Reflections on the status of protection of the rights of persons with intellectual and psychosocial disabilities in Kenya

Keynote address by Hon. Lady Justice Grace Ngenye, JA,
Chairperson, National Committee on Criminal Justice Reforms
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Bethel Auditorium

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Allow me to start by expressing my gratitude to Kabarak University for inviting me to be part of this significant event, which celebrates the launch of several mental health publications. The importance of research work in the justice sector cannot be gainsaid. It is through rigorous research that we are able to gain insights, identify gaps, and find solutions to the complex challenges that face the realm of justice.

Speaking with reference to the work that the NCAJ Committee on Criminal Justice Reforms (NCCJR) is undertaking as per its mandate to spearhead the review and reform Kenya's entire criminal justice system, the Committee greatly appreciates the indispensable role of research in our ongoing efforts. The Committee has a monumental mandate requiring a deep understanding of the issues at hand and their potential impact on individuals and society. Research plays a pivotal role in this process by providing us with vital data, empirical evidence, and expert analysis that can inform the development of effective laws and policies.

I applaud the members of the faculty and students of the Kabarak University, School of Law, for their remarkable scholarly contribution titled *Mental health and the criminal justice system***.** The book meticulously documents the development of criminal justice laws pertaining to individuals with intellectual and psychosocial disabilities, exploring their influence on the entire criminal justice process from the point of arrest to sentencing. It also examines the evolving jurisprudence of the Kenyan courts and offers a comparative analysis with jurisprudence from selected African countries.

I would also like to extend my heartfelt congratulations to KNCHR for their outstanding research endeavours which have resulted in the publication of two significant reports. The first report, titled *Mapping of organisations of and for persons with psychosocial and intellectual disabilities,* provides valuable insights and seeks to create a strong advocacy platform amongst organisations of, and for persons with psychosocial and intellectual disabilities in Kenya. The second report, titled *Still silenced: A quality rights assessment of selected mental health facilities in Kenya* assesses the current state of mental health care units and presents crucial recommendations for necessary improvements.

Let me also congratulate the KNCHR and Validity Foundation for their vision in partnering with Kabarak University School of Law to further innovative relevant research in Kenya, particularly in the field of mental health.

As you recall, in September 2021, we came together at Kabarak University for an extraordinary international conference under the theme, 'Nothing for us without us: Securing the dignity of persons with intellectual and psychosocial disabilities'. During the conference, we engaged in rich discussions, meticulously examining the legal framework around mental health, encompassing all aspects of the criminal justice system, from arrest to investigation, prosecution, sentencing, and post-sentencing practices. And now, as we gather here today for this launch event, our collective commitment to championing mental health rights grows even stronger, resonating with passion and purpose.

Today's event not only brings us together in celebration of milestones made, but it also invites us to make an honest assessment of where we are with regard to our criminal justice system's compliance with the rights and wellness of persons with intellectual and psychosocial disabilities. The important concerns that I raised in my opening remarks during the Conference in 2021 continue to be relevant and significant today, because when individuals with intellectual and psychosocial disabilities enter the criminal justice system, they still face a myriad of challenges that exacerbate their conditions, as opposed to being facilitated with access to appropriate treatment and care.

Although some progress has been made towards enhancing awareness and understanding of mental health issues within the criminal justice system generally, many individuals in conflict with the law are struggling with undiagnosed or untreated mental health conditions which, unfortunately, due to inadequate training and resources, our police officers, prosecutors, and courts and correctional officers may not recognise and appropriately address.

Concerning administrative processes, there are still numerous gaps in practice with regards to the procedure of handling persons with intellectual and psychosocial disabilities within correctional/detention facilities, and facilitating their access to legal aid services.

With particular reference to our criminal laws and procedures, our statutes are yet to embody the rights and protections for persons with

intellectual and psychosocial disabilities as reflected in the Constitution of Kenya, 2010. Derogatory terms referring to persons with intellectual and psychosocial disabilities are yet to be removed from the Penal Code, and mental illnesses in attempted suicide is still criminalised under Section 226 of the Penal Code.

As regards criminal procedures for offenders suffering from a mental illness that amounts to a defence, Section 166 of the Criminal Procedure Code (CPC) makes provision for where the court makes a finding of *'guilty but insane'*. Here, the law provides that the court has the discretion to determine the location and the manner the offender shall be held in custody while awaiting the President's decision. Thereafter, the President may then issue an order for the person to be detained in a mental hospital, prison, or another appropriate place of safe custody with regular reviews being undertaken. The *'guilty but insane'* finding has divided the Judiciary on the legal soundness of such a finding and emerging jurisprudence has called for the urgent reform on this issue.

In the case of *Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA (KLR),* the Court of Appeal observed that a finding of *'guilty but insane'* is a legal paradox considering the need to prove *mens rea* in the commission of the crime. The Court opined that it must be established beyond reasonable doubt that an offender who committed the offence, whether by commission or omission, acted voluntarily and with a blameworthy mind. Similarly, the Court noted the conflicting decisions emerging from various courts on the legality of some of the provisions of Section 166 of the CPC, for instance, *Republic vs SOM [2017] eKLR* and *Republic v ENW [2019] eKLR***,** and directed the Attorney General to take immediate steps to initiate reforms to clarify the position.

In *Republic v ENW (supra),* a distinction was drawn under Section 166, between the judicial function to pass sentence, a reserve of the judicial process, and the executive responsibility of the President regarding power of mercy. In conclusion, the Court found that it was expedient and judicious to give a determinate sentence in cases concluded under Section 166 (1) of the CPC. After so doing, the Court becomes *functus*

officio, and should let the Executive carry out its responsibility under Section 166 (2) to (7) of the CPC.

The Court of Appeal in *Wakesho v Republic (supra)* essentially followed this approach by ordering the offender, who had been in custody, to be sent to a mental hospital until such time a psychiatrist, responsible for his/her care, certified the offender as no longer a danger to society. However, what happens thereafter remains unclear as regards whether the psychiatrist can order the offender's release, whether the matter requires a referral back to court and whether there is any question of the accused then being sent into custody to serve a sentence.

Further concerns have arisen on the implementation of the review mechanism under Section 166 of the CPC in that it falls short of the standards expected of the treatment of persons with mental illness. A first review coming three (3) years after committal to safe custody is an inordinately long period for an enquiry into the safety and wellbeing of an offender with mental illness.

For accused persons who cannot understand the proceedings against them as a result of a mental illness, Section 167 of the CPC makes similar provisions to Section 166, although notably, the review mechanism is not provided for.

We also note with concern that situations may arise where the courts are sentencing offenders who at the time of sentence, may have an intellectual or psychosocial disability that does not amount to a defence, and equally does not impact their ability to understand the proceedings.

The NCCJR remains deeply committed to advancing the rights and protection of persons with intellectual and psychosocial disabilities among other vulnerable groups in the various ongoing criminal law reforms it is undertaking. I would like to share with you some of the mentionable initiatives that NCCJR has undertaken and is currently advancing towards the realisation of reforms in the criminal justice system that promotes fairness, inclusivity, and facilitates effective support for individuals with intellectual and psychosocial disabilities:

i) The amendment of our criminal laws to enhance protection of the rights of persons with intellectual and psychosocial disabilities. NCCJR has developed draft amendment bills to the Penal Code and the CPC, which are currently undergoing public participation. The Committee has in the past year engaged with inmates from Naivasha and Nyeri Prisons, and held two expert stakeholder engagements with magistrates and members of the Legal, Constitutional Affairs and Intergovernmental Relations Committees of the Council of Governors. The Bills make the following proposals related to mental health:

   a. Repeal of Section 266 of the Penal Code which criminalises attempted suicide.

   b. Amendment of Section 4 of the Penal Code to include the definition of 'intellectual or psychosocial disability'.

   c. Deletion of derogatory language *('idiot and imbecile'*) in Section 13 and 146 of the Penal Code to refer to persons with intellectual and psychosocial disabilities.

   d. Decriminalisation and reclassification of petty offences, hence, the repeal of Section 182 of the Penal Code which criminalises *idle and disorderly behaviour*, Section 191 and 192 which criminalise fouling water and fouling air, amongst other provisions.

   e. Comprehensive review of Sections 162 to 167 of the CPC to make special regulations for the trial and defence of persons with intellectual and psychosocial disabilities.

ii) Under the auspices of NCAJ, the Committee convened the 2nd National Criminal Justice Reforms Conference in May 2022 bringing together criminal justice sector actors to discuss the reform agenda. One of the key thematic areas of discussion was enhancing access to justice for persons with mental illness in the criminal justice system. We recognise that effective

criminal justice reform requires engagement and input from a wide range of stakeholders, including government agencies, civil society organisations, community representatives, and individuals impacted by the system. By bringing together these actors, we facilitate a comprehensive review of the challenges and opportunities across the entire sector and facilitate discussions on how institutions can complement and reinforce various ongoing reform initiatives.

iii) In 2022, NCCJR also embarked on the review of the Sentencing Policy Guidelines and proposed updates which were subsequently adopted by the NCAJ Council in February 2023. The Revised Guidelines provide comprehensive guidance on emerging issues with relevance to sentencing, in particular, handling of mandatory and minimum sentences, the attention and care owed to victims of crime, and considerations to be made when addressing the unique vulnerabilities of special categories of offenders in the criminal justice system, including persons with mental illness.

iv) In particular, the revised Sentencing Policy Guidelines provide guidance on sentencing offenders who are found *'guilty but insane'* – please note the phrasing remains so until amendment is made to Section 166 of the CPC to provide for a finding of *'not guilty by reason of inability to understand the nature or consequences of one's acts or omissions pursuant to an intellectual or psychosocial disability or mental illness*' –

- The revised Sentencing Policy Guidelines indicate that the court must be guided by relevant expert opinion based on the thorough examination of the offender. Among other things, courts should specifically request for advice on the treatment and care regime suitable for the offender.
- The court should then determine where the offender should be placed and give a direction that he or she be so detained, until a psychiatrist responsible for that facility

certifies the offender as no longer a danger to society. The court should expressly state that upon making such a finding, the psychiatrist responsible for the facility must refer the matter back to the court before any release is made, for further directions/order. This would also apply where treatment is failing, whereupon the court may make further orders on treatment.

For offenders with mental illness who do not understand the proceedings against them:

- The revised Sentencing Policy Guidelines make reference to Section 167 (4) of the CPC which gives an opportunity for the court to make recommendations on a suitable intervention. This provision should be utilised to address the lack of any review mechanism expressed under Section 167. The court should in such a case recommend a more responsive review timeline and care regime for implementation by the relevant care agency based on a comprehensive expert report from a psychiatrist responsible for the facility. Similar directions as outlined in above should also be given.

For all other cases that do not fall within Sections 166 or 167:

- Where it appears that the offender is, or, appears to be, suffering from a mental disorder at the time of sentencing, the court must obtain a medical report before passing a sentence unless the court considers it unnecessary to do so, for instance, if existing, reliable and up to date information is available. Where conditions are progressive, the impact of sentencing may also require expert opinion particularly where custody is being considered.
- In determining the sentence, courts will naturally assess culpability, which may be reduced if at the time of the offence the offender was suffering from a mental disorder and provided that there is a sufficient connection between the offender's disorder, and the actual offending behaviour. If the

court considers that culpability should be reduced, it must give the reasons and the extent of that reduction.

- If the court considers a custodial sentence is merited, the court must consider the impact of the mental disorder when assessing the length of sentence. This is because the sentence may exacerbate the effects of the disorder. When a custodial sentence is passed, the report and any other relevant information concerning the offender's physical and mental health should be forwarded to the prison to ensure they have the appropriate information and can ensure the welfare of the offender.
- Courts must take particular care to ensure that the offender understands the sentence and what will happen if they reoffend or breach the terms of a community service or probation or suspended sentence order.

It is anticipated that the revised Sentencing Policy Guidelines will be gazetted by the Hon Chief Justice and Chairperson of the National Council on the Administration of Justice in the coming days. Thereafter, NCCJR purposes to embark on a rigorous training and sensitisation campaign to ensure implementation of these Guidelines.

As evidenced by the extensive work we are undertaking, the NCCJR steadfastly maintains its dedication to advocating, and enhancing the protection of individuals with intellectual and psychosocial disabilities in the criminal justice system.

It is delighting that KNCHR, Kabarak University and Validity Foundation have amplified the clarion call for legal and institutional reform regarding treatment of persons with intellectual and psychosocial disabilities. Indeed, the launch of the three publications is a clear manifestation that it takes concerted efforts to expose and oppose the continuous violations meted against persons with intellectual and psychosocial disabilities.

I am certain that these collaborations will inform current and future reform, sensitisation and advocacy strategies, not only at government level, but also at non-state levels such as in our communities. I am also certain that these partnerships are crucial in translating the significant aspirations outlined in the Convention on the Rights of Persons with Disabilities (CRPD) and the 2010 Constitution into practical application within our Nation.

Once again, I extend my deepest gratitude and appreciation to the authors, experts, and partners whose tireless efforts have given rise to these three very important pieces of work on mental health, which serve as a catalyst for dialogue and action.

Let us champion reforms that break down the walls of stigma and ensure that mental health receives the attention it warrants in the criminal justice system. And, this is the clarion call to action for all of us; to strive to protect and uphold the dignity of persons with intellectual and psychosocial disabilities.

Thank you for your attention and God bless you all.

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