prosecution

100. The prosecution is required to give a factual statement about the offender. The statement should include whether the offender has any previous convictions and, if so, provide details of the crime committed, the date of conviction, the sentence imposed, and when the offender was last released from prison. The prosecution should not allege or imply that the offender has committed offences for which he or she has not been convicted. Similarly, the court should not allow any prejudicial statements meant only to influence the court to award a more severe sentence (Karanja v R[1985] KLR 348; Ruhi v R [1985] KLR 373). Indeed, if the prosecution knows anything in favour of the offender, it should bring it to the attention of the court. This information does not have to be given under oath.

101. If the prosecution alleges a previous conviction, the court should ask the offender whether he or she admits or denies the allegation, and note the response in the record (Thathi v R [1983] KLR 354). If the offender denies a previous conviction, the prosecution must prove the conviction by any of the methods set out in section 142 of the CPC. In addition to proof of the conviction, the offender has to be identified as the same person who was convicted. This is usually done through fingerprint analysis. If a fingerprint identification is made by the person who took the fingerprints of the offender, it is prima facie evidence of the facts set out in the prior conviction. For the prosecution to prove the existence of a conviction outside Kenya, it must provide a certificate of a police officer in the country of conviction, a copy of the sentence or order of conviction, the fingerprints or photographs of the person convicted, and evidence that the fingerprints are those of the offender.

The Convicted Person

102. After submissions from the prosecutor, the convicted person should be given an opportunity to deny or qualify the information presented and to state additional facts in mitigation. When the offender denies or disputes something alleged by the prosecution, the court should conduct a hearing to determine the truth of the allegation. The prosecution must produce evidence on oath, which should be subjected to cross-examination. The offender may also present evidence that contradicts that of the prosecution.

103. Mitigation enables the offender to submit evidence that may reduce the severity of the sentence. A non-exhaustive list of mitigating circumstances is set out in the Sentencing Policy Guidelines (para. 23.8, Sentencing Policy Guidelines). The court may inquire into the facts relied upon by the offender in mitigation.

104. The court should explain to the offender his or her right to make a statement or submit evidence in mitigation.

105. Under Article 133 of the Constitution, the President, acting on the advice of the Advisory Committee on the Power of Mercy, may pardon an offender, postpone the execution of the punishment indefinitely or for a specified period, substitute a less severe punishment for that imposed, or remit whole or part of the sentence. Any offender, even one sentenced to death, may petition the President for mercy (s. 21(2) (b), Power of Mercy Act (POMA)). The mitigation statement, as part of the court record, may be valuable when considering whether to exercise the prerogative of mercy. It may also be relevant in an appeal at which the conviction for a capital offence may be reduced to a non-capital offence. In Joseph Kaberia Kahinga &11 Others v Attorney-General (High Court at Nairobi Petition No.618 of 2010) the court held that

mitigation is linked to the right to an appeal or review in a higher court as the mitigating statements give the appeal court a holistic view of the case.

The Victim

106. Courts should allow victims to express their views before any decision that affects them, such as sentencing, is made (ss. 4(2)(b) & 9(2)(b), VPA; para. 22.29, Sentencing Policy Guidelines). Victims are specifically entitled to submit information for consideration during sentencing (s. 20(1)(b), VPA). Victims can submit their views and concerns in person or through a legal representative (s. 9(3), VPA).

107. Victim impact statements may also be submitted and considered at sentencing (s. 12(1), VPA). These are statements that inform the court of the harm suffered by the victims as a result of the offence (s. 329A, CPC). The court is allowed to receive such statements if it considers them appropriate (para. 22.28, Sentencing Policy Guidelines). Victim impact statements are not mandatory and must not be received or considered by the court if the victim objects (s. 329(d), CPC).

V. Determination of the Sentence

108. The Sentencing Policy Guidelines require courts to take a two-step approach to determining the sentence (pg. 5). First, the court must decide whether a custodial or non-custodial sentence is appropriate. Custodial sentences should be reserved for instances when the objectives of sentencing would not be achieved through non-custodial sentences. Paragraph 7.19 of the Sentencing Policy Guidelines sets out the considerations to be taken into account when deciding whether to impose a custodial or a non-custodial sentence

109. Second, within the category of custodial or non-custodial sentence, the court must determine the length of the custodial sentence, or the type and duration of the non-custodial sentence and the conditions that will accompany it. This decision involves a balancing of mitigating and aggravating factors as detailed in paragraph 23.9 of the Sentencing Policy Guidelines.

VI. Sentencing Offenders Found 'Guilty but Insane'

110. If a court finds that an accused is guilty of the act or omission alleged but was insane at the time the offence occurred, the court must proceed as follows:

i) Order the offender to be held in custody in such place and manner it so directs (s. 166(2), CPC), and

ii) Report the case to the President for an order of commitment (s. 166(2), CPC)

111. The accused is then detained in a 'mental hospital, prison or other suitable place of safe custody,' as ordered by the President (s. 166(3), CPC). Courts have found difficulty with this provision, as later paragraphs show.

112. Three years after the order of detention, the officer in charge of the designated place of custody is required to write a report on the condition, history, and circumstances of the detained person for consideration by the President through the Cabinet Secretary responsible for matters relating to correctional services. Subsequently, a report is required every two years (s. 166(4), CPC). The report provides information necessary to determine whether to discharge or require the detained person to remain under supervision (s. 166(5), CPC). While not required by law, it is good practice for the court to set a mention date for the case within a year of the detention order to monitor the progress of the case.

113. In R v Samson Otieno Munyoro (High Court at Kisumu Criminal Case No. 6 of 2011 (Unreported)), the trial court raised concerns about the constitutionality of section 166 of the CPC and requested further briefing on the matter. Similarly, as noted above, decisions in B K J v R (High Court at Meru Criminal Appeal No. 16 of 2015) and Hassan Hussein Yusuf v R (High Court at Meru Criminal Appeal No. 59 of 2014), have held that detention at the President's pleasure under section 167 of the CPC is unconstitutional. In HM v R (High Court Meru HCCRA No.17 of 2017) the court held that an indefinite detention, possibly longer than the minimum sentence for the offence with which the accused was charged, was both excessive and an infringement of dignity. The sentence was reduced to one of time served. A similar decision was reached in Joseph Melikino Katuta v R ([2017] eKLR High Court at Voi Criminal Appeal No. 12 of 2016).

Sentencing Offenders Who Cannot Understand Proceedings

114. Section 167 of the CPC stipulates a sentence for an offender who is not insane but cannot be made to understand the proceedings, and against whom there is enough evidence to convict. Such an offender is detained at the President's pleasure. This indeterminate detention was however held to be unconstitutional in B K J v R (High Court at Meru Criminal Appeal No. 16 of 2015) and Hassan Hussein Yusuf v R(High Court at Meru Criminal Appeal No. 59 of2014).

VII. Determining Orders for Children

115. For children found guilty in the Children's Court, the word 'sentence' must not be used in referring to orders made (s.189, CA). The paramount consideration by the court must be the best interests of the child (art.53(2), CoK; s. 4(2), CA; para.20.13, Sentencing Policy Guidelines).

The overall objectives of orders for children are reformation, social integration, and restorative justice (para. 20.10, Sentencing Policy Guidelines).

116. The orders appropriate for children found guilty of a crime are set out in section 191 of the Children Act (Mwata Mwachinga Mwazige v R Court of Appeal at Mombasa Criminal Appeal No.377 of 2012). Section 191(1)(l) gives the court the discretion to make any other lawful order it deems fit.

117. The following orders must never be imposed upon children:

i) Imprisonment (s. 190(1), CA), or

ii) Death Penalty (s. 190(2), CA; Peter Nakale Lugulai v R High Court at Nakuru Criminal Appeal No. 363 of 2002).

118. Children under the age of ten years must not be sent to rehabilitation schools (s. 190(3), CA). Courts should only use custodial orders as a matter of last resort (art. 53(1)(f), CoK; para. 20.11, Sentencing Policy Guidelines).

VIII. Sentencing Adults Who Committed Offences While Minors

119. When sentencing people who committed offences while they were minors, courts must consider that fact. Since the offence was committed while the offender was a minor, the penal sanction is a response to conduct of the offender when a child. The penal sanction imposed must therefore not be the same as what would have been imposed had the offence been committed by an adult.

120. While some of the sentences in section 191 of the Children Act cannot be imposed upon an adult, the court's decision should be consistent with the spirit of sections 190 and 191 of the Children Act. These sections focus on rehabilitation and embrace aspects of restorative justice, such as compensation and counselling.

121. Section 25(2) of the Penal Code, which requires that an offender convicted of a capital offence while a child be detained at the President's pleasure, was declared unconstitutional by the High Court (AO & 6Others v Attorney-General& Another High Court at Nairobi Petition No. 570 of 2015).

IX. Sentencing Sexual Offenders

122. The Sexual Offences Act provides mandatory minimum sentences for most of the offences. If the statute requires the imposition of a mandatory minimum, the court does not have discretion and must mete out the prescribed sentence (para. 7.17, Sentencing Policy Guidelines; David Kundu Simiyu v R Court of Appeal at Eldoret Criminal Appeal No. 8 of 2008). However, in Francis Karioki Muruatetu & Another v R Supreme Court Petition No.15 &1 6 of 2015 the Supreme Court decided the mandatory nature of the death sentence for the offence of murder because it denied the courts their discretion in sentencing. A similar argument may be raised in regard to minimum sentences

123. For some offences under the Sexual Offences Act, the sentence is determined by the age of the victim. Evidence of the age of the victim must therefore be adduced (DWM v R Court of Appeal at Nyeri Criminal Appeal No. 12 of 2014). A birth certificate, school documents, a baptismal card, or similar record, may be admitted to prove age (r. 4, Sexual Offences Rules of Court). In the absence of documentary evidence, other evidence may be provided. A medical assessment may also be sought.

124. If the age of a victim differs from the age requirements of the charged offence, the court can substitute the charged offence for an offence that reflects the proven age of the victim, and then convict for that offence.

The substitution can only be for a lesser and cognate offence (s. 179, CPC; Francis Kahindi Mwaiha v R Court of Appeal at Mombasa Criminal Appeal No. 121 of 2014).

125. Further, if a person is charged with defiling a girl under fourteen years under the Criminal Procedure Code, and the court finds the person not guilty of that offence but that there is sufficient evidence to find him guilty of an offence under the Sexual Offences Act, the court can convict the person of the latter offence (s.186, CPC). Before doing this, however, it must be proven that the victim was under the age of fourteen.

X. Sentencing Categories of Offenders Requiring Further Consideration

126. When considering custodial sentences or community service orders for offenders who are elderly, terminally ill, or who have disabilities, the court should take into account the state of the offender and the proposed sentence to ensure that the sentence does not amount to inhuman treatment (para. 20.25, Sentencing Policy Guidelines).

127. When sentencing female offenders, the court should also take into account gender-related factors such as caretaking obligations, whether they are pregnant, or lactating (paras. 20.39-20.40, Sentencing Policy Guidelines).

XI. Costs

128. The court has the discretion to order a person convicted of an offence to pay reasonable costs to the prosecutor, whether private or public, in addition to any penalty imposed (s. 171(1), CPC). Under section 175(1) of the CPC, the court may also order that all or part of any fine be used to cover expenses incurred in the prosecution of the case.

129. Further, the court has a discretion to order a private prosecutor to pay reasonable costs to an accused person who has been acquitted or discharged (s. 171(2), CPC). The costs awarded should not exceed twenty thousand shillings for matters before the High Court (s. 171(2)(i), CPC). In subordinate courts, the limit for awarding costs is ten thousand shillings (s. 171(2)(i), CPC). However, costs must not be imposed against a private prosecutor if the court considers that there were reasonable grounds for prosecuting (s. 171(2), CPC).

130. The costs awarded must be stated clearly (s. 174(1), CPC). In Katuva Munyao v Edward Jacob(High Court at Nairobi Criminal Revision No. 42 of 1982), the appellate court set aside the order for costs because the trial court did not indicate the actual amount awarded.

131. Should a party fail to pay costs awarded, the court may invoke the provisions on distress on movable or immovable property procedure in section 334 of the CPC (s. 174(2), CPC). In default of distress, the court may impose a sentence adhering to the scale set out in section 28 of the Penal Code (s. 174(2), CPC). The sentence in default of payment of costs must never exceed three months (s. 174(2), CPC).

CHAPTER FIVE:
APPEAL, REVIEW, REVISION, AND RELATED MATTERS

I. Appeals

1. The right of a person convicted to appeal to a higher court is guaranteed by the Constitution (art. 50(1)(q), CoK). And, because an appeal does not constitute a new trial, the right not to be tried for an offence of which one has been acquitted does not bar an appeal by the DPP against an acquittal (art. 50(o), CoK; R v Danson Mgunya Court of Appeal at Mombasa Criminal Appeal No. 21 of 2016).

2. There is no provision for a private prosecutor to appeal an acquittal by a subordinate court to the High Court (s. 348A, CPC; Njoroge v Karanja & Another High Court of Kenya Criminal Appeal No. 399 of 1981; Kimani v Kahara High Court at Nairobi High Court Revision Case of 1983).

Interlocutory Appeals

3. The limit of the right of appeal to those who have been convicted excludes any fundamental right to file an interlocutory appeal (art. 50(1)(q), CoK). The CPC also refers only to appeals following conviction or acquittal (ss. 347(1) & 379(1), CPC).

4. However, an interlocutory appeal may be allowed in exceptional circumstances such as when a ruling made by a trial court violates or is likely to violate the constitutional rights of an accused person (Thomas Patrick Gilbert Cholmondeley v R Court of Appeal at Nairobi Criminal Appeal No. 116 of 2007, citing s. 84(7) of the former Constitution, equivalent of Article 22(1) of the CoK). However, the court in Sheila Kinya Maingi v R (High Court of Kenya at Nairobi Criminal Appeal No. 388 of 2008) held that, in criminal cases, it is good practice for an accused who is aggrieved by a decision made during trial to await the conclusion of the trial and, if convicted, challenge that decision in a substantive appeal to the High Court. In deciding whether to entertain an interlocutory appeal, courts must bear in mind that such appeals

may be used to delay the trial rather than to pursue substantive legal concerns (John Njenga Kamau v R High Court at Nairobi Criminal Appeal No. 63 of 2014). Nevertheless the court must strike a balance between the constitutional rights of an accused and the possibility that the interlocutory appeal was made to delay or frustrate the case (Sheila Kinya Maingi v R High Court at Nairobi Criminal Appeal No. 388 of 2008).

Bail Pending Appeal

5. When an appeal is pending in the High Court, a magistrate or judge may grant bail or stay execution of a sentence pending appeal (s. 356 & 357, CPC; R v Antony Karanja Njeru High Court at Embu Criminal Case No. 9 of 2016).

6. To be entitled to bail pending appeal, the applicant must satisfy the court that the appeal has overwhelming chances of success (para. 4.30, Bail and Bond Policy Guidelines; Samuel Macharia Njagi v R High Court at Nyeri Criminal Appeal No. 50 of 2013; Francis Ngobu v R High Court at Murang'a Criminal Appeal No. 264 of 2013). This phrase, which has been used in recent cases, may suggest a heavier burden of persuasion than earlier decisions that stated that the applicant must persuade the court that the grounds for appeal are so meritorious that the probabilities will favour acquittal (Somo v R (1972) EA 476). On the other hand, a recent case that cites many previous authorities uses the expression 'high chances of success' (Peter Hinga Ngatho v R [2015] eKLR High Court Nyeri, Criminal Appeal No. 2 of2015).

7. For appeals to the Court of Appeal, either the High Court or the Court of Appeal may grant bail to an appellant pending appeal (s.357, CPC; r. 5(2)(a), Court of Appeal Rules 2010).

8. In cases involving certain serious offences, the DPP may appeal to the Court of Appeal, as of right, against a decision of the High Court (in its original jurisdiction) to grant bail to an accused person (s. 379A, CPC; R v Nuseiba Mohammed Haji Osman alias Umm Fidaa, alias Ummu Fidaa, alias Ummulxarb Court of Appeal at Nairobi Criminal Application No. 4 of 2016). The DPP's right to appeal under section 379A, however, only applies in cases in which an accused has been charged under the following Acts:

   i) Penal Code, section 203 or 296(2);

   ii) Prevention of Terrorism Act;

   iii) Narcotic Drugs and Psychotropic Substances (Control) Act;

   iv) Prevention of Organized Crimes Act;

   v) Proceeds of Crime and Anti-Money Laundering Act; and

   vi) Counter-Trafficking in Persons Act.

II. Appellate Jurisdiction

Appeal from a Subordinate Court to the High Court

9. The High Court, as the first appellate court, may hear appeals on both matters of law and matters of fact (s. 347(2), CPC). For matters of fact, it is the duty of the High Court as the first appellate court to re-evaluate the evidence adduced at trial (Okeno v R (1972) EA 32; Felix Kinyanya Marako v R High Court at Migori Criminal Appeal No. 102 of 2014).

10. An appeal to the High Court should be filed within 14 days from the date of delivery of judgment. However, if an appeal is filed after the 14-day period, the High Court may admit it if good cause is shown for the delay. The High Court has allowed late filings where, for example, an appellant or his or her advocate was unable to obtain a copy of the order or judgment before the14-day deadline (s. 349, CPC; R v Ramchandra

Shankarlal Bhatt v R High Court at Kericho Criminal No. 19 of 2015; Mary Wanja Njoroge v R High Court at Nakuru Misc. Criminal Application No. 65 of 2014).

11. An accused convicted on a plea of guilty can only appeal against the sentence (s. 348, CPC) and has no right to appeal against the conviction. However, this is not an absolute bar; there may be special circumstances that, in the interests of justice, would warrant an appeal against the conviction, even by an accused who pleaded guilty (Nyawa Mwajowa v R Court of Appeal at Mombasa Criminal Appeal No. 46 of 2015). For instance, the plea of guilty may not have been truly voluntary because it was made under duress (John Gupta Nganga Thiongo v R High Court at Nairobi Criminal Appeal No. 669 of 1986), or without knowledge of the severity of a mandatory sentence (Julius Mwanzia Muthiani v R Court of Appeal at Mombasa Criminal Appeal No.92 of 1999). The accused may have admitted facts that do not disclose an offence, or pleaded guilty to a non-existent offence (Nyawa Mwajowa v R Court of Appeal at Mombasa Criminal Appeal No. 46 of 2015).

Petition of Appeal

12. Appeals to the High Court are lodged in the form of a petition. The petition must be accompanied by the judgement or the order appealed against (s. 350(1), CPC).

13. The petition must (s. 350(2), CPC):

    i) Be signed by the appellant or the appellant's advocate if the appellant is represented;

    ii) Set out particulars of the matters of law or fact constituting the grounds of appeal;

    iii) Indicate the address to which documents may be served on the appellant or the appellant's advocate if the appellant is represented.

14. To amend the petition of appeal, the appellant or appellant's advocate must seek leave of the court (s. 350(2)(iv), CPC; Gerald Wathiu Kiragu v R High Court at Nyeri Criminal Appeal No.110 of 2011). An appellant or appellant's advocate may, however, amend the petition without leave of the court under the following circumstances (s. 350(2)(i), CPC):

    i) Within seven days of receiving the copy of the trial court record, and

    ii) The appellant or appellant's advocate had applied for the record of the trial court within five days of receiving the judgement or order, and

    iii) The appeal was lodged within the 14-day period but before receiving a copy of the trial record.

15. An amendment of the petition without leave of the court under section 350(2)(i) of the CPC is made through a notice in writing to both the Registrar of the High Court and the Director of Public Prosecutions.

Summary Rejection of Appeals

16. Generally, an appeal may be rejected summarily if a High Court judge, after reviewing the petition, is satisfied that there are no sufficient grounds for interfering (s. 352(1), CPC).

17. However, where a petition challenges the weight of the evidence or claims that the sentence is excessive, the appellate court may summarily dismiss the petition if:

    i) The evidence is sufficient to support the conviction;

    ii) There is no new material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead the judge to the opinion that the sentence ought to be reduced (s. 352(2), CPC).

18. Except for the two reasons above, no appeal should be rejected summarily (s. 352(1), CPC; Abdi Wali Hassan v R Court of Appeal at NyeriCriminalAppealNo.49of2015;James Obiri v R Court of Appeal at Kisumu Criminal Appeal No. 58 of 1981). Summary rejection of appeals must be done sparingly and only when it is clear that the appeal is brought solely on the ground either that the weight of the evidence does not support the conviction or that the sentence is excessive (Okello v R Court of Appeal at Kisumu Criminal Appeal No.172 of 2002;Ngera Kamau Wahome v R Court of Appeal at Nyeri Criminal Appeal No. 61 of 2001).

19. Where an appeal is summarily rejected, the court must certify that it reviewed the record and is satisfied that there were no sufficient grounds for the complaint. It must also issue a notice of rejection to the appellant or his advocate and to the Director of Public Prosecutions (s. 352(2 & 3), CPC; Abdi Wali Hassan Kher v R Court of Appeal at Nyeri Criminal Appeal No. 49 of 2015).

20. An aggrieved party may appeal the summary rejection of appeal. In Moses Rafiki Kazungu v R Court of Appeal at Malindi Criminal Appeal No. 89 of 2014, the appellant appealed against summary rejection of his appeal, which had raised both points of law and fact, and the appellate court quashed the summary rejection (see also Obiri v R [1981] KLR 493 Criminal Appeal at Kisumu Appeal No. 58 of1981).

Summary Granting of Appeals

21. An appeal may be summarily allowed when a High Court judge is satisfied that the weight of the evidence does not support a conviction and there is communication, in writing, from the Director of Public Prosecutions confirming that the Office of the DPP does not support the conviction (s. 352A, CPC). In Gulam Sadik v R (High Court at Mombasa Criminal Appeal No. 198'B' of 2001), for example, the court

ordered a new trial because the Attorney-General conceded that glaring procedural violations had occurred. The judge should not allow the appeal simply because the Office of the Director of Public Prosecutions does not support the conviction, but should personally be satisfied that this is the right course of action (Topika Ole Murumbi v R High Court at Nakuru Criminal Appeal No. 370 of 2003).

22. Where an appeal is not summarily dismissed, the court must notify the parties of the time and place where the appeal will be heard (s. 353, CPC).

III. Appeals from the High Court to the Court of Appeal

23. A person can appeal against a conviction to the Court of Appeal (s. 379(1)(a), CPC), or against sentence, except when the sentence is fixed by law (s. 379(1)(b), CPC). Leave of the Court of Appeal must be obtained for an appeal against sentence (s. 379(1)(b), CPC). However, the constitutionality of this provision may now be in doubt, in view of the right to appeal in Article 50(2)(q).

24. In a first appeal to the Court of Appeal, it has jurisdiction to adjudicate legal and factual matters (s. 379(1) & (2), CPC; r. 29(1), Court of Appeal Rules 2010; Mabel Kavati & Another v R Court of Appeal at Nairobi Criminal Appeal No. 509 of 2010; Okeno v R [1972] EA32).

25. The jurisdiction of the Court of Appeal in second appeals is limited to matters of law (s. 361(1), CPC; Mohamed Famau Bakari v R Court of Appeal at Malindi Criminal Appeal No. 64 of 2015; Naftali Mwenda Mutua v R Court of Appeal at Nyeri Criminal Appeal No. 137 of 2014; M'Riungu v R [1983] KLR 455; Kaingo v R (1982) KLR 213).

26. Pursuant to rule 29 of the Court of Appeal Rules, on a first appeal the court has the power:

    i) to re-appraise the evidence and to draw inferences of fact; and

ii) to take additional evidence if there is sufficient reason to do so (Marcarios Itugu Kanyoni v R Court of Appeal at Nyeri Criminal Application No. 5 of 2011; Brown Tunje Ndago v R Court of Appeal at Mombasa Criminal Appeal (Application) No. 12 of 2012). A sufficient reason may exist if an appellant would suffer a great injustice if the evidence is not taken or if the decision of the first appellate court would have been different had the evidence been taken (Marcarios Itugu Kanyoni v R Court of Appeal at Nyeri Criminal Application No. 5 of 2011).

27. When additional evidence is taken by the court, it may be given orally or by affidavit, and the court may allow the cross-examination of any deponent. The accused's right to challenge evidence at trial (art. 50(2)(k), CoK) would apply to adverse evidence in appeal proceedings. The parties to the appeal are entitled to be present when additional evidence is taken.

28. The Court of Appeal will not interfere with the findings of fact of the trial court or the first appellate court unless: the findings were based on no evidence at all; the findings were based on a perversion of the evidence; or if no court that had followed the evidence could have reasonably reached the same conclusion as the lower court (Mohamed Famau Bakari v R Court of Appeal at Malindi Criminal Appeal No. 64 of 2015).

29. The Director of Public Prosecutions may appeal to the Court of Appeal if the DPP believes that an acquittal was based on an error of law or fact (s. 348A, CPC). If the appeal succeeds, the court may substitute the acquittal with a conviction and proceed to sentence (s. 348A, CPC). In R v Danson Mgunya (Court of Appeal at Mombasa Criminal Appeal No. 21 of 2016), the court held that section 348A did not violate the principle of double jeopardy because an appeal does not 'constitute a new or different and distinct trial'.

30. If an accused is acquitted in a trial in the High Court that the DPP believes involves a matter of law of exceptional public importance, the DPP may request that the Court of Appeal determine that matter (s. 379(5), CPC). In such a case, the Court of Appeal delivers a declaratory judgment that is binding on lower courts but does not overturn the acquittal (s. 379(6), CPC; R v Danson Mgunya Court of Appeal at Mombasa Criminal Appeal No. 21 of 2016).

31. The DPP may also seek the Court of Appeal's review of a sentence imposed by the High Court. The Court of Appeal may maintain or enhance the sentence in the interests of justice (s. 379(5A), CPC; R v Edward Kirui Court of Appeal at Nairobi Criminal Appeal No. 198 of 2010).

Documentation on Appeal to the Court of Appeal

Notice of Appeal

32. An appeal to the Court of Appeal is initiated by lodging a notice of appeal (r. 59(1), Court of Appeal Rules 2010; Feisal Mohammed Ali alias Feisal Shahbal Court of Appeal at Malindi Criminal Application No. 2 of 2015). The notice of appeal must be lodged in the High Court within 14 days from the date of the decision intended to be appealed against.

Record of Appeal

33. Once a notice of appeal is lodged, the registrar of the High Court prepares a record of appeal.

34. The record of appeal must contain copies of the following documents in the following order (r. 62(2), Court of Appeal Rules 2010):

i) an index of all documents in the record that includes the page numbers at which each document begins, the names of the witnesses, and the pages of the record (including the trial judge's notes, the transcript, or shorthand notes) at which the witnesses' evidence appears;

ii) the information, indictment or charge;

iii) the trial judge's notes of the hearing, including those of the sentencing and any post-sentencing hearings;

iv) the transcript of any shorthand notes taken at the trial;

v) a list of all trial exhibits;

vi) all documentary exhibits, photographs and plans put in at the trial, and all depositions submitted because an intended witness was absent.

35. The registrar of the High Court should not prepare the record of appeal where:

i) The Notice of Appeal has not been filed within the required time unless either:

a. the Chief Justice, the High Court, or the Court of Appeal orders that the untimely notice be lodged; or

b. the Court of Appeal has ordered that the time for filing be extended (r. 62(5)(a), Court of Appeal Rules 2010; R v Paul Wainaina Boiyo alias Sheki & 5 Others High Court at Nairobi Criminal Case No. 8 of 2014);

ii) The prescribed fee has not yet been paid (r. 62(5)(c), Court of Appeal Rules 2010).

36. Within fourteen days after service of the record of appeal on the appellant, he or she must lodge a memorandum of appeal with the Registrar or Deputy Registrar 'at the place where the appeal is to be heard' (r. 64(1), Court of Appeal Rules 2010).

37. The Memorandum of Appeal must set out the grounds upon which the appeal is based. For a first appeal, the grounds may raise both points of law and points of fact. For a second appeal, the Memorandum may only raise points of law (r. 64(2), Court of Appeal Rules 2010).

Filing a Memorandum of Appeal Out of Time

38. The Memorandum of Appeal should be concise (Henry Karanja Muiri v R Court of Appeal at Nairobi Criminal Appeal No. 384 of 2010).

39. If a Memorandum of Appeal is not filed within the required time, the court may either dismiss the appeal or set a hearing to address the late filing. Once dismissed, the appeal may only be restored if the appellant shows sufficient cause for the late filing (r. 64(5), Court of Appeal Rules 2010). The court may, on such terms as it thinks just, extend the time for filing the Memorandum (r. 4, Court of Appeal Rules 2010).

Withdrawal of Appeal

40. An appellant may withdraw an appeal by filing a written notice to the Registrar (r. 68(1), Court of Appeal Rules 2010). A withdrawn appeal may, however, be restored by leave of the court if it is satisfied that the 'withdrawal was induced by fraud or mistake and that the interests of justice require that the appeal be heard' (r. 68(3), Court of Appeal Rules 2010).

Hearing of Appeal

41. The appellant and the State are entitled to attend the appeal hearing (r. 71(1), Court of Appeal Rules 2010). The appellant or the respondent, where the state is the appellant, may opt not to attend the hearing, in which case the party should submit a statement of the arguments in lieu of attendance (r. 66, Court of Appeal Rules 2010). If the appellant is represented by an advocate or has submitted a statement under rule 66 of the Court of Appeal Rules, the appellant need not attend the hearing unless required to do so by the court (r. 71(2) & (3), Court of Appeal Rules 2010; JCS v R Court of Appeal at Nyeri Criminal Appeal No.219 of 2011). Written statements and oral statements made at the hearing are given equal consideration (r. 72(b), Court of Appeal Rules 2010).

42. During the hearing, the appellant is restricted to the grounds of appeal raised in the Memorandum of Appeal or Supplementary Memorandum unless the court permits the appellant to raise other grounds (r. 72(a), Court of Appeal Rules 2010).

Orders on Appeal

43. If the Court of Appeal sets aside or varies the decision of the subordinate court or of the first appellate court, it may:

    i) Make any order that the subordinate court or the first appellate court could have made; or

    ii) Remit the case, together with its judgment or order, to the first appellate court or to the subordinate court for determination with any directions it deems necessary (s. 361(2) CPC; r. 31, Court of Appeal Rules 2010; Robert Mutungi Muumbi v R Court of Appeal at Malindi Criminal Appeal No. 5 of 2013).

44. With regard to an appeal against sentence, the Court of Appeal may:

    i) Affirm the sentence previously imposed or impose another sentence; or

ii) If a party to an appeal has been convicted of an offence and the subordinate court or first appellate court could have lawfully found him guilty of another offence, the Court of Appeal may change the conviction to the other offence and impose an appropriate sentence (s. 361(3), CPC; A M & 2 Others v R Court of Appeal at Nairobi Criminal Appeal No. 19 of2007).

IV. Appeals from the Court of Appeal to the Supreme Court

45. Except for matters that involve the interpretation or application of the Constitution, appeals to the Supreme Court must first be certified as involving a matter of general public importance.

The Constitution refers to 'certification' while the Supreme Court Act refers to 'leave of the court'. These two terms have the 'same legal meaning' (Lawrence Nduttu & 6000 Others v Kenya Breweries & Another Supreme Court Petition No. 3 of 2012).[1]

46. An application for leave to appeal to the Supreme Court may be made either to the Court of Appeal or to the Supreme Court (art. 163(4)(b), CoK; s. 16(2)(a), Supreme Court Act 2011 (SCA)). A two-judge bench of the Supreme Court has stated that it is good practice to approach the Court of Appeal in the first instance (Sum Model Industries Ltd v Industrial and Commercial Development Industries Supreme Court Civil Application No. 1 of 2011). The Supreme Court may review a certification by the Court of Appeal and either affirm, vary, or overturn it (s. 16(5), SCA). The refusal to certify an application made to the Court of Appeal may be appealed to the Supreme Court.

47. Although section 16(2)(b) of the Supreme Court Act also states that leave to appeal to the Supreme Court may be granted if 'substantial injustice may have occurred or may occur if the appeal is not heard,' the

1 Application for leave to appeal to the Supreme Court applies to both civil and criminal matters. Decisions in civil matters are therefore instructive in criminal matters.

Supreme Court declared that this section was unconstitutional because it conflicted with Article 163(4)(b) of the Constitution (Malcolm Bell v Daniel Toroitich Arap Moi & Another Supreme Court Application No. 1 of 2013).

Retrial

48. When deciding whether to order a retrial, having decided to overturn a conviction or acquittal, an appellate court should be guided by the facts and circumstances of the case. In all cases, however, the ultimate consideration must be whether the interests of justice demand a retrial (Benard Lolimo Ekimat v R Court of Appeal at Eldoret Criminal Appeal No.151 of 2004; Dennis Leskar Loishiye v R Court of Appeal at Nairobi Criminal Appeal No. 24 of 2015).

49. A re-trial would ordinarily be ordered when it would be in the interests of justice to do so, or where an injustice has been caused by an irregularity or illegality during trial (Samwel Ngare Kayaa & Another v R Court of Appeal at Mombasa Criminal Appeal No. 5 of 2011; Muiruri v R [2000] KLR 552; Makupe v R Court of Appeal at Mombasa Criminal Appeal No. 98 of 1983).

50. If the conviction is overturned because the prosecution's case was insufficient or inadequate, a retrial is not appropriate. (Makupe v R Court of Appeal at Mombasa Criminal Appeal No. 98 of 1983; Fatehali Manji v R [1966] EA343).

51. Further, the court should not order a retrial if it would not be possible to conduct a new trial because witnesses were no longer available (Roy Richard Elirema & Another v R Court of Appeal at Mombasa Criminal Appeal No.67 of 2002;Munyole v R Court of Appeal at Kisumu Criminal Appeal No. 97 of 1985)

52. A retrial should not be ordered if it would violate the interests of justice. In Benard Lolimo Ekimat v R (Court of Appeal at Eldoret Criminal Appeal No. 151 of 2004), for example, the court held that it was not in the interests of justice to retry the accused in view of the length of time he had already spent in prison. In Makupe v R(Court of Appeal at Mombasa Criminal Appeal No. 98 of 1983), the court held that a retrial would violate the interests of justice because the appellant was not to blame for the weaknesses of the prosecution's case.

V. Revision

53. The High Court exercises a supervisory role over subordinate courts. As part of that role, it may examine the records or orders of subordinate courts and assess whether those orders are correct, legal, or proper. It may also review the proceedings of the subordinate courts to ensure they meet all procedural requirements (s. 362, CPC; R v Simon Wambugu Kimani & 20 Others High Court at Garissa Criminal Revision No. 1 of 2015). The interests of justice require that High Court routinely exercise this supervisory authority.

54. A Chief Magistrate may call for and examine the records of a subordinate court of a lower class (s. 363(2), CPC). If, during the examination, the Chief Magistrate discovers that illegal orders or sentences have been imposed, he or she must forward the records, with remarks, to the High Court (s. 363(2), CPC).

55. If orders or proceedings in the subordinate court are found to be incorrect, illegal, marred by impropriety or generally irregular, the High Court may exercise its revisionary powers set out in s. 364 of the CPC (R v Jared Wakhule Tubei & Another High Court at Bungoma Revision Case No. 26 of 2012; Catherine Mueni Makau v R Criminal Revision No. 2 of 2012).

56. When exercising its powers of revision, the High Court may (s. 364, CPC):

    i) Exercise its powers as an appellate court in accordance with sections 354, 357 and 358 of the CPC. In so doing it may increase the sentence in cases that have resulted in a conviction;

    ii) In cases other than an order of acquittal, alter or reverse the order of the subordinate court (s. 364(1), CPC; Peter Njuguna Mburugu & 2 Others v R High Court at Nakuru Revision Case No. 9 of 2012; R v Everlyne Wamuyu Ngumo High Court at Embu Criminal Revision No. 138 of 2016; Abdi Noor Saidi & Another v R High Court at Nakuru Criminal Revision No. 58 of 2010).

57. The High Court may not make an order that would prejudice an accused without first giving the accused an opportunity to be heard either personally or through his or her advocate (s. 364(2), CPC; R v Mohamed Rage Shide High Court at Garissa Criminal Revision No. 9 of 2016).

Limits of the Revisionary Powers

58. When exercising the power of revision, the High Court may not:

    i) Impose a punishment greater than that given by a subordinate court (s. 364(3), CPC).

    ii) Convert an acquittal to a conviction (s. 364(4), CPC; R v Samuel Karonjo Rurigi High Court at Nairobi Criminal Revision No.147 of 2016).

59. The court may not entertain a request for are vision of a finding, sentence, or order if the requesting party did not appeal even though he or she was able to do so (s. 364(5), CPC;R v Mohamed Rage Shide High Court at Garissa Criminal Revision No. 9 of 2016;Wahome v R [1981] KLR 497).

60. When the High Court conducts a revision, it must certify its decision or order to the court that originally issued it. If necessary, the court that issued the original decision must then make orders that are in accordance with the certified decision (s. 367,CPC).

VI. Petition for a New Trial

61. Article 50(6) of the Constitution gives a person convicted of a criminal offence the right to petition the High Court for a new trial if:

    i) The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

    ii) New and compelling evidence has become available.

62. 'New evidence' refers to 'evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial' (LT. Colonel Tom Martins Kibisu v R Supreme Court at Nairobi Petition No. 3 of 2014).

63. 'Compelling evidence' implies 'evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial, would probably have led to a different verdict' (LT. Colonel Tom Martins Kibisu v R Supreme Court at Nairobi Petition No. 3 of 2014).

64. If a court finds that new and compelling evidence has become available, it must order a new trial. The court making an order for a new trial may indicate that part of the evidence adduced at the earlier trial may be adopted by the court if it would be difficult to secure the attendance of the witnesses at a new trial.

65. The applicant has the burden of satisfying the conditions of Article 50(6) of the Constitution. This right conveyed by Article 50(6) has no time limit.

CHAPTER SIX:
SPECIAL PROCEDURES

I. Introduction

1. Typically, criminal proceedings are governed by rules of procedure that apply to all criminal matters. However, certain types of proceedings are governed by rules that relate to them specifically. These 'special' procedures are discussed in this chapter.

II. Inquests

2. An inquest is a special judicial process of inquiry into sudden or unexplained death. The law governing inquests is in sections 385-388 CPC.

Jurisdiction in Inquest Proceedings

3. Jurisdiction to conduct an inquest is vested in the Magistrates Courts. The court nearest to where the sudden or unexplained death occurred has jurisdiction to conduct the inquest (s. 386(1), CPC).

4. Inquests can be reviewed by the High Court. For example, in R v Chief Magistrate Naivasha (High Court at Nakuru Judicial Review Case No.8 of 2008), the High Court issued an order of certiorari quashing an order made by an inquest court for failing to allow the applicants to challenge evidence on the basis of which the court then ordered they be charged with murder.

5. The power of revision under section 362 of the CPC can be exercised over inquest proceedings as well (In re Estate of Philip Otieno Odhiambo (Deceased) High Court at Homa Bay Criminal Revision No. 8 of 2014).

Mandatory and Discretionary Inquests

6. An inquest must be held when someone dies while imprisoned, in the custody of the police or a prison officer, or when a missing person is believed to be dead (s. 387(1), CPC).

7. The Magistrate's Court, however, has discretion to hold an inquest when there is information that a person (ss. 386 & 387(1), CPC):

   i) Has committed suicide;

   ii) Has been killed by another or by accident; or

   iii) Has died under circumstances raising a reasonable suspicion that some other person has committed an offence.

8. The DPP has the discretionary authority to direct a Magistrate to hold an inquiry or to re-open a terminated inquiry (s. 388, CPC). In Hassan Kinako Suku (Suing in his capacity as next of kin of Ali Suku Kinango-Deceased) v Attorney-General & Another (High Court at Mombasa Judicial Review No.93 of 2011)), the High Court held that, although the DPP's authority to direct an inquest was described as discretionary, it was the responsibility of the DPP to move the court, and therefore there was no discretion when s. 187(1) of the CPC required that an inquest be held. .

Procedure in Inquests

9. An inquest starts when a Magistrate Court with appropriate jurisdiction is informed by the police that a death has occurred in any of the circumstances set out in section 386 CPC. The information is usually followed by a detailed report of the investigation and any supporting evidence.

10. If the circumstances of the death fit within section 387(1) of the CPC, the court must order an inquest. Otherwise, it may exercise its discretion. In conducting the inquest, the court has all the powers it would have if it were holding an inquiry into an offence (s. 387(1) CPC). Therefore, the court is mandated to inquire into the truth of the information presented before it and to take any additional evidence it deems necessary.

The Finding

11. In reaching its findings, the court must bear in mind that the purpose of an inquest is to determine the cause of death, whether a crime was committed and, if so, whether there is sufficient evidence to prosecute any person. Depending on the evidence before it, the court may act in any of the following ways:

    i) If the evidence discloses, in the opinion of the court, that an offence was committed by an unknown person(s), the court should make a record of its findings and send a copy to the Office of the DPP (R Thro' Cid Mwingi & In the Matter of Julius Kilonzo Muthengi High Court at Garissa Criminal Revision No. 199 of 2013).

    ii) If the evidence discloses, in the opinion of the court, that an offence has been committed by a known person(s), the court should, similarly, forward the finding to the DPP. Both Re Homa Bay Chief Magistrates Court (High Court at Homa Bay Criminal Revision No.52 of 2015) and Re Estate of Philip Otieno Odhiambo (Deceased) (High Court at Homa Bay Criminal Revision No. 8 of 2014), held that a court holding an inquest under section 387(3) of the CPC may not issue warrants for arrest based on its findings. Article157 (6)(a) of the Constitution vests the authority to institute proceedings in the DPP.

    iii) If the court concludes that no offence has been committed, then it must record that conclusion. The opinion of the Inquest Court must be based on a hearing and can only be recorded at the close of the inquiry. The High Court granted an application to revise an Inquest Court's ruling when the Inquest Court had merely recorded its opinion without hearing any evidence (R v Charles M'twamwari High Court at Meru Criminal Revision No. 88 of 2006).

iv) When the court holds an inquest for a missing person believed to be dead, the court must report the case and its findings to the Office of the DPP. Based on its findings, the Inquest Court should recommend whether to reduce the timeframe set out in section 118 A of the Evidence Act for presuming that a missing person is dead, and, if so, to what shorter period.

III. Related Processes – The National Coroners Service

12. The National Coroners Service Act (NCSA) establishes the National Coroners Service whose role is to investigate deaths that occur while in custody or during medical procedures as well as deaths resulting from (ss. 24&28, NCSA):

i) violence,

ii) sudden or unnatural causes,

iii) unexplained reasons,

iv) suspected maternal deaths,

v) child abuse, and

vi) other related causes.

13. The service must conduct medical examinations of all deaths suspected to be of a criminal nature (s. 26. NCSA). If a coroner finds that a death was caused by a criminal offence, an investigation report must be submitted to the DPP and Inspector-General of Police (s. 27NCSA).

IV. Orders in the Nature of Habeas Corpus

14. Habeas Corpus is a special order against unlawful restraint. It is a procedure by which the High Court directs someone who has detained another to produce that person and to show cause why that person may not be set at liberty at once (s. 389 CPC). Realistically, it is usually used

when the police are holding or believed to be holding a person, but it could be used for any situation (for example, if the person is believed to be forcefully held because of mental illness, or failure to pay a debt).

15. Under Articles 25(d) and 51(2) of the Constitution, habeas corpus is a fundamental right that may not be limited.

16. The High Court has the authority to issue various directions in habeas corpus proceedings, including that any detained person be brought before the court and that an illegally detained person be released (s. 389 CPC).

17. If the respondents no longer have physical custody, even as a result of their voluntary act, the right to habeas corpus will be ineffective because the respondents would not be in a position to comply with any order that can be made in the proceedings (Masoud Salim & Another v Director of Public Prosecutions & 3 Others High Court at Mombasa Petition No. 7 of 2014).[1]

Procedure in Habeas Corpus Applications

18. The procedure in Habeas Corpus Applications is set out in the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules, 1948. These rules, which have not been amended since 1963, are included in the schedule to the CPC.

19. Under Rule2, the application must be made *ex parte*, in the first instance, to a High Court Judge in Chambers and must be supported by affidavit (usually this will have to be by someone other than the person detained). The Judge may dismiss the application summarily or make an order that a summons be issued to the person alleged to be detaining the prisoner.

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1 Kenya has signed but not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, which requires member states to extend the criminal law in a way that might make it easier to hold responsible those in authority when people disappear (UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006).

The Rules do not specify what must be proved for the application to succeed, but it has been suggested that what is needed is to raise a doubt in the mind of the judge about the validity of the detention. The petitioner must also prove that the missing person is in the custody of the respondent in accordance with the usual rule under (s. 107, Evidence Act; Masoud Salim & Another v Director of Public Prosecutions & 3 Others High Court at Mombasa Petition No. 7 of2014).

20. If the application does proceed, copies of the summons must be served on the Attorney-General if the individual detained is in public custody (r. 4, Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules, 1948).

21. At the hearing stage, the burden of proving that the custody is lawful lies on the person seeking to justify the detention (Masoud Salim & Another v Director of Public Prosecutions & 3 Others High Court at Mombasa Petition No. 7 of 2014).

V. Contempt of Court

22. The law relating to contempt of court, which was previously set out in several acts, is now consolidated and contained in the Contempt of Court Act, No. 46 of 2016 (CCA).

23. Contempt of court under the CCA comprises both criminal and civil contempt of court (s. 4, CCA). Criminal contempt of court is conduct that undermines the dignity of the court, interferes with the proper running of court proceedings, or obstructs the administration of justice (s. 4, CCA). Civil contempt of court is constituted by willful refusal to obey a court order or breach of an undertaking to a court.

Jurisdiction in Relation to Criminal Contempt of Court

24. All courts have original jurisdiction under the CCA to deal with contempt of the court (the traditional phrase is 'in the face of the court' but the CCA uses 'on the face').

25. A superior court may punish for both contempt of court generally and contempt on the face of the court (s. 5, CCA). A subordinate court may only punish for contempt of court on the face of the court. Contempt on the face of the court occurs when a person (s. 6, CCA):

    i) assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate;

    ii) wilfully interrupts or obstructs the proceedings of a subordinate court; or

    iii) wilfully disobeys an order or direction of a subordinate court.

26. Either a subordinate court or the DPP may make a reference or application by motion to the High Court for criminal contempt occurring before a subordinate court.

27. The High Court has the same authority to punish for contempt of court that occurs in the subordinate courts as it does for contempt of court that occurs in the High Court (s. 24, CCA).

Procedure

28. A contempt offence must be tried summarily, but the court must keep a record of the proceedings (s. 7, CCA). The requirements of the Constitution on fair trial (art. 50) and fair administrative action (art. 47) must nonetheless be respected (s. 7(3), CCA).

29. No procedure is specified for contempt trial in Magistrates courts, but when contempt of court occurs before a Superior Court, the court may order the person detained for up to 24 hours and then must proceed in the following manner:

i) inform the person in writing of the contempt of court charge;

ii) afford that person an opportunity to defend against the charge;

iii) take evidence that it deems necessary to reach a finding or that has been offered by the person;

iv) determine based on the evidence whether contempt has occurred; and

v) may make an order for the punishment or discharge of the person (s. 25, CCA).

30. A superior court may act on its own motion or on an application by any person (s. 26(1), CCA). In the case of contempt of a subordinate court, the High Court may take action on a reference made to it by that court or on a motion by the DPP (s. 26(2), CCA).

31. In exercising this power, the court must balance the freedom of expression guaranteed in Article 33 of the Constitution on the one hand and the duty to protect the authority of the court on the other (R v David Makali Court of Appeal at Nairobi Criminal Application No. 4 and 5 1994).

VI. Extradition Proceedings

32. Extradition is the judicial process through which an alleged criminal or fugitive is surrendered by one state to another having jurisdiction over the crime charged.

33. In Kenya, the extradition process is governed by the Extradition (Contiguous and Foreign Countries) Act and the Extradition (Commonwealth Countries) Act. The request for the return of a person

will be made by the authorities of the requesting country through the Attorney-General, while the DPP will apply to the court (s. 2, Office of the Director of Prosecutions Act ('prosecution' includes extradition)).

34. A court conducting extradition proceedings must bear in mind the following provisions of the law:

(i) Whether the Offence is Extraditable

35. Not all offences warrant extradition. To be an 'extradition offence' a crime must be punishable under the law of the country seeking extradition and under Kenyan law or under a law that can be applied as an extra- territorial offence in Kenya. In addition, the offence must be listed in the Schedules of the governing act (s. 2(1), Extradition (Contiguous and Foreign Countries) Act; ss. 2(1) & 4(1), Extradition (Commonwealth Countries) Act). The lists are not identical.

(ii) Statutory Grounds for Refusal to Extradite

36. Although States have the obligation to extradite or prosecute, there are statutory barriers to extradition that require the State to refuse to extradite. The barriers include when it appears that the offence alleged is of a political character,[1] that the accused is in reality being sought in order that he or she may be punished for political opinions, or that the accused is being charged on the basis of gender, race, religion, or nationality (s. 6, Extradition (Commonwealth Countries) Act; s. 16, Extradition (Contiguous and Foreign Countries) Act; s. 18(a), Refugee Act). In the case of the Commonwealth Countries Act, extradition is forbidden if the law about previous conviction or acquittal applies (s. 6(2)); in view of the constitutional prohibition on discrimination, this rule ought to apply to extradition under the other Act also. No one is to be extradited to a

1 Note that for the purposes of extradition law 'no offence which may, or does, jeopardize the safety of an aircraft, or of any person or property on board an aircraft, in flight shall be regarded as an offence of a political nature irrespective of the motive or alleged motive for such offence' (s. 7(1)(b), Protection of Aircraft Act).

country where 'there is reason to believe that the person is in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment' (Prevention of Torture Act s. 21(2)), or if 'the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country' (s. 18(b), Refugee Act). There might be doubts about whether the person, if extradited, would receive a fair trial, even beyond the issues raised in the legislation. The court in Torroha Mohamed Torroha v R (Court of Appeal at Nairobi Criminal Appeal No. 163 of 1988) said, '[i]t is fundamental that there cannot be extradition where fair trial cannot be guaranteed'. Article 50 on fair trial would arguably be infringed if a Kenyan court extradited a person when there was a real risk of a flagrant breach of the fair trial requirement with serious consequences in terms of penalty for the accused.[1]

(iii) Whether there is an Extradition Treaty or Agreement between Kenya and the Requesting State

37. The Extradition (Commonwealth Countries) Act applies to any Commonwealth country that the DPP has designated for the purposes of the Act (s. 3, Extradition (Commonwealth Countries) Act).[2] No separate agreement with the country is required.

38. On the other hand, an application for extradition under the Extradition (Contiguous and Foreign Countries) Act cannot succeed unless the requesting country has entered into an extradition agreement with Kenya. (Gunter Grochowski v Attorney-General & Another High Court at Nairobi Miscellaneous Criminal Application 282 of 2009).

1 The wording is taken from the cases in the UK refusing extradition, most recently Government of Rwanda v Nteziryayo & Others [2017] EWHC 1912 (Admin).

2 It appears that a small number of Commonwealth countries have been so designated, plus various countries that were still British colonies at the time of designation (see Extradition (Commonwealth Countries) Act, Subsidiary Legislation).

39. Even if there is no bilateral agreement with the requesting country, or it is a Commonwealth country that has not been designated, extradition may still occur based on an international legal instrument that has been ratified by Kenya and that provides for the extradition for the offence. In Gunter Grochowski v Attorney-General & Another (High Court at Nairobi Miscellaneous Criminal Application No. 282 of 2009), the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which both Kenya and the requesting state, Belgium, were parties, was the basis for extradition.[1] Various other treaties include similar provisions.

40. Under both acts, the Resident Magistrates Court has jurisdiction to hear extradition cases (ss. 2 & 9(1), Extradition (Commonwealth Countries) Act; ss. 2(1), (2), & 7(1), Extradition (Contiguous and Foreign Countries) Act).

Bail

41. The court has discretion to grant bail in extradition cases. When determining whether to grant bail, each case should be dealt with on its own merits (R v Baktash Akasha Abdalla & 3 Others High Court at Mombasa Criminal Appeal No. 178 of 2014).

The Court's Task

42. The court should not act like a trial court, deciding whether the accused is guilty (R v Wilfred Onyango Nganyi & Another High Court at Nairobi Criminal Appeal No. 96 of 2005).

1 Article 6.3 of the Convention was important: 'If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies'.

43. Satisfaction that there is, prima facie, a link between the individual and the criminal incident is sufficient (Torroha Mohamed Torroha v R Court of Appeal Nairobi Criminal Appeal No. 163 of 1988).

VII. Proceedings under the International Crimes Act

44. Kenya is a State Party to the Statute of the International Criminal Court (Rome Statute), which it ratified on 15th March 2005. Under Article 2(6) of the Constitution, treaties and conventions ratified by Kenya form part of the law of Kenya (Beatrice Wanjiku & Another v Attorney-General & Another High Court at Nairobi Petition No. 190 of 2011). In 2008, the International Crimes Act, 2008 (ICA) was enacted to give the Rome Statute force of law in Kenya (s. 4,ICA).

Jurisdiction

45. The High Court has jurisdiction to try offences under the ICA. These include genocide, crimes against humanity, war crimes, bribery of ICC judges, and obstruction of justice in the ICC (ss. 9-17,ICA).

46. Part III of the ICA relates to requests for assistance made by the ICC to Kenyan authorities while Part IV deals with arrest and surrender of persons to the ICC.

47. The High Court has exclusive jurisdiction in matters falling under Part IV, which includes issuance of arrest warrants, requests for surrender, and bail (s. 37 ICA). In this respect, the High Court may be required to:

    i) Issue or cancel warrant of arrests (ss. 30-32, ICA). In the absence of procedural rules, the request for the issue of a warrant should be by miscellaneous application (Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior and National Co-Ordination & 6 Others High Court at Nairobi Constitutional Petition No. 488 of 2013). The criteria for issuing a warrant of arrest are set out in section 30 of the ICA. In Kenya Section of the International

Commission of Jurists v Attorney-General & Another (High Court Miscellaneous Criminal Application No. 685 of 2010), the High Court issued a provisional warrant of arrest against president Omar Ahmad Hassan AlBashir of Sudan, who had a pending warrant of arrest issued by the ICC under Article 91 of the Rome Statute. However, this decision was reversed by the Court of Appeal in early 2018 (not yet reported).

ii) Issue orders on detention or release on bail (ss. 34, 35 and 38, ICA). Section 35 and 36 of the ICA should inform the court when making a decision on bail. In particular, the court should take into account recommendations made by the ICC (s. 36(2) ICA).

iii) Determine whether a person before the court is eligible for surrender to the ICC (s.39, ICA). When making this determination, the court should be guided by the parameters set out in section 39(3) of the ICA.

48. Domestic courts have the first opportunity to prosecute international crimes, and the jurisdiction of the International Criminal Court will only be invoked if the State is unwilling or unable to prosecute the offences (art. 17(1), Rome Statute). Unwillingness and inability are determined in accordance with the criteria set out in Articles 17(2) & (3) of the Rome Statute.

VIII. Corruption Offences

49. The Anti-Corruption and Economic Crimes Act (ACECA) governs most corruption offences in Kenya. It defines corruption as the misuse of entrusted power for private gain; it includes such offences as bribery, fraud, embezzlement, breach of trust, and abuse of office (s.2, ACECA).

50. The ACECA gives the Independent Ethics and Anti-Corruption Commission the authority to investigate corruption (s. 23(4), ACECA). Other statutes that create corruption-related offences are the Proceeds of

Crime and Anti-Money Laundering Act (POCAMLA), the Leadership and Integrity Act, the Public Procurement and Disposal Act, (PPDA), and the Bribery Act.

51. Although corruption offences are criminal offences and are generally subject to the ordinary procedures in a criminal trial, the ACECA has provisions specifically applicable to the investigation and trial of these offences. These provisions supersede the provisions of the Criminal Procedure Code and any other procedural law (s. 5(2), ACECA).

52. Corruption offences can only be tried by a Special Magistrate appointed by the Chief Justice through notification in the Kenya Gazette (s. 3, ACECA). A person qualifies to be appointed as a special magistrate if he or she is a Chief Magistrate, a Principal Magistrate, or an advocate of at least ten years standing. (s. 3, ACECA).

53. Upon completion of an investigation, the Ethics and Anti-Corruption Commission (EACC) is required to submit its report to the DPP with any recommendation for prosecution that it deems appropriate (s. 35, ACECA). In Nicholas Muriuki Kangangi v Attorney-General (Court of Appeal at Nairobi Civil Appeal No. 331 of 2010), the court held that the law required the EACC's predecessor, the Kenya Anti-Corruption Authority, to investigate and recommend prosecution and could not bypass the Attorney-General (who had prosecutorial powers then) to prosecute a case.

54. A court trying a corruption offence is required, as far as it is practicable, to hold its hearings on a daily basis until complete (s. 4(4), ACECA). This, however, does not take away the Magistrate's power to adjourn the trial when justice demands.

55. A Special Magistrate may offer a pardon to any corruption suspect on the condition that the suspect makes a full and true disclosure of the circumstances relating to the offense that are within his or her knowledge.

A suspect who accepts a pardon and testifies before the court cannot be tried for the offence in respect of which he or she has been pardoned (s. 5(1), ACECA).

56. A person who commits a corruption offence, or economic crime is liable to compensate any victim of the crime and to repay any improperly accrued benefits (ss. 51 & 52, ACECA). A court that convicts a person under the ACECA must order that the offender pay compensation, return property that had improperly been acquired, or pay the equivalent value of property that had been improperly acquired (s. 54, ACECA).

57. Part III of the ACECA creates offences punishable under the Act. A person convicted under the ACECA is subject to a fine of up to one million shillings and a sentence of up to 10 years imprisonment (s. 48(1)(a), ACECA). If the convicted person received a quantifiable benefit from his or her illegal conduct, the court must also impose a mandatory fine (ss. 48(1)(b) & (2), ACECA).

58. The High Court has special jurisdiction to entertain civil proceedings with respect to orders for the preservation and forfeiture of assets suspected to be proceeds from corruption or corrupt conduct (ss. 55, 56, & 56A, ACECA).

59. The Proceeds of Crime and Anti-Money Laundering Act provides for both criminal and civil confiscation of the proceeds of crime and has elaborate provisions empowering the court to issue orders relating to the preservation, forfeiture, and confiscation of criminal proceeds.

60. Due to the trans-boundary nature of corruption offences, a court conducting trials may be called upon to apply the Mutual Legal Assistance Act, 2011, the extradition Acts, international instruments on corruption to which Kenya is a party, and principles of international law.

IX. Private Prosecution

61. A private prosecution is any prosecution commenced by any person other than someone acting on behalf of the Government. Such a prosecution is undertaken by the Private Prosecutor in the name of the State with leave of court (s. 88, CPC).

62. Under the former constitution the right to undertake private prosecution was hailed as an important constitutional safeguard against partiality, bias, corruption, and indolence on the part of the public prosecutor (Kimani v Kahara High Court at Nairobi High Court Revision Case of 1983. See also Gouriet v Union of Post Office Workers [1978] AC 435). In Albert Gacheru Kiarie t/a Wamaitu Productions v James Maina Munene & 7 Others (High Court at Nairobi Petition No. 426 of 2009), the High Court held that Article 157(6)(b) of the 2010 Constitution specifically anticipated the use of private prosecutions. The Constitution has a similar provision, but it also recognises the DPP as the authority for prosecutions generally.

Procedure for Instituting Private Prosecution

63. A private prosecution may be instituted by making a complaint or by bringing a person who has been arrested without a warrant before a Magistrate. If the former occurs, the Magistrate is required to either draw up a charge or cause it to be drawn up. In both cases, the charge must be signed by the complainant and the Magistrate (s. 89, CPC).

64. Thereafter the Magistrate may either issue a summons or a warrant to compel the attendance of the accused person before a subordinate court having jurisdiction to try the alleged offence.

65. Once the accused person is in court, the complainant must seek permission from the Magistrate to conduct the private prosecution (s. 88(i), CPC; Otieno Clifford Richard v R (High Court at Nairobi Misc. Civ. Suit No. 720 of 2005).

Requirement for Leave

66. A private prosecutor must obtain the leave of the court to conduct a private prosecution (s. 88(1), CPC; Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others High Court at Nairobi Petition No. 339 of 2013; Otieno Clifford Richard v R High Court at Nairobi Misc Civ. Suit No. 720 of 2005; Shamsher Kenya Ltd v Director of Public Prosecution & Another High Court at Nairobi Criminal Appeal No. 93 of 2015).

67. Upon obtaining leave, a private prosecutor may conduct the prosecution in person or by an advocate and has the power to withdraw a prosecution (s. 87, CPC).

68. If a private prosecutor does not seek leave from the Magistrate to prosecute, leave may be inferred if no objections were raised during the course of the prosecution (R v Davendra Valji Halal [1978] KLR 178; Nunes v R [1935] 16 KLR 126). Similarly, if the court allows the private prosecutor to provide evidence, then it will be presumed that the court gave its permission when it allowed the trial to proceed (Njoroge v Karanja & Another High Court of Kenya Criminal Appeal No. 399 of 1981).

69. Permission to conduct a private prosecution is not given as of right. The court must b satisfied that the complaint or charge discloses an offence. If it does not, the court should make an order refusing to admit the complaint or charge and record the reasons for the order (s. 89(5), CPC; Jopley Constantine Oyieng v R Court of Appeal at Nairobi Criminal Appeal No. 45 of 1988).

Principles to Consider when Granting Leave

70. The court granting leave should be guided by the principles enunciated in Floriculture International Limited & Others (High Court Misc. Civil Application No.114 of 1997) as quoted in Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others (High Court at Nairobi Petition No. 339 of 2013).

71. The court should be satisfied that:

i) The public prosecution procedures have been exhausted;

ii) The DPP's decision not to proceed has been clearly demonstrated;

iii) The failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued;

iv) Unless the suspect is prosecuted by the court, there is a likelihood of a failure of public and private justice; and

v) There is reason to believe that a grave social evil is being allowed to flourish because of the inaction of the DPP, and that the private prosecution will counteract the DPP's in action.

72. According to section 4 of the Vexatious Proceedings Act, a person who has been declared a vexatious litigant by the High Court cannot institute a private prosecution without the written consent of the DPP. In all other cases, the DPP was not required to give consent before a private prosecution can be initiated (Kimani v Kahara High Court at Nairobi High Court Revision Case of 1983). This provision, which was enacted in 1958, and the cases must be read in the light of the current Constitution and the cases discussed earlier. The situation of a vexatious litigant would not be significantly different from any other potential private prosecutor under the current law.

Power of the DPP to Take Over Private Prosecution Proceedings

73. The DPP has the authority to takeover and continue a private prosecution (art. 157(6)(b), CoK). To do so, the DPP must first obtain permission from the person who initiated the proceedings.

74. To discontinue private prosecution proceedings, the DPP has to obtain permission from the court (art. 157(8), CoK; Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others High Court at Nairobi Petition No. 339 of 2013). If the application is refused, the DPP has no right of appeal but may apply to the High Court for revision of the order.

LIST OF CASES

A

A M M & 2 Others v R Court of Appeal Nairobi Criminal Appeal No. 19 of 2007 [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/119204/>

A O O & 6 Others v Attorney-General & Another High Court at Nairobi Petition No. 570 of 2015 [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/119204>

Abdi Noor Saidi & Another v R High Court at Nakuru Criminal Revision No. 58 of 2010 [2010] eKLR <http://kenyalaw.org/caselaw/cases/view/64165/>

Abdi Wali Hassan Kher v R Court of Appeal at Nyeri Criminal Appeal No. 49 of 2015 [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/123308>

Abdikadir Hussein Mberwa v R High Court at Garissa Criminal Appeal No. 43 of 2014 [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/119061>

Abel Monari Nyamamba & Others v R Court of Appeal at Nairobi Criminal Appeal No. 86 of 1994 [1996] eKLR <http://kenyalaw.org/caselaw/cases/view/30043>

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