

# REGIONAL DEVELOPMENTS

## PETTY POLICING PRACTICES: ENFORCEMENT OF MINOR OFFENCES AGAINST PERSONS WITH PSYCHOSOCIAL DISABILITIES IN THREE EAST AFRICAN COUNTRIES

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### 1 Introduction

Persons with psychosocial disabilities<sup>1</sup> often experience discrimination, harassment and even violence at the hands of law enforcement officials due to the latter's misinterpretation of their actions or circumstances. Especially when using public spaces, persons with psychosocial disabilities are disproportionately at risk of arrest for so-called 'petty'<sup>2</sup> offences such as loitering, indecent exposure, causing a public nuisance, urinating or defecating in public, as well as drunk and disorderly conduct.

Research conducted by the Southern African Litigation Centre in Malawi and Kenya has noted 'rampant abuse' of such minor offences by law enforcement officials in order to remove persons with psychosocial disabilities from their families or the community, especially where the

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1 Experiences of persons with intellectual disabilities in these contexts – and applicable legal principles – are in many respects similar to those of persons with psychosocial disabilities, however, in the interest of length this commentary is limited to the latter.

2 Section 1 of the Principles on the Decriminalisation of Petty Offences in Africa (adopted by the African Commission on Human and Peoples' Rights in 2018) defines petty offences as 'minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine ... Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanours, summary offences or regulatory offences'. See sec 3.1 below for further examples from the three jurisdictions under review.

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‘troublesome’ acts occur in public.<sup>3</sup> Arrests for these minor offences often occur without any evidence or police attempts to obtain evidence.<sup>4</sup> Petty offences therefore serve as a form of crime prevention or punishment which offers shortcuts to avoid due process requirements. Since the colonial era, these measures have been a helpful tool for law enforcement officials in many African countries in dealing with persons deemed a disturbance or annoyance.

While the pretext of arrests for ‘public nuisance’ offences is not utilised solely in respect of persons with psychosocial disabilities – or even persons with disabilities more broadly – it can be said that it disproportionately affects the former group. To understand this asymmetric effect, the following should be considered. First, criminal justice systems are typically skewed against the poor. For example, poor people are more likely to be detained for longer periods because of their lack of access to legal representation, and fines exacerbate their poverty.<sup>5</sup> Given the mutually reinforcing linkages between poverty and disability,<sup>6</sup> it is unsurprising that persons with disabilities are generally over-represented among persons experiencing discrimination based on their (low) economic status.

Second, although some progress has been made in recent years, psychosocial disabilities still carry severe social stigma – especially on the African continent. When it comes to persons with psychosocial disabilities, the same stigma and discrimination found in the general population also prevail among law enforcement officials.<sup>7</sup> In addition, there are common concerns about police behaviour concerning persons with psychosocial disabilities.<sup>8</sup> Laws which facilitate the criminalisation of poverty and status and place unfettered discretion on arrest and detention in the hands of law enforcement officials are particularly problematic when

3 Southern Africa Litigation Centre ‘Prosecuting sexual violence against women and girls with disabilities in Malawi’ (2017); Southern Africa Litigation Centre, Arthurs’ Dream Autism Trust and Article 48 Initiative ‘An exploratory study of the interaction between the criminal justice system and persons with intellectual and psychosocial disabilities in Nairobi, Kenya’ (2021).

4 See eg the 1948 judgment of the Malawi High Court in *R v Willie* 1923-60 ALR Mal 152, 154, regarding the offence of being a ‘suspect person or reputed thief who has no visible means of subsistence and cannot give good account of himself’.

5 UN General Assembly, Report by Special Rapporteur on Extreme Poverty and Human Rights, 66th session, 4 August 2011, UN Doc A/66/265 (2011).

6 LM Banks, H Kuper & S Polack ‘Poverty and disability in low- and middle-income countries: A systematic review’ (2017) 12 *PLoS One*.

7 See inter alia the findings of Afrobarometer surveys in Malawi and Kenya indicating the extent of discrimination experienced by persons with disabilities – B Howard “‘All in this together’: Africans tolerant on ethnic, religious, national, but not sexual differences’ (2020) Dispatch 362 *Afrobarometer Dispatch* 1 19. See also G Barbareschi and others “‘When they see a wheelchair, they’ve not even seen me’ – Factors shaping the experience of disability stigma and discrimination in Kenya’ (2021) 18 *International Journal on Environmental Research and Public Health* 4272, 4277.

8 G Gulati and others ‘Experiences of people with intellectual disabilities in encountering law enforcement officials as suspects of crime – A narrative systematic review’ (2020) 71 *International Journal of Law and Psychiatry* 3.

the latter are known for abusive, brutal, corrupt and sexually harassing conduct.<sup>9</sup>

Given the potential for rights violations, it is hardly surprising that there has been an increasing call, not only in Africa but also globally, for the decriminalisation of petty offences as well as a reconsideration of law enforcement practices relating to persons with psychosocial disabilities.<sup>10</sup>

Against this background, this commentary explores whether law enforcement practices in respect of minor offences allegedly committed by persons with psychosocial disabilities are aligned with regional human rights standards. Building on the findings of previous research,<sup>11</sup> the position in three East African countries, namely, Kenya, Malawi and Tanzania, is examined. The commentary, in turn, provides an overview of standards emerging in the African human rights system; a critical analysis of the domestic legal frameworks in the three countries; and concluding observations as well as recommendations for reform.

## **2 A brief glance at regional developments**

### **2.1 The African Commission on Human and Peoples' Rights**

The period from 2003 to date has seen a few significant milestones in the development and consolidation of regional norms on the rights of persons with psychosocial disabilities who encounter criminal justice systems.

In 2003, the African Commission on Human and Peoples' Rights (ACHPR) published its 'Principles and guidelines on the right to a fair trial and legal assistance in Africa'.<sup>12</sup> Although this document prohibits disability-based discrimination within the criminal justice system, its detailed provisions relating to arrest, detention and trial make no mention

9 Southern Africa Litigation Centre (n 3) 14.

10 UN Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights - Breaking the cycle: ending the criminalization of homelessness and poverty, 26 June 2024, UN Doc A/HRC/56/61/Add.3 (2024) 11.

11 Southern Africa Litigation Centre (n 3); Southern Africa Litigation Centre, Arthurs' Dream Autism Trust and Article 48 Initiative (n 3); Southern Africa Litigation Centre & Centre for Human Rights, Education, Advice and Assistance 'No justice for the poor: A preliminary study of enforcement of nuisance-related offences in Blantyre, Malawi' (2013).

12 ACHPR 'Principles and guidelines on the right to a fair trial and legal assistance in Africa' (2003). These principles generally follow the content of the United Nations' Body of principles for the protection of all persons under any form of detention or imprisonment, General Assembly, Body of principles for the protection of all persons under any form of detention or imprisonment, 9 December 1988, General Assembly Resolution 43/173 (1988).

of the accommodations which persons with disabilities may require in this context.<sup>13</sup>

That same year, in its landmark decision on the communication of *Purohit and Moore v The Gambia*, the ACHPR found that The Gambia had violated the rights of persons with psychosocial disabilities detained in 'mental institutions' in several respects. Significantly, the Commission highlighted the principle of inherent dignity as it relates to persons with psychosocial disabilities.

In 2011, the ACHPR's 'Guidelines and principles on economic, social and cultural rights in the African Charter on Human and Peoples' Rights' finally recognised the intersectionality of discrimination<sup>14</sup> and emphasised that persons with psychosocial disabilities ought not to be imprisoned with the general population.<sup>15</sup> In addition, they should be provided with appropriate support, social security and treatment instead.

The Commission's 2015 'Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa' included persons with disabilities under the vulnerable groups requiring specific attention.<sup>16</sup> Notably, the Guidelines emphasised that persons with disabilities have full legal capacity<sup>17</sup> and that they should be provided with

appropriate support to exercise their legal capacity, including through the provision of interpreters, information in accessible formats and/or independent third parties who are not employed by the law enforcement authority and who are appropriately qualified.<sup>18</sup>

In a major development, the African Union in 2018 adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol).<sup>19</sup> Article 13 of the Protocol provides for the right to access justice, requiring state parties to ensure that all parties in legal proceedings are provided with

13 These accommodations may include using easily understood terms when explaining the arrest process; repeating or rephrasing questions; allowing additional time for the person to process information; and suspending question when s/he becomes stressed or unable to concentrate. Gulati and others (n 8).

14 ACHPR, 'Guidelines and principles on economic, social and cultural rights in the African Charter on Human and Peoples' Rights' (2011) para 38.

15 ACHPR's Guidelines and principles (n 14) para hh, 27.

16 Sec 33(a)(i), ACHPR 'Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa' (Luanda Guidelines) (2017).

17 As confirmed in art 12 of the UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, 24 January 2007, UN Doc A/RES/61/106 (2007) (CRPD); and art 7 of the African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted by the 30th ordinary session of the Assembly, held in Addis Ababa, Ethiopia, on 29 January 2018 (African Disability Protocol).

18 Luanda Guidelines (n 16) sec 33(c).

19 The Protocol entered into force in June 2024 after ratification by the required 15 AU member states.

‘procedural, age and gender-appropriate accommodations’ to enable their participation. In addition, state parties are required to provide legal aid to persons with disabilities and ensure the training of law enforcement and judicial personnel to ensure recognition of the rights of persons with disabilities.

The year 2018 also saw the ACHPR’s adoption of the ‘Principles on the decriminalisation of petty offences in Africa’. These Principles are aimed at reducing prison overcrowding arising from arrests for minor offences and the arbitrary enforcement of penal laws against persons based on their vulnerability,<sup>20</sup> including persons engaging in life-sustaining activities. The document emphasises that offences ought not to be so broad as to allow for unfettered discretion in their enforcement and should meet the criteria of proportionality. Member states are called on to address marginalisation’s root causes, including poverty.<sup>21</sup> The Principles urge alternatives to detention for petty offences, which ‘[recognise] the need for reasonable accommodation for persons with disabilities’.<sup>22</sup>

In 2020, the Commission published a study on the use of force by police, emphasising the prohibition of disability-based discrimination.<sup>23</sup> The study highlighted the need for states to comply with the African Disability Protocol, including training law enforcement officials on disability.<sup>24</sup> The study noted that training would alleviate instances, for example, where police believe that persons with physical, intellectual or psychosocial disabilities are deliberately unruly or non-compliant.<sup>25</sup>

## **2.2 The Advisory Opinion of the African Court**

Most recently, in 2020, the African Court on Human and Peoples’ Rights (African Court) issued a ground-breaking Advisory Opinion<sup>26</sup> to the effect that so-called ‘vagrancy laws’ are incompatible with African human rights instruments. The Court concluded that expressions such as ‘loitering’, ‘having no visible means of support’ and ‘failing to give a good account of oneself’ do not provide sufficient indication to citizens on what the law

20 Section 1 of the Principles defines vulnerable persons as ‘persons who are marginalised in society and the criminal justice system because of their status, or an intersection of one or more statuses’. This group includes, amongst others, the economically or socially marginalised, persons living in poverty, or who experience homelessness, and persons with disabilities.

21 Secs 13 and 14(3) of the Principles.

22 Sec 14(2)(3) of the Principles.

23 ACHPR ‘Study on the use of force by law enforcement officials in Africa’ (2020) para 27.

24 ACHPR (n 23) para 28.

25 ACHPR (n 23) paras 29, 60.

26 The African Court may provide an advisory opinion on any legal matter relating to the African Charter provided that the subject matter of the opinion is not related to any matter under examination by the ACHPR - art 4 of the Organisation of African Unity (OAU), Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, 10 June 1998.

prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce the offences.

The African Court's Advisory Opinion also dealt with those criminal procedure provisions which allow police to arrest someone without a warrant where the person has no apparent means of subsistence and cannot give a satisfactory account of themselves, and any other provisions related to the enforcement of these offences. The Court concluded that arresting individuals under these offences and soliciting statements from them about their possible criminal culpability, is at variance with the presumption of innocence.

Significantly, the Court expressed the view that the overly broad petty offence of 'vagrancy' disproportionately punishes the poor and underprivileged, including individuals with disabilities.<sup>27</sup> The Court found that vagrancy laws are incompatible with the provisions in the African Charter on Human and Peoples' Rights (African Charter) on non-discrimination, equality, dignity, liberty and protection of the family under article 18.<sup>28</sup> Such laws are prone to abuse due to their vague and imprecise language. The Court ordered state parties to amend or repeal all their vagrancy laws, related by-laws and other laws and regulations to bring them in conformity with the provisions of the Charter.<sup>29</sup>

The Advisory Opinion accordingly states that the enforcement of vagrancy laws is contrary to states' obligation to protect the rights of women, children and persons with disabilities.<sup>30</sup> The Court condemned any offences which have a disproportionate effect on women and children and which

effectively punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living,

noting that there is simply no reasonably justifiable basis for such offences and arrest practices.

27 African Union 'Advisory opinion on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa' No 001/2018 (4 December 2020) paras 3, 4, 70 (Advisory Opinion).

28 Advisory Opinion, paras 70, 79, 83-87, 104-105.

29 Advisory Opinion, paras 153-54.

30 Advisory Opinion, para 139.

### 3 Gaps in domestic legal frameworks

#### 3.1 General overview: ‘Petty offences’

Despite the 2020 Advisory Opinion of the African Court, it is notable that legislation in all three jurisdictions under examination still makes provision for a range of minor ‘nuisance-related’ offences.

In Malawi and Tanzania, the offences of being a rogue and vagabond remain in force<sup>31</sup> and include being a ‘suspected person or reputed thief who has no visible means of subsistence and cannot give a good account’ of themselves. In these two countries, criminal procedure legislation also allows police officers to arrest someone without a warrant where the person has no apparent means of subsistence and cannot give a satisfactory account of themselves, providing broad-based discretion to police.

Law enforcement officials in Malawi,<sup>32</sup> Kenya<sup>33</sup> and Tanzania<sup>34</sup> also use the catch-all category of ‘common nuisance’ or ‘criminal nuisance’ in their Penal Codes to arrest persons who live on the streets or who carry out life-sustaining economic activities in public spaces. This offence originates from the English common law offence of being a ‘public nuisance’. In practice, this offence is used as a blanket justification to arrest and detain poor and marginalised persons.

Begging is prohibited in Malawi, Tanzania, and Kenya under the offence of being an idle and disorderly person.<sup>35</sup> In Tanzania, the by-laws of the Municipal Council of Ilala of 2019 specifically deal with controlling persons who beg, making it an offence to beg and to give to someone who begs for food or money.<sup>36</sup> The by-law goes further to require mandatory reporting of persons who beg. The offence of a breach of peace is sometimes also used against persons with disabilities in Malawi,<sup>37</sup> Kenya<sup>38</sup> and Tanzania.<sup>39</sup>

31 Secs 184 and 177 respectively in Malawi and Tanzania’s Penal Codes.

32 Penal Code, sec 168.

33 Penal Code, sec 175.

34 Penal Code, sec 170.

35 The offence of being an idle and disorderly person encapsulates a range of prohibited forms of conduct and is included in the Penal Codes of Kenya (sec 182), Malawi (sec 180) and Tanzania (sec 176) respectively.

36 Government Announcement 529, 19 July 2019, Law of Local Governments (Town Authorities) (Chap 288), By-Laws of Ilala Municipal Council (Controlling Requests).

37 Penal Code, sec 181.

38 Penal Code, sec 182(d).

39 Penal Code, sec 176(e).

### 3.2 The position in Kenya

It is noteworthy that the Kenya Judiciary as well as the Director of Public Prosecutions have adopted progressive policies focusing on ‘people-centred justice’.<sup>40</sup> For example, the Director of Public Prosecutions has urged prosecutors to prioritise alternatives to trial, including charging with restraint, using diversion for misdemeanours and encouraging treatment and non-criminalisation of mental illness.<sup>41</sup>

In 2019, the Office of the Director of Public Prosecutions published Guidelines on prosecutorial decisions regarding institution of criminal charges. The Guidelines state that prosecutors should have regard (amongst other factors) to whether the suspect is, or was at the time of the offence, affected by any significant mental or physical disability, since this may in some circumstances indicate that a criminal prosecution is not required. However, prosecutors should also weigh the seriousness of the offence, the likelihood of re-offending and the (perceived) need to safeguard the public.<sup>42</sup>

The Director of Public Prosecutions’ Diversion Policy Guidelines of 2019 instruct prosecutors to consider diversion for so-called ‘vulnerable persons’ irrespective of the nature of the offence.<sup>43</sup> This term is defined as ‘a person who, due to age, gender, disability or other special characteristics, may require the provision of special justice and support’. However, because these Guidelines also encourage the use of the Criminal Procedure Code when dealing with persons perceived to be of ‘unsound mind’, incarceration of persons with psychosocial disabilities continues to happen – often for lengthy periods – for minor nuisance-related offences.<sup>44</sup>

In another positive development, the Kenya Sentencing Policy Guidelines (2017) – formulated by the Kenya Judiciary – recommend the avoidance of imprisonment for petty offenders. At the same time, however, these sentencing guidelines also allow for the detention of persons with psychosocial disabilities ‘at the President’s pleasure’.<sup>45</sup> The High Court has emphasised that being detained for an indefinite period at the President’s pleasure is unconstitutional because it disregarded the rights of

40 Judiciary of Kenya ‘A blueprint for social transformation through access to justice 2023-2033: A people-centred justice approach’ (2023).

41 RM Ingonga ‘The Director of Public Prosecutions (DPP) Strategic Agenda 6’ (2023) 5.

42 Office of the Director of Public Prosecutions ‘Guidelines on the decision to charge’ (2019) 30.

43 Office of the Director of Public Prosecutions ‘Diversion policy guidelines’ (2019) Guideline 2.8.

44 Southern Africa Litigation Centre, Arthurs’ Dream Autism Trust and Article 48 Initiative (n 3) 25.

45 Judiciary of Kenya ‘Sentencing policy guidelines’ (2017). Sec 167(1) of the Kenyan Criminal Procedure Code allows for detention ‘at the pleasure of the President’ as a sentencing option, which effectively amounts to an indeterminate period of incarceration without any length of time or date of release being indicated.



an accused person as a person with a disability.<sup>46</sup> Despite this observation, courts continue to sentence persons to be detained at the President's pleasure.<sup>47</sup>

In terms of the provision of legal advice or legal representation, it should be noted that section 38 of the Persons with Disabilities Act of 2003 (Cap 133)<sup>48</sup> allows the Attorney-General and Law Society to make regulations for free legal services for persons with disabilities in capital cases or cases where their rights were adversely affected. The Legal Aid Act of 2016 recognises the need to protect marginalised groups. Still, it does not provide the opportunity for legal support for persons psychosocial disabilities at the police station level.

### **3.3 The position in Malawi**

Malawi's National Disability Mainstreaming Strategy optimistically proclaims that the country has the 'ideal legal framework adequate for ensuring access to justice for persons with disabilities'.<sup>49</sup> The Strategy does admittedly show some understanding of the challenges faced by persons with psychosocial disabilities when in conflict with the law, noting that 'prejudice overrides rational consideration of situations by law enforcers'.<sup>50</sup> The Strategy recommends improving support services and facilities for persons with psychosocial disabilities to exercise their legal capacity.<sup>51</sup>

In practice, however, such support services for persons with psychosocial disabilities are lacking. The new Persons with Disabilities Act of 2024, in section 32, has broad provisions on access to justice but no specific requirements for law enforcement agencies. Section 32(2)(b) of the Act requires that courts ensure reasonable accommodation to facilitate the participation of that person in the proceedings. This may include the use of sign language and augmentative or alternative modes of communication accessible to the person with a disability.

Section 17 of the Legal Aid Act of 2013 (Chapter 4:01) makes provision for access to legal aid when the interests of justice require, including for individuals who are arrested and held in police custody. When considering whether to provide legal assistance in criminal matters,

46 *Charles Kipkoech Chirchir v Republic* [2021] KEHC 7637 (KLR) (22 April 2021); *Republic v SOM* [2018] eKLR; *Joseph Melikino Katuta v Republic* [2016] eKLR.

47 *Republic v NEW* [2019] eKLR.

48 At the time of writing, a new Persons with Disabilities Bill, 2023 is pending in Kenya's parliament.

49 Ministry of Gender, Children, Disability and Social Welfare 'Malawi National Disability Mainstreaming Strategy and Implementation Plan (NDMS&IP) 2018-2023' (2018) 25.

50 Ministry of Gender, Children, Disability and Social Welfare (n 49) 26.

51 Ministry of Gender, Children, Disability and Social Welfare (n 49) 27.

section 18 of the Act lists factors such as whether the accused may be unable to understand the proceedings ‘due to mental illness or physical disability’.

The Malawi Directorate of Public Prosecutions in 2017 published Guidelines for Prosecutors on Nuisance-Related Offences in the Penal Code, which emphasise that prosecutors should consider several factors, including whether it is in the public interest to prosecute.<sup>52</sup>

Both the Legal Aid Act and the Persons with Disabilities Act indicate missed opportunities to include provisions that could assist persons with disabilities at the police station level, even though such examples already exist in Malawi. For example, the Child Care, Protection and Justice Act of 2010 (Chapter 26:03) provides for an ‘appropriate adult’ to assist a child in conflict with the law.<sup>53</sup> It is also disconcerting that the Malawi Police Service Strategic Development Plan 2019-2024 does not address the needs of persons with disabilities.

Further, the attitudes of law enforcement agencies towards persons with psychosocial disabilities is reinforced by outdated legislation such as the Mental Treatment Act of 1948 (Chapter 34:02).<sup>54</sup> These laws, which favour the institutionalisation of persons with intellectual and psychosocial disabilities, create a bias in favour of arrest when alternatives may exist.

### 3.4 The position in Tanzania

Tanzania’s Persons with Disabilities Act 9 of 2010 makes it an offence to discriminate against a person with a disability. The Act focuses on access to public buildings and access to information for persons with visual and hearing impairments. The Act does not deal with law enforcement agencies or access to justice.

Section 33 of the Legal Aid Act of 2017 (Chapter 21) allows representation in criminal court proceedings where the interests of justice require it. This provision is quite limited, but the Act’s inclusion of paralegals, if adequately trained, could assist persons with psychosocial disabilities at the police station level.<sup>55</sup>

52 Para 5 of the Guidelines. These factors are broadly like those listed in the guidelines issued by the Kenya Director of Public Prosecutions – see sec 3.2 above.

53 The role of an appropriate adult is to support, advise and assist the child.

54 For example, sec 17 of the Act empowers officers in charge to ‘take into safe-keeping’ persons who are believed to ‘suffer from a mental disorder’ and are found wandering or behaving indecently or causing a nuisance.

55 Sec 20 of the Legal Aid Act of 2017 (Chap 21) provides for paralegal services, including to assist persons to access justice and approach justice institutions.

### 3.5 Judicial interpretation

Following the views of the African Court regarding vagrancy laws, one expects that domestic courts in the region will look at existing legislation through a new lens. It is however notable that courts in Malawi and Kenya became critical of vagrancy laws and other petty offences long before the 2020 advisory opinion. For example, in *Mayeso Gwanda v State*, the High Court of Malawi observed that ‘most of the colonies and protectorates have new constitutional orders, and thus it is argued that these vagrancy laws are now dated’.<sup>56</sup> The Court accordingly held that the offence was unconstitutional and violated human rights.<sup>57</sup>

The Kenya High Court has held that the language of the offence of ‘creating a disturbance in a manner likely to cause a breach of the peace’<sup>58</sup> implies also that people have the right to peacefully go about their daily activities without interference.<sup>59</sup> Other Kenyan courts have similarly sought to limit the application of the offence to disturbances likely to lead to physical violence.<sup>60</sup>

These types of judgments are essential to start challenging the inadequacies within the legal frameworks that enable the extended incarceration of persons with psychosocial disabilities and related rights violations.

## 4 Conclusion and recommendations

In his judgment in the significant Malawi case of *Mayeso Gwanda v the State*, Kalembera J made the following remark:

What evidence was there that the applicant intended to commit an offence? ... there was no investigation, there was no evidence that the applicant intended to commit an offence or an illegality... His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person’s dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual’s human rights end up being violated.<sup>61</sup>

This statement aptly describes the position of persons with psychosocial disabilities who are arrested, prosecuted and imprisoned based on ‘petty offences’. As found in the above analysis, some degree of progress has been made in the three countries surveyed; however, much remains to be done.

56 *Mayeso Gwanda v State* [2017] MWHC 23, Mtambo J, 6.

57 *Mayeso Gwanda* (n 56).

58 In contravention of sec 95(1) of the Penal Code of Kenya.

59 *Jacob Nthiga Ngari v Republic* Criminal Appeal 48 of 2014.

60 *Mule v Republic* (1983) KLR 246. See also *Fransisca Kiborus v Republic* [2017] eKLR.

61 See sec 3.3 above.

First and foremost, following the recommendation of the African Court in its Advisory Opinion, Penal Codes should be reviewed and amended to repeal petty offences which are typically overbroad and open to abuse. This review should include local by-laws, since these often fly in the face of international and regional human rights standards and easily go under the radar because they are regulated by municipalities and not identified during broader law reform processes.

In addition to the legislation outlined above, there is also a need to reconsider colonial-era mental health laws, which continue to frame persons with psychosocial disabilities as lacking legal capacity and dignity.<sup>62</sup>

Pending such law reform, guidelines for prosecutors and law enforcement officials on the interpretation of the respective Penal Codes will be helpful to avoid an overly broad application. An example here would be the Guidelines for Prosecutors issued in Malawi and Kenya respectively. Sentencing guidelines for the judiciary (like the Kenya example) may further be considered.

Another key aspect to be considered is the extent to which legal aid legislation or policies may require amendment to address the risks inherent in the absence of legal representation for persons with psychosocial disabilities.<sup>63</sup> Current gaps may be filled by paralegals providing support at police station levels. The notion of an ‘appropriate adult’ to provide support and advice may be adapted by analogy to fulfil the primary needs of persons with psychosocial (and other) disabilities in conflict with law enforcement officials, such as information on why they are in custody and what their rights are as well as emotional support.<sup>64</sup> In resource-constrained settings, the role of an appropriate adult could be fulfilled by trained volunteers or paralegals on standby.

The collection of comprehensive data on all persons with disabilities who find themselves in contact with the criminal justice system is essential to prevent rights violations.<sup>65</sup> A lack of documentation not only impacts on the course of the criminal trial and sentence upon conviction, but may, especially in the case of persons with psychosocial disabilities, result in people literally becoming lost in the penal system without any follow-up or review of their detention.<sup>66</sup>

62 See eg judgment by the Zambian High Court in *Mwewa v Attorney General* [2017] ZMHC 77 (9 October 2017) at J20.

63 Gulati (n 8) 3.

64 Gulati (n 8) 4.

65 Both the CRPD (art 31) and the African Disability Protocol (art 32) require states parties to collect comprehensive disaggregated information on disability.

66 MC van Hout and others ‘Judicialisation of the mentally ill and/or mentally incapacitated in the Malawi criminal justice system: Gaps and flaws of human rights protection’ (2023) 4 *Forensic Science International: Mind and Law* 5. Southern Africa Litigation Centre, Arthurs’ Dream Autism Trust and Article 48 Initiative (n 3) 25.

None of these initiatives will have any prospect of success in the absence of training of law enforcement officials. Principle 10 of the UN International Principles and Guidelines on Access to Justice for Persons with Disabilities of 2020 provides a detailed guide on various topics to be covered by such training, including communication skills, the duty to respect the legal capacity of all persons, overcoming prejudice against persons with disabilities, reasonable accommodation and importantly, the de-escalation of crisis situations.<sup>67</sup>

The increasing recognition in the three selected jurisdictions that petty offences may be arbitrarily enforced against marginalised groups such as persons with psychosocial disabilities – which may in turn result in further serious rights violations – is encouraging. However, against the background of vast levels of poverty in Africa and the lack of social and other support for persons with psychosocial disabilities, it must be noted that law enforcement practices still require constant and critical review.<sup>68</sup>

67 Principle 10, para 10.2(i)-(j).

68 See eg *The State v The Officer In-Charge | Ex Parte: Banda* (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022) para 1.28.