

Living With a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row

Carolyn Hoyle and Lucrezia Rizzelli

We wish to acknowledge the support of, and continued partnership with, the Kenya National Commission on Human Rights (KNCHR). Particular thanks are due to KNCHR's CEO, Dr Bernard Mogesa, and Samson Omondi, Senior Human Rights Officer at KNCHR, who provided critical help and support throughout the project.

We are also grateful to Professor Carolyn Hoyle, Director of the Death Penalty Research Unit, University of Oxford, and Lucrezia Rizzelli, who we commissioned to write the report.

This study was made possible by funds awarded to The Death Penalty Project from the European Union and the United Kingdom Foreign, Commonwealth and Development Office (FCDO). The contents of this publication are the sole responsibility of The Death Penalty Project and do not necessarily reflect the views of the European Union or the FCDO.

© 2022 The authors

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or any information storage retrieval system, without permission in writing from the authors.

Copies of this report may be obtained from:

The Death Penalty Project
87-91 Newman Street
London
W1T 3EY
www.deathpenaltyproject.org

and

Kenya National Commission on Human Rights
PO Box 7459-00200
1st Floor, CVS, Lenna Road
Nairobi
Kenya

ISBN: 978-1-8384709-5-1



Authors' acknowledgements

The Death Penalty Project, in partnership with the Kenya National Commission on Human Rights (KNCHR), commissioned the University of Oxford Death Penalty Research Unit to conduct this study as part of its programme of research on the death penalty in Kenya. To date, this work has comprised a study on opinion formers' views on the death penalty and a report on public attitudes to the death penalty, both published in 2022.

We were commissioned to collect data from prisons across Kenya holding prisoners sentenced to death, including some whose death sentences had been commuted to life in prison. We designed a quantitative research tool and our colleagues in Kenya, from KNCHR, interviewed prisoners and entered the data onto Excel files, which we have analysed for this report. We worked closely throughout this project with the KNCHR team, and we are very grateful to them for their efficient and professional approach to collecting sensitive data from prisoners. In particular, we thank Bildad Mulanda, Case Ananda, Donpaul Odhiambo, Earnest Olunga, Hezron Krop Kangerep, John Karunda Maroo, Kevin Luyegu, Martin Anduvate, Noreen Wewa, Patrick Oluoch, and Stephen Sikolia.

The KNCHR research team, led by Samson Omondi, Senior Human Rights Officer, assisted with the training of the researchers, gave feedback on the design of the research tools and secured access to the prisons. We are particularly grateful to Samson for his advice and guidance throughout the process. At all times, the researchers adhered to strict ethical protocols, managing the empirical research with skill and care. We thank Daniel Cullen, of the University of Oxford Death Penalty Research Unit, for his helpful comments on an earlier draft and his support for this programme of work in Kenya.

We are grateful to Parvais Jabbar and Saul Lehrfreund, Co-Executive Directors of The Death Penalty Project, for inviting us to be involved with this important programme of research in Kenya that could have implications for other countries in East Africa. Parvais Jabbar ran the project, with excellent support from his team at The Death Penalty Project, particularly Joey Greene and Svetlana Karadimova. His expertise and commitment to rigorous empirical research is crucial to developing knowledge and having an impact on discourse and practice concerning capital punishment.

Finally, we offer sincere thanks to the 671 prisoners who gave up their time to share their histories and experiences. Without their candid and detailed reflections this report would not have been possible.

Carolyn Hoyle and Lucrezia Rizzelli

Oxford, December 2022

Contents

EDITORS' PREFACE	6
KEY FINDINGS.....	8
PART ONE: THE PURPOSE OF THE STUDY	11
1.1 The context	12
1.2 The rationale for a study of death sentenced prisoners	14
1.2.1 The socio-economic status of death sentenced prisoners.....	14
1.2.2 The question of deterrence	15
1.3 Research design and methods	16
1.3.1 Study design.....	16
1.3.2 A representative sample of death sentenced prisoners.....	17
1.3.3 Ethical approaches to participant recruitment.....	18
1.3.4 Data recording and analysis.....	18
PART TWO: THE FINDINGS.....	21
2.1 A history of the present: socio-economic, demographic and welfare profile of prisoners ...	22
2.1.1 Crimes and demographics of prisoners	22
2.1.2 Socio-economic profile of prisoners	25
2.1.3 Health and welfare at the time of offending.....	30
2.2 Prisoners' decisions to offend.....	34
2.2.1 Motivations for offending	34
2.2.2 Why were prisoners not deterred from offending by harsh punishments?	40
2.3 Experiences of the justice system and incarceration	47
2.3.1 Access to pre-trial and trial procedural safeguards	47
2.3.2 Experiences of prison	52
PART THREE: CONCLUSION.....	61
3.1 Socio-economic and welfare profile of prisoners	62
3.2 Prisoners' decisions to offend	63
3.3 Experiences of the justice system and incarceration	64
3.4 An opportunity to imagine a better way	65
APPENDIX INTERVIEW SCHEDULE.....	67
About the authors.....	87

Editors' preface

The Death Penalty Project's latest report provides a comprehensive analysis of the lives of prisoners on death row in Kenya. It focuses on prisoners' socio-economic backgrounds and profiles, their pathways to, and motivation for, offending, as well as their experiences of the criminal justice process and of imprisonment. It complements our previous research, a two-part study of attitudes towards the death penalty in Kenya, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice*.

While 120 countries around the world have now abolished the death penalty, including 25 in Africa, Kenya is one of 22 African nations that continues to retain the death penalty in law, albeit it has not carried out any executions for more than three decades. As such, Kenya is classified as '*abolitionist de facto*', the United Nations term for a country that has not carried out an execution for at least 10 years. Yet, while state-sanctioned executions no longer occur, hundreds of people are currently living under sentence of death and others are convicted and sentenced to death each year. As long as the death penalty is retained in law, there remains a risk that executions might resume if there is political change. Moreover, the plight and turmoil of those languishing on death row – consistently the poorest and most vulnerable – cannot be ignored. They are disproportionately sentenced to death and suffer the harshest punishments and treatment.

The Death Penalty Project, in partnership with the Kenya National Commission on Human Rights, commissioned Professor Carolyn Hoyle and her team at the Death Penalty Research Unit, University of Oxford, to undertake this research. The study draws on a sample of 671 prisoners across 12 Kenyan prisons, and it includes not only those currently under sentence of death, but also those previously sentenced to death who later had their sentence commuted. It covers the whole country, and it is therefore representative of the prison population sentenced to death across Kenya.

The report finds that Kenya's death row is populated by those who were poorly educated and were in low-level, precarious jobs, with little financial security. Many had considerable responsibility for the welfare of dependents at the time of their offence. The report concludes that, far from 'the worst of the worst', those on death row in Kenya are largely vulnerable and disadvantaged individuals. The research documents their journey to offending and how adversities have shaped their decision-making process, but also how their relatively low levels of education and limited resources have impacted their ability to access adequate legal representation.

Through interviews with those on death row, the report also explores whether the death penalty offers an effective deterrent against serious crimes and shows that, in line with our previous findings on public levels of knowledge about the death penalty, those on death row in Kenya were unaware of the risk of punishment, and it therefore could not be said to have influenced them when they committed their offences. Such evidence, viewed through established frameworks on the theory of deterrence, concludes that arguments made around the punishment's efficacy in reducing serious crime in Kenya do not hold up to scrutiny.

The report highlights areas of concern in relation to individuals' experiences of the criminal justice process. Fundamental rights, such as the right to remain silent during police interviews or to be provided with access to a lawyer, were rarely provided. From interrogation to trial, there were serious failings and a lack of adequate safeguards to prevent wrongful convictions or protect vulnerable individuals. Those who find themselves on death row may well have been victims of miscarriages of

justice or been denied the opportunity to submit evidence of mitigating circumstances that could have significantly reduced their sentence. The report also indicates that entrenched disadvantages, such as the inability of many of the individuals to understand either English or Swahili during their trial, may have compounded the unfairness.

Evidence of inequality of this kind within criminal justice systems has played an important role in debates leading to abolition of the death penalty worldwide. We hope that by providing empirical evidence of inequalities within Kenya's criminal justice system, this report helps to highlight the realities as it is applied to individuals in practice. Despite a clear need to appropriately punish individuals guilty of committing serious offences, a criminal justice system must ensure that all individuals receive due process of law and protection at every stage. Given that risk of error remains inherent in all criminal justice systems and that the death penalty has been shown to unfairly impact those most vulnerable, we hope that leaders in Kenya will take the necessary steps to swiftly remove capital punishment from Kenya's statute books.

We would like to thank the report's authors, Professor Carolyn Hoyle and Lucrezia Rizzelli, for their dedication in writing this report, as well as the research team at the Kenya National Commission on Human Rights who travelled and interviewed all the prisoners across the country. We are grateful to all those at The Death Penalty Project and at the Kenya National Commission on Human Rights who supported and contributed to the work throughout.

Parvais Jabbar and Roseline Odede, HSC

Co-Executive Director at The Death Penalty Project, and Chairperson of the Kenya National Commission on Human Rights
December 2022

Key findings

There are currently approximately 600 prisoners on death row in Kenya. There are many more who have been sentenced to death over the past decades, but whose death sentences have been commuted to life imprisonment. This report draws on interviews with a large, stratified sample of 671 prisoners, across 12 prisons in Kenya, who have been sentenced to death, just over a quarter of whom had their sentences commuted to life. During interviews, we sought information on:

1. Their lives at the time they committed their offences, their socio-economic status and any vulnerabilities and disadvantages;
2. Their pathways to, and motivations for, offending, including why they were not deterred by harsh punishments;
3. Their experiences of the criminal justice process and of imprisonment.

This representative sample draws from prisons across Kenya and is sufficiently large to allow inferences to be made from our findings that can be applied to the wider population of prisoners sentenced to death.

Socio-economic, demographic & welfare profile of prisoners

Crimes & demographics of prisoners at the time of offending

- Only 11% had a **prior conviction**. The majority (56%) had been sentenced to death for robbery with violence, with 44% sentenced for murder.
- Most were **poorly educated**. More than 1 in 10 had never been in formal education and more than 2/3 had only completed primary school.
- Only 1 in 10 was in **permanent full-time employment**.
- 79% of participants were in the two lowest categories of **social stratification**: 'semi-routine' or 'routine' occupations.
- Their average wage was **below** the Kenyan **minimum wage**.
- Most prisoners (89%) were responsible for supporting **dependents**. More than 1/3 were in debt.
- Almost 1/2 (43%) said that they had been relying on alcohol and almost 1/3 had a history of alcohol or **substance misuse**, higher rates than the national average.
- 15% reported that they had been experiencing **mental health problems**, higher than the national average.

Prisoners' decisions to offend

Why were prisoners not deterred from offending by harsh punishments?

- The majority (72%) of those convicted of **robbery with violence** were **motivated by financial gain**.
- The necessary preconditions for being **deterred** from committing capital crimes were not met in most of our cases and so these prisoners could not have been deterred from offending:
 - The vast majority (95%) of those convicted of robbery **did not know that it was punishable by death**; and 86% of those convicted of murder did not know.
 - The vast majority (85%) of prisoners had **thought that it was unlikely or very unlikely that they would be arrested**, and an even higher proportion (89%) thought it was **unlikely or very unlikely that they would be imprisoned**. Only 1% thought it likely or very likely that they would be **sentenced to death**.
 - The majority were **not worried** about being **sentenced to death**.

Experiences of the justice system and incarceration

Pre-trial:

- 53% were not given the right to **communicate with a lawyer**;
- 50% had felt compelled to make a **confession** or to give evidence that could be used against them;
- 49% were not afforded the right to **remain silent**.

Interrogation:

- Almost 1/2 were subject to either psychological or physical abuse;
- More than 1/3 (35%) were denied rest or adequate **breaks**;
- Almost 1/4 (23%) were **denied medical attention**.

Trial:

- 27% were denied an **interpreter**;
- 24% were denied **legal assistance**;
- 43% did not **understand** what was happening at trial.

On death row:

- Around 2/3 of prisoners said that their **physical and mental health** had suffered since they had been incarcerated;
- 2/3 said that their **relationships with families** had deteriorated, with 1 in 10 having no visitors in prison;
- About 1/3 did not have sufficient nourishing **food** or adequate access to **medical care**;
- However, the vast majority had 'excellent' or 'good' relationships with prison officers and with other prisoners and the majority were able to take advantage of a range of **work and recreation activities** to relieve the boredom and frustration of permanent incarceration:
 - 56% worked or were able to practise acquired work skills ('hobbies');
 - 73% had received education; 84% had received rehabilitation.

PART ONE

The purpose of the study



1.1 The context

Under the penal code, the death penalty is retained in Kenya for the offences of murder, robbery with violence, attempted robbery with violence, and treason.¹ However, it is 35 years since the last execution, which took place in 1987, when three people were hanged for their role in the 1982 coup d'état attempt to overthrow President Daniel arap Moi. Kenya is now classified as an 'abolitionist *de facto*' state: the death penalty is still present in law, and people are sentenced to death, but they are not executed.

A step towards restricting the application of the death penalty was made in 2017, when the Supreme Court of Kenya ruled the mandatory death penalty to be unconstitutional. In the case of *Muratetu v Republic*² the Supreme Court concluded *inter alia* that the prevention of any judicial discretion in sentencing was 'harsh, unjust and unfair',³ in violation of the right to a fair trial.⁴

Until recently however, mass commutations have been the central mechanism for reducing the number of people subject to the death penalty in Kenya. In early 2003, the newly elected President Mwai Kibaki commuted the death sentences of more than 200 prisoners and, in August 2009, commuted more than 4,000 death sentences to life imprisonment, leaving few on death row. The largest mass commutation known to Amnesty International, this was aimed at relieving the 'undue mental anguish and suffering, psychological trauma and anxiety' that results from long periods of time on death row.⁵ In October 2016, most death sentences (2,747) were again commuted to life imprisonment.⁶

The impulses that drive presidential mass commutations can be seen in calls for abolition. In 1997, the Kenya Law Reform Task Force on the Reform of Penal Law and Procedures recommended that the death penalty be abolished. In early 2003, the Vice-President and Minister for Home Affairs and National Heritage, Moody Awori, stated that he wanted the death penalty to be abolished, and was supported by the then Commissioner of Prisons. At the same time, the Commissioner of Prisons, Abraham Kamakil, called for abolition, explaining that the death penalty claims innocent lives.⁷ Neither made progress and, in 2007, a motion to abolish the death penalty⁸ was heavily defeated in the Kenyan Parliament. In recent years, the government has reiterated a commitment to review the death penalty and the Kenya Law Reform Commission has recommended that the death penalty should be abolished.⁹ The 2018 Task Force,¹⁰ established by the Attorney General to advise on the abolition of the mandatory death penalty, argued that Kenya's criminal justice system was defective, that death sentences amounted to torture and inhumane treatment, and that the system generated a death row population with a disproportionate number of poor, uneducated and vulnerable people,

¹ Sections 203, 296, 297, 40(3) of the Penal Code respectively. In addition, there are four martial offences punishable by the death penalty under the Armed Forces Act, though no one is currently serving a death sentence for these offences as far as we are aware.

² *Francis Karioko Muratetu and another v Republic* [2017] eKLR, Petition No 15 of 2015.

³ *Ibid.*, para 48.

⁴ This followed on from similar decisions, in the preceding years, ending mandatory sentencing in neighbouring Malawi and Uganda.

⁵ Amnesty International, *Death Sentences and Executions in 2009*, 2010, p23.

⁶ *Ibid.*

⁷ Penal Reform International, *The Abolition of the Death Penalty and its Alternative Sanction in East Africa: Kenya and Uganda*, 2012, p8.

⁸ Kenya National Commission on Human Rights, *Abolition of the Death Penalty in Kenya* (2007), position paper 2 of 2007 available at <https://www.knchr.org/Portals/0/Penal%20Reforms/KNCHR%20Position%20paper%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf?ver=2018-06-08-154159-423>, accessed 17 August 2022.

⁹ UN Human Rights Council, 39th session, *Question of the Death Penalty*, Report of the Secretary-General, 10-28 September 2018, A/HRC/39/19.

¹⁰ The Task Force comprised representatives of the Attorney General's office, the Kenya Law Reform Commission, the Power of Mercy Advisory Committee, the Office of the Director of Public Prosecutions, Parliament of Kenya, the Judiciary, the Kenya National Commission on Human Rights, the Ministry of Interior, the Prison Service, and the Probation and After Care Department.

as well as innocent people. It recommended complete abolition and, failing that, retention only for murder under a discretionary sentencing regime.¹¹

After decades of political, judicial and civil society attempts to limit or abolish the death penalty, and 35 years without an execution, approximately 600 prisoners remain on death row in Kenya, in poor conditions and at risk of dying in prison.¹² Meanwhile, there has been no independent, rigorous empirical data to support assertions about the public appetite for capital punishment or the population serving death sentences and their experiences of incarceration.

Since late 2021, The Death Penalty Project has commissioned research on the views of the Kenyan public,¹³ and of opinion formers¹⁴ who could influence both the public and the government, as well as this detailed study of who is sentenced to death and their experiences of incarceration.

The public opinion survey of a stratified random probability sample of 1,672 respondents interviewed across Kenya in late 2019 demonstrated that only 51% of people supported the retention of the death penalty, and only 32% were strongly in support. Nuanced questions revealed a reduction in support for retention to just 28% when respondents were asked if they would support the death penalty if it was proven to their satisfaction that innocent people have sometimes been executed. Those who supported abolition focused on prisoners' 'repentance' (29%) and their potential for 'rehabilitation' (29%). Almost one in five (18%) were clear that capital punishment is 'inhumane'. Furthermore, when asked how they would respond to government policy abolishing the death penalty, the majority (59%) of retentionists said they would accept abolition.

The study of 42 opinion formers¹⁵ found that almost all (90%) supported abolition, most because they were worried about the risk of sentencing to death someone who has been wrongfully convicted, as they had relatively low levels of trust in the criminal justice system – but many also saw the death penalty as an abuse of human rights.

Clearly, in Kenya, support for the death penalty among 'elites', and even the public, is not sufficiently robust to act as a barrier to abolition. Views are rather malleable, and there are many factors present in the administration of the justice system in Kenya, as elsewhere, that militate against support. Yet the government has not embraced abolition and the courts continue to sentence people to death, even for offences that do not result in death and even when many of those sentences will later be commuted. This raises questions about these prisoners living under the challenging conditions of a death sentence – described by the 2018 task force as 'torture' and 'inhumane treatment' – uncertain about their future. Who are they, what have they done, and what are their experiences of death row?

¹¹ Njau-Kimani M, *The Taskforce on the Review of the Mandatory Nature of the Death Penalty in Kenya*, p10, available at <http://congres.ecpm.org/wp-content/uploads/2019/04/Maryann-Njau-Kimani-PRESENTATION-DEATH-PENALTY-BRUSSELS.pdf>; accessed 17 August 2022; Muthoni K, Criminal Justice System Favours the Rich, State Report Reveals, *The Standard*, 4 November 2019, <https://www.standardmedia.co.ke/article/2001348026/freedom-for-the-rich-prison-for-the-poor-injustice-in-corridors-of-law>; accessed 17 August 2022.

¹² Official statistic from the Kenya Prison Service confirmed that there are 593 death row prisoners in Kenya as of 23 November 2021.

¹³ Hoyle C with Batchelor D, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice, Part One: A Public Ready to Accept Abolition* (The Death Penalty Project 2022).

¹⁴ Hoyle C and Harry L, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice. Part Two: Overwhelming Support for Abolition Among Opinion Leaders* (The Death Penalty Project 2022).

¹⁵ These were people who have jurisdiction over part of the criminal process or who are considered to be influential in shaping, or responding to, public opinion: social justice centres, civil society organisations, advocates, senior government officials, representatives of the media, elders, religious leaders, and magistrates and prosecutors.

1.2 The rationale for a study of death sentenced prisoners

We know from studies around the world that the public's appetite for capital punishment declines significantly when they are given evidence of due-process flaws in the criminal process and of the risks of executing innocent people, and when they are presented with offence and offender scenarios that demonstrate mitigating evidence, an absence of aggravating features and the vulnerability of the defendant.¹⁶ The recent studies published by The Death Penalty Project, of opinions on the death penalty among the public and elites of Kenya, contribute to that body of work.

Evidence that points to a death row populated by some of the most vulnerable and disadvantaged people in Kenya, rather than the most heinous offenders, could inform discussions about desert, especially considering information on particularly challenging experiences of incarceration. Similarly, research on decision-making prior to, and during, offending among death sentenced prisoners can speak to assumptions about the potential of the death penalty to deter the most serious offences. By questioning prisoners about motivations to commit offences and perceptions of the risks of getting caught and punished, we can learn why prisoners were not deterred from offending by the most severe punishment, particularly as some were convicted during a time when the death penalty was mandatory for certain offences.

Along with our studies on the opinions of the public and those who may influence both public and government, this research could contribute to international scholarship on death sentenced prisoners, addressing the current lacuna in knowledge about African jurisdictions. However, its main aim is to contribute to an ongoing conversation on the death penalty in Kenya.

1.2.1 The socio-economic status of death sentenced prisoners

In most countries around the world that retain the death penalty, there is little empirical evidence about the types of people who are sentenced to death, the offences they were convicted for, or their experiences of the justice process or incarceration. Even in the US, where research is more developed, there are few empirical studies of prisoners on death row, and those that are published have typically captured a relatively small proportion of the death sentenced population.¹⁷

Notwithstanding methodological limitations, research suggests that death row prisoners in America tend to be ethnic minorities, the poor, and those with low educational achievement, poor functional literacy capabilities, learning disabilities, experiences of substance abuse, and neurological disorders – often triggered by physical and emotional trauma. They are also those without resources for private and competent legal representation.

In other countries, we do not know if those on death row have committed the most heinous offences or if they are simply the most disadvantaged and precarious people, whose biographies and experiences have shaped those behaviours that led to capital offending and death sentences; people

¹⁶ Hood R, Is Public Opinion a Justifiable Reason Not to Abolish the Death Penalty? A Comparative Analysis in Eight Countries, *Berkeley Journal of Criminal Law* 23:3 2018, pp218-242.

¹⁷ Cunningham M D and Vigen M P, Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature, *Behavioral Sciences and the Law*, 20 2002, pp 191-210.

with experiences of poverty, neglect, abuse and discrimination, whose lifestyles have exposed them to criminogenic risk factors and, ultimately, to incarceration for violent crime.

One exception to the paucity of detailed empirical evidence beyond the US is a rigorous empirical study conducted by the Indian NGO Project 39a at the National Law University of Delhi. Interviews were conducted between 2013 and 2015 with 373 of the 385 prisoners under sentence of death across India, and some of their families.¹⁸ These focused on socio-economic and cultural data, as well as experiences of the justice system. Like the American research, the Indian study showed that the death penalty is disproportionately imposed on vulnerable and socio-economically disadvantaged people. Furthermore, people were often sentenced to death after pre-trial investigations and trials that did not observe due process of law; indeed, the vast majority had experienced torture in police custody, and most had not been represented by a lawyer. A much smaller ‘pilot’ study of those sentenced to death in Dhaka, Bangladesh, produced similar findings.¹⁹

While this study is not the only research to be done on death sentenced prisoners in Kenya, it is the most thorough and recent. In 2012, Penal Reform International published a short report that included discussion of death row in Kenya, though few prisoners were interviewed.²⁰ Studying secondary sources, and interviewing some rights organisations, as well as other stakeholders in the criminal justice system, the report concluded that the prison regime for death row and for life sentenced prisoners was ‘harsh and discriminatory’, and that:

‘Problems of overcrowding, inadequate living conditions, poor access to medical care, and a lack of rehabilitation for those on death row or serving a life sentence create serious human rights concerns.’²¹

The report alludes to rationing of food, inadequate bedding, and poor sanitation. In 2008, the UN Committee against Torture had also expressed concerns about these poor conditions, as well as high levels of violence on death row, recommending that Kenya improve conditions of detention to guarantee basic needs and rights.²²

1.2.2 The question of deterrence

Some consider it inevitable that the risk of death or other extremely harsh penalties must deter potential criminals.²³ With the exception of a study on deterrence and homicide in Asia,²⁴ almost all deterrence research on capital punishment has been conducted and modelled in the global north, focusing on homicides – as the only crime punishable by death in that region – with no known deterrence studies on robbery and the death penalty.²⁵ American research is inconclusive as to the deterrent effect of capital punishment; a review of five decades of research concluded that the belief in deterrence is unfounded and unreliable, with policy-makers advising against determining sanctions

¹⁸ National Law University of Delhi, *Death Penalty India Report 2016*, available at www.project39a.com/dpir accessed 17 August 2022

¹⁹ Dept. Law, University of Dhaka, *Living Under Sentence of Death: A Study on the Profiles, Experiences and Perspectives of Death Row Prisoners in Bangladesh*, 2022, available at deathpenaltyproject.org/knowledge/living-under-sentence-of-death; accessed 29 March 2022.

²⁰ Penal Reform International, *The Abolition of the Death Penalty and its Alternative Sanction in East Africa: Kenya and Uganda*.

²¹ *Ibid.*, p7.

²² Committee against Torture: Kenya, 19 January 2009, CAT/C/KEN/CO/1, paras 15&29.

²³ Rubin P, Don't Scrap the Death Penalty, *Criminology and Public Policy*, 8(4) 2009, pp853-859.

²⁴ Zimring F E, Fagan J and Johnson D T, Executions, Deterrence, and Homicide: A Tale of Two Cities, *Journal of Empirical Legal Studies*, 7 2010, pp1-29.

²⁵ Fagan J, Deterrence and the Death Penalty in International Perspective, *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations 2015).

on the promise of deterrence.²⁶ Moreover, analysis of hundreds of deterrence studies in the US and Europe shows that, while deterrent effects can be found in relation to *minor crimes*, there were no such effects on murder for any punishment, including execution.²⁷

Previous deterrence research was framed by rational choice and econometric perspectives, and based on quantitative methodologies comparing homicides and execution rates, or estimating possible lives saved after every execution.²⁸ As there have been no executions in Kenya for 35 years, we could not have conducted such a study. Hence, to achieve an in-depth understanding of the contextual, situational and interactional factors and decision-making processes that lead people to commit crimes in Kenya, we abandoned the general deterrence theory framework based on rational choice for a more perceptual conceptualisation of deterrence theory.²⁹ Deterrence theories based on perceptions were born out of the realisation that 'what people think or perceive the risk or level of official punishment to be might not be the same as the objective or actual risk of punishment, but the perception they have is what influences what they do'.³⁰

Keen to explore the role that the subjective perception of risk plays in people's decision-making processes and their motivations to commit crimes, our aim was to examine pathways to, motivations behind, and decision-making processes preceding engagement in criminal activities, including the risk and reward calculation.³¹

1.3 Research design and methods

The aim of this study was to conduct in-person, structured interviews with prisoners convicted of death-eligible crimes, who had been sentenced to death, across different regions of Kenya, including those whose death sentences had been commuted to life in prison. We sought to understand who they are by analysing their background and the choices they made up to committing their offences, as well as their experiences of criminal justice and of incarceration.

1.3.1 Study design

The interview tool was designed to explore prisoners' background and their circumstances prior to the commission of the crime. This included their familial, employment, educational and socio-economic status, but also biographical details, such as gender, nationality and citizenship. In so doing, we hoped to assess the extent of their precarity, vulnerability and disadvantage. Additionally, this project sought data on what motivates people to commit offences, how much the risk of being caught and being punished factored into their decision-making, and to what extent the amount or type of punishment was a feature of their choices. We sought to explore the weight of 'push' and 'pull' factors, including

²⁶ Nagin D and Pepper J V, (eds.), *Deterrence and the Death Penalty* (The National Academic Press 2012); Blumstein A, Cohen J and Nagin D, *Deterrence and Incapacitation: Estimating the Effect of Criminal Sanctions on Crime Rates* (National Academy of Sciences 1978).

²⁷ Dolling D, Entorf H, Dieter H, and Rupp T, Is Deterrence Effective? Results of a Meta-Analysis of Punishment, *European Journal of Crime Policy Research*, 15 2009, pp201-224.

²⁸ For a review of the literature, see Hood R and Hoyle C, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2015) ch.9.

²⁹ Williams K R, and Hawkins R, Perceptual Research on General Deterrence: A Critical Review, *Law & Society Review*, 20 1986, p545; Fagan J and Meares T L, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, *Ohio State Journal of Criminal Law*, 6 2008, p173; Waldo G P, and Chiricos T G, Perceived Penal Sanction and Self-reported Criminality: A Neglected Approach to Deterrence Research. *Social Problem*, 19(4) 1972, pp522-540; Geerken M R, and Gove W R, Deterrence: Some Theoretical Considerations. *Law & Society Review*, 9(3) 1975, pp497-514.

³⁰ Paternoster R, and Bachman R, Perceptual Deterrence Theory, in Cullen F T and Wilcox P (eds.), *The Oxford Handbook of Criminological Theory* (Oxford University Press 2012) p3.

³¹ Ibid.

their perceptions of the risks and costs of potential sanctions, as well as their perceptions of the benefits of offending.

In trying to understand the decision-making processes prior to the commission of the crime, we aimed to assess why the possible prospect of capital punishment did not deter these prisoners from committing their crimes. By gathering prisoners' accounts of their crimes, their reasons for involvement, and their experiences of criminal justice, in the context of their socio-biographical position, we can contribute to the very limited knowledge on death sentenced prisoners in the global south. As mentioned above, this literature includes a small, local study in Dhaka, Bangladesh, and a comprehensive study across India, that demonstrate relative disadvantage among those subject to the harshest forms of penal power.³²

We designed a research tool with 109 quantitative questions, inclusive of prompts, divided into several sections, each pursuing a distinct, but related, theme. Overall, the interview tool allows us to answer the question 'who is on death row?' through analysis of participants' demographics, details of their offence, and their decisions about involvement in criminal activity and the weighing up of the potential risks and benefits. The final section explores their experiences post-arrest, including the state's adherence to procedural safeguards, and participants' experiences of prison life.

1.3.2 A representative sample of death sentenced prisoners

At the time of our study, information provided by the Kenya National Commission on Human Rights (KNCHR) showed that there were 593 prisoners on death row, with a further 1,471 people who had been sentenced to death but who had, at a later stage, had their death sentences commuted to life. Many were taken off death row in mass commutations, though some had their death sentences commuted at resentencing, following abolition of the mandatory death penalty. In Kenya, death sentenced prisoners are held in approximately 27 prisons, with most held in Shimo La Tewa, Embu, Nyeri, Naivasha, Kisumu, Kibos and Kamiti. To gather a representative sample of death sentenced prisoners, including those whose death sentences had been commuted, KNCHR successfully secured permission to get access to and interview prisoners in 12 prisons across Kenya, including in all but one of the prisons with the most death sentenced prisoners (see Table 1).

Table 1: Interviews conducted in each prison

Naivasha	162	Kamiti	78	Langata	14
Kibos	99	Mayani	42	GK Eldoret	13
Shimo La Tewa	97	Nyeri	36	Kitale	8
Kisumu/Kodiaga	90	Meru	28	Bungoma	4

In January and February 2022, a team of 11 researchers from KNCHR interviewed 682 prisoners in 12 prisons across Kenya. Eleven of these did not meet our eligibility criteria of having committed a death-eligible crime – and, therefore, of having been sentenced to death – and were consequently excluded from analysis. Hence, this report draws on 671 interviews. As the overall number of people

³² Dept. Law, University of Dhaka, *Living Under Sentence of Death: A Study on the Profiles, Experiences and Perspectives of Death Row Prisoners in Bangladesh*, 2022, available at deathpenaltyproject.org/knowledge/living-under-sentence-of-death – accessed 29 March 2022; National Law University of Delhi *Death Penalty India Report*, 2016, available at www.project39a.com/dpir – accessed 29 March 2022.

currently under sentence of death in Kenya is 593, and the number of people sentenced to life is 1,471, the size of our sample allows us to draw inferences with a 5% margin of error and a 99% confidence level. As we were able to interview 484 of the 593 people currently on death row in Kenya, we can draw inferences regarding this subgroup with a 99% confidence level and less than 3.5% margin of error.

1.3.3 Ethical approaches to participant recruitment

Prisoners fall within the category of vulnerable or 'at risk' participants because of the limits on their ability to make a free choice about their participation because of the somewhat coercive conditions they are in. To ensure the prisoners were willing to participate in the study, researchers provided the participants with details of the aims of the study and invited them to participate, handing out and reading the information sheets, and addressing any questions the participants might have. Those who indicated an interest in participating in the study were asked if they understood everything they had been told, and if they wished to participate in the interview. The information sheet, consent form and interview questions were in simple language, accessible to reading ages of between 7 and 10, and oral consent could be given by illiterate participants. No interviews were done with people suffering from serious mental health problems or severe learning difficulties, as they are housed within separate facilities at the prisons, and we did not attempt to interview them for ethical reasons.

Prisoners were reminded before the beginning of the interview that they were under no obligation to participate and that they could interrupt the session at any time, as well as withdraw their data, with no consequence to them or their status. Once informed consent was provided, the interview was conducted by a trained and experienced Kenyan researcher.

One of the risks in conducting research with prison populations is the possibility that participants will make incriminating statements during the interview. To mitigate such a risk, participants were informed before each interview about the limits of anonymity and confidentiality. The questions in the interview were not aimed at eliciting incriminating information, however. They focused on the person's state of mind and motivations prior to offending, rather than the criminal behaviour itself. No prison officers were present in the interview rooms during interviews and, therefore, none could have overheard the conversations between the interviewer and the prisoner at any stage of the interview or recruitment process.

Although this research took place while some Covid-19 restrictions remained in place, our experienced researchers were able to complete all interviews face to face. To safeguard the health of both interviewers and prisoners, the team adopted several measures aimed at minimising the risk of Covid-19 transmission. All interviewers tested for Covid-19 before accessing any detention facility; inmates and interviewers wore masks throughout the research period and, periodically, made use of sanitiser; interviewers and inmates practised 'social distancing' by maintaining a 1.5-metres distance throughout the interview.

1.3.4 Data recording and analysis

The interview tool was printed and administered in paper form, with researchers reading the questions and possible responses to the participants (when applicable), and then recording their answers on the

coding sheet. At the same time, the interviews were audio recorded, with each prisoner's consent, to allow us to check any erroneous entries on the hard copy of the interview schedule.

Once each interview was finished, researchers stored the completed interview schedules, as well as the consent forms, and at the end of each day, or within three days of the interview, they entered the participants' answers onto a structured Excel coding sheet with some predetermined responses, to match the options on the interview tool that we had designed for this purpose. However, the coding sheet allowed for original entries if the participants' answers did not match any of the predetermined ones, or if the question did not have given responses. Each researcher entered their own interview data using their own personal coding sheet, and was assigned a unique identifier code for each interview, consisting of the researcher's initials, the prison name, date of the interview, and a number specific to the interview. This allowed us to safeguard the anonymity of the participants while, at the same time, enabling us to check ambiguous entries against the original hard copies.

The researchers uploaded their Excel spreadsheets onto a secure OneDrive folder for the researchers at the Death Penalty Research Unit (DPRU) at the University of Oxford to download and compile a unifying coding sheet, before the 'cleaning' process began. During data cleaning, we excluded from our sample all interviews with prisoners convicted of non-death-eligible crimes. Additionally, we standardised responses across researchers, so that different expressions of the same concept could be categorised and, therefore, analysed together. This step of the process allowed us to familiarise ourselves with the data and adjust inconsistent entries.

Once we completed the data-cleaning stage, we analysed the data, producing statistics for the percentage of the sample population that had chosen different responses. We also made notes of datapoints that did not fit within the predetermined answers, or outliers; the latter, at times, led us to employ methods for achieving a more accurate determination of the parameters. When a question required original responses from participants, we created categories starting with the participants' own words, and applied informed discretion in deciding how to classify each entry. We first conducted the analyses on the entire sample; then, because of the different pathways and cognitive processes underlying the two main offence types – robberies with violence and murders – we split the sample according to the crime, and analysed each subsample separately for many of the questions. In places, our discussion of differences between those convicted of robbery with violence and those convicted of murder stems from an understanding of robbery as an acquisitive crime. It might be thought that harsh sentences would deter people from such offences, whereas murder is often committed in the heat of the moment for less rational reasons. Otherwise, in the main section, we analyse our sample as a whole, not according to whether or not prisoners have had their death sentences commuted to life. We do so because the majority of commutations occur as part of a mass commutation ordered by the president for political rationales, rather than because a particular offender is deemed no longer to be deserving of the death penalty. Hence, there should be no difference in the experiences and accounts of those who are on death row from those whose sentences were commuted. That said, at times, we have split our analysis to see if, for example, those now serving a life sentence have different experiences of incarceration from those still on 'death row'.



PART TWO

The findings

2.1 A history of the present: socio-economic, demographic and welfare profile of prisoners

Studies of death sentenced prisoners elsewhere have shown that they are not necessarily the most heinous offenders, but they are typically those who are the most disadvantaged and, in some cases, vulnerable. They tend to be economically marginalised, from low social classes, and poorly educated.³³ Their histories leave them exposed to crime and without adequate protections from the criminal justice system, arguably more likely to be sentenced to death and less likely to have adequate resources to navigate the criminal justice process.

This first section of our findings presents information about those prisoners we interviewed, to put their offending in the context of their socio-economic, demographic and welfare histories. We explore who the prisoners were when they committed their offences to better understand their decisions to offend, which we turn to in section 2.2 and their experiences of the justice process, which we explore in section 2.3.

2.1.1 Crimes and demographics of prisoners

Interviews were carried out with 671 prisoners in 12 prisons across Kenya, 33 women³⁴ (5% of our total sample) and 638 men (95%). They had been in prison for an average of eight years and one month.³⁵ On average, participants had endured four years and two months on death row.³⁶ Only 11% had a prior conviction.

As Table 2 shows, the majority of prisoners (71%) were between 30 and 49 years of age, and were married or in a civil partnership. Almost all (98%) said they practised religion and, of those, most identified as Christian; just one in five was Muslim. Just more than half (56%) had been convicted of robbery with violence; less than half (44%) were convicted of murder.

³³ National Law University of Delhi *Death Penalty India Report* 2016, available at www.project39a.com/dpir; Dept. Law, University of Dhaka, *Living Under Sentence of Death: A Study on the Profiles, Experiences and Perspectives of Death Row Prisoners in Bangladesh* 2022, available at deathpenaltyproject.org/knowledge/living-under-sentence-of-death – accessed 29 March 2022.

³⁴ This is likely to be most of those sentenced to death in Kenya. Prison statistics suggest there are currently 26 women on death row, and a larger number who are now serving life sentences following commutation of their death sentence. Furthermore, research in 2017 showed 42 women under sentence of death at that point; Jeffries S, Chuenurah C, Rao P, and Yamada Park M J, *Women's Pathways to Prison in Kenya: Violence, Poverty, Familial Caretaking and Barriers to Justice*, *Women's Studies International Forum*, 73 2019, pp50–61.

³⁵ This is a mean average. The median average is 7 years, and the mode is 5 years.

³⁶ This is a mean average. The median is 4 years, and the mode is 5 years.

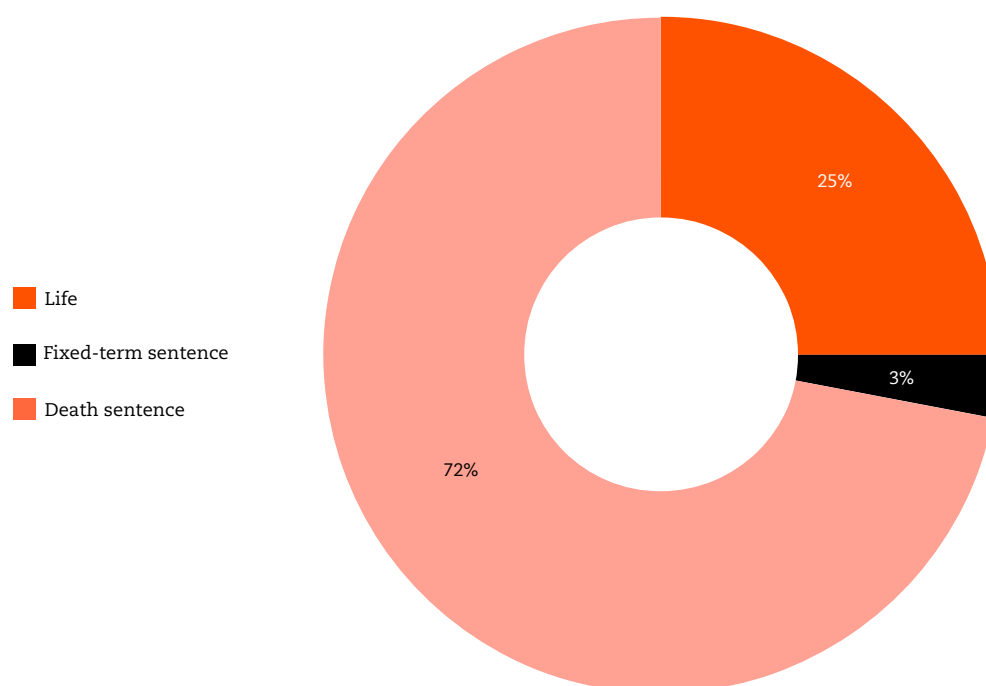
Table 2: Participant demographics and information on offences³⁷

		No.	%	n
Crimes	Attempted robbery with violence	12	1.8%	670
	Robbery with violence	361	53.9%	
	Attempted murder	2	0.3%	
	Murder	290	43.2%	
	Murder and robbery with violence	5	0.8%	
Sentence at interview	Death sentence	484	72%	671
	Life following commutation	166	25%	
	Fixed-term prison sentence	21	3%	
Current age	20-29	55	8.2%	667
	30-39	250	37.5%	
	40-49	223	33.4%	
	50-59	77	11.5%	
	60-69	43	6.4%	
	70-79	17	2.5%	
	80+	2	0.3%	
Religious affiliation	Practising religion	656	97.8%	671
	Christianity	526	80.4%	
	Islam	128	19.6%	
Relationship status	Single	119	17.8%	667
	Married/civil partnership	468	70.2%	
	Separated/divorced	59	8.9%	
	Widowed	21	3.1%	

Though we aimed to interview only those who had been sentenced to death, including those whose sentences had been commuted and were now serving a life sentence, 27 participants claimed, during the interview, that they had been sentenced to life at the outset. We have included them in our analysis, as some may have been mistaken, but, more importantly, they were all charged with death-eligible offences so are qualitatively not significantly different from our other participants for the purpose of this study (in Table 2, they are included in the category of ‘life following commutation’, as they were serving a life sentence when we interviewed them).

Hence, we interviewed 484 prisoners who were still on death row (72% of all those interviewed), 166 whose death sentences had been commuted to life, and 21 whose death sentences had been commuted and had been resentenced to fixed-term prison sentences, which took into account the time they had already spent in prison, on death row (their sentences ranged from five to 40 years; see Figure 1).

³⁷ Occasionally participants did not answer a question or were not sufficiently clear in their answer. Therefore, not all answers are available for all 671 interviews. For example, in response to the question about their relationship status, two participants simply replied that ‘it was complicated’.

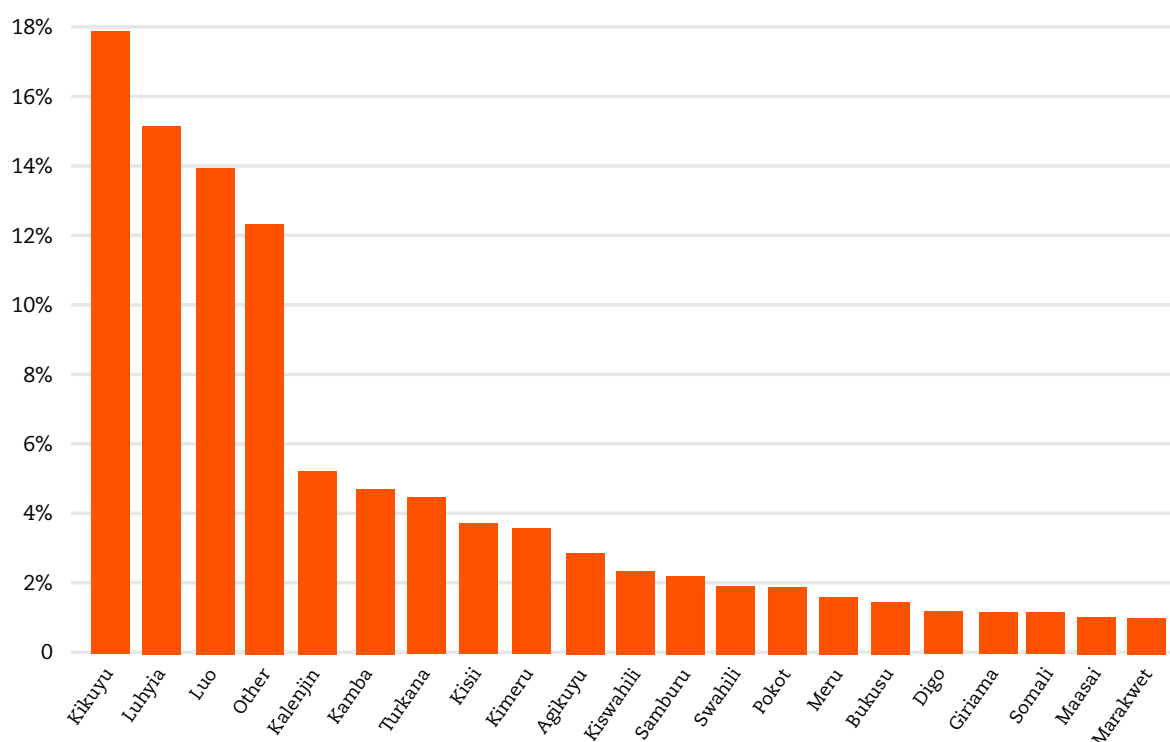
Figure 1: Prisoners' sentences at time of interview

Though all participants were Kenyan nationals, they spoke a range of languages. While Kenya is a multilingual country, it has two official languages, English and Swahili, and around 65 tribal languages or dialects, about 13 spoken by more than 1% of the population, though this could be higher or lower depending on definitions of 'languages' and 'dialects'.³⁸ Though only a small proportion (about 5%) of Kenya's population of almost 50 million people has English as a first language (language spoken at home), with just more than a quarter of the population speaking Swahili as their first language, English and Swahili are the means of communication between speakers of different languages. That said, in many rural areas the population is not multilingual and many speak only their native languages.³⁹

Figure 2 shows the distribution of participants' 'first' languages, including only languages (or dialects) used by more than 1% of our interviewees (there were a further 32 languages used by fewer than 1% of the participants). It is notable that none of them had English as a first language. In Kenya, English is the language of government, business, law, the media, and higher education, and is perceived as a marker of a good education. Though bequeathed by British colonial rulers, English remains the must-have language for upwardly mobile Kenyans, still privileged in status, prestige, employment opportunities, and favoured among the higher classes. Our participants clearly did not come from this socio-economic background. Furthermore, only just less than 2% spoke Swahili as their first language, much lower than the more than a quarter of the population with Swahili as a first language.

³⁸Michieka M and Ondari H, A Comparative Analysis of the Sociolinguistic Profiles of English in Kenya and Uganda, *Journal of Language, Technology and Entrepreneurship in Africa*, 7(2) 2016; see also, Statista, *Distribution of Primary Languages Spoken at Home in Kenya as of 2019*, available at www.statista.com/statistics/1279540/primary-languages-spoken-at-home-in-kenya – accessed 27 April 2022.

³⁹ Milestone Localization, Official Languages of Kenya [Updated 2021], available at www.milestoneloc.com/official-languages-of-kenya. – accessed 28 April 2022.

Figure 2: First languages spoken by participants

In considering whether those with different first languages are under or overrepresented in our sample, we met some challenges, given inconsistencies in reported frequencies across the two population datasets we studied for comparative purposes.⁴⁰ We settled on the Milestone Localization database, as it is more thorough, and suggests that some languages among our sample are overrepresented, while others are underrepresented.⁴¹ In particular, there were fewer Oluluhya/Luhya and Somali speakers than we might have expected and more Luo, Turkana and Kalenjin speakers.

2.1.2 Socio-economic profile of prisoners

To fully understand prisoners' pathways into crime would require rich life-course analysis of crucial events and biological, psychological and social circumstances throughout their lives, from early childhood.⁴² This would typically necessitate long and repeated interviews over a period of time – not usually possible to do in prisons and certainly not with a large sample of prisoners. However, we aimed to learn a little about our interviewees' lives before they committed their offences, to better understand how their socio-economic and psychological milieus may have shaped their decisions to commit offences.

⁴⁰ Ibid., see also; Statista, *Distribution of primary languages spoken at home in Kenya as of 2019*.

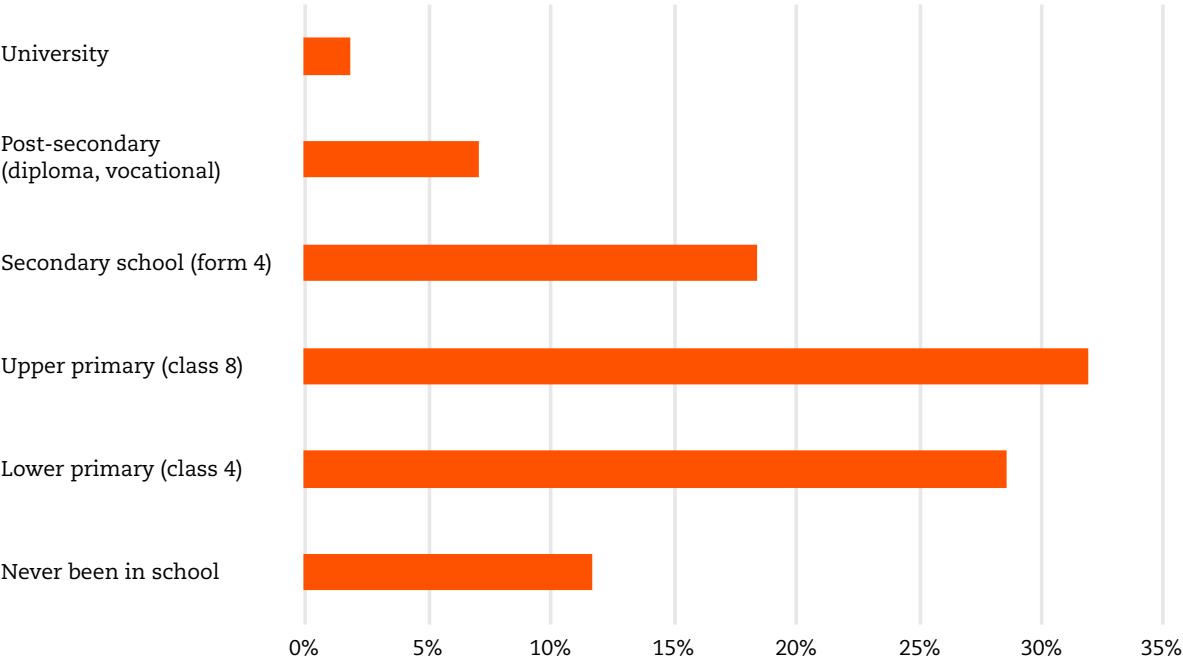
⁴¹ Reporting only where the differences are relatively large. The following languages were **less** prevalent in our sample than in the overall population: Kamba (4.37% sample, 8.18% population); Kisii/Ezegush/Gusii (3.77% sample, 5.21% population); Oluluhya/Luhya (15.23% sample, 27.90% population); and Somali (1.21% sample, 4.65% population). The following languages were **more** prevalent in our sample than in the overall population: Kalenjin (5.28% sample, 2.98% population); Luo (14.03% sample, 7.81% population); Turkana (4.52% sample, 1.86% population); Kimeru/Meru/Kimiiru (5.28% sample, 3.72% population); and Kikuyu (17.80% sample, 13.02% population).

⁴² Keatley D, *Pathways in Crime: An Introduction to Behaviour Sequence Analysis* (Palgrave 2019).

Educational background

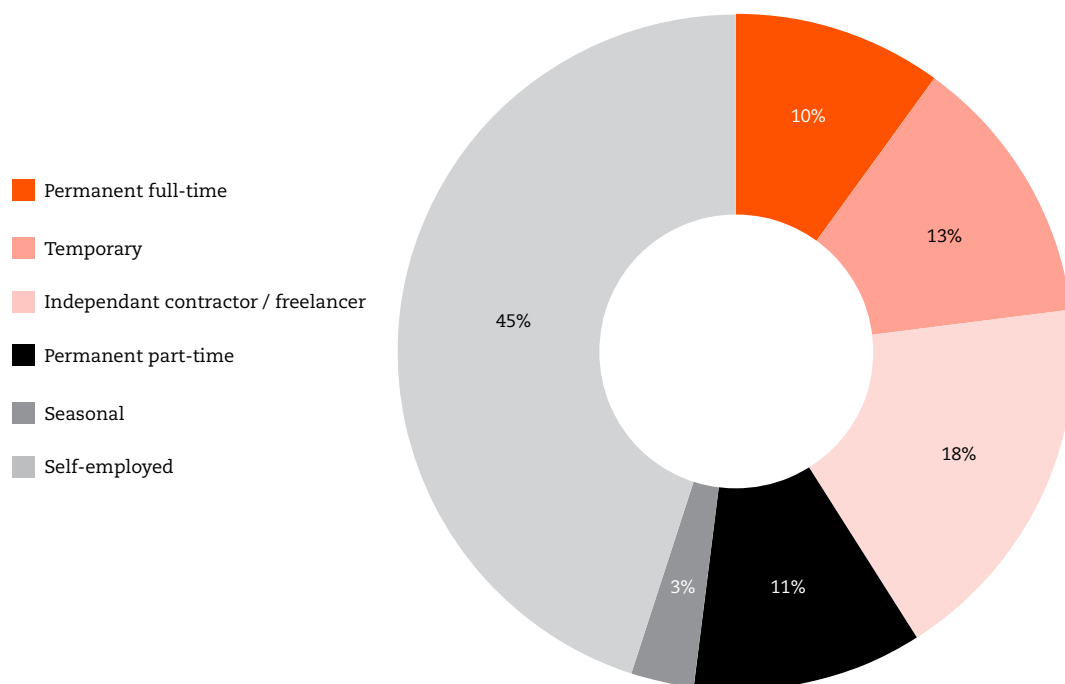
More than one in 10 of the prisoners we interviewed had never been in formal education, and another more than two-thirds had only completed primary school, with almost half of these only completing up to class 4 of primary education. Fewer than 2% had been to university. Clearly, as Figure 3 shows, most of those who are sentenced to death have not benefited from a good education.

Figure 3: Participants' educational attainment

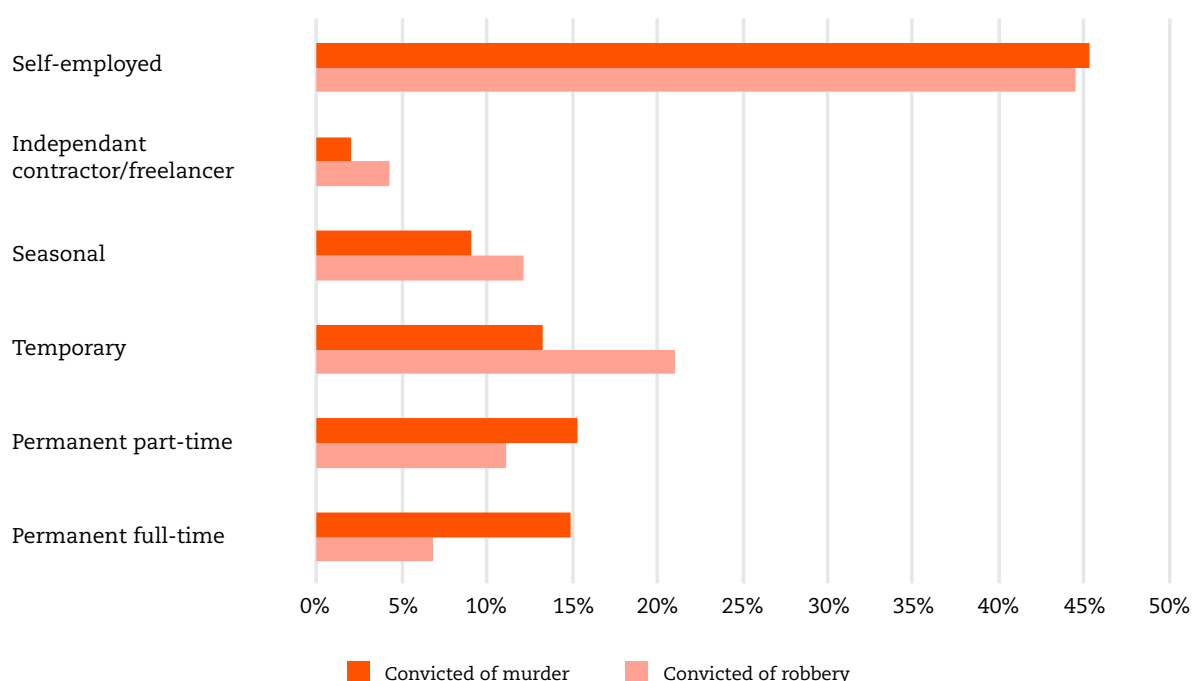


Occupational background

The vast majority (82%) of the participants were in legal employment at the time of arrest, but only one in 10 was in permanent full-time employment. Almost half (45%) identified as 'self-employed', which can be secure and lucrative, but, for many, is precarious. Furthermore, as Figure 4 shows, 29% were in 'temporary' or 'seasonal' employment, which is inevitably precarious.

Figure 4: Occupational status at arrest

We were keen to explore the hypothesis that those convicted of robbery were in less financially secure positions when they committed their offences. In other words, that there was likely to be economic reasons for committing acquisitive crimes that might not be so apparent for those convicted of murder. We found this to be the case, with those convicted of robbery in more precarious employment, such as temporary, seasonal or even self-employment, and those convicted of murder more likely to be in full-time employment, as Figure 5 shows.

Figure 5: Employment type at arrest (for those convicted of robbery and murder)

The difference between the proportions of people convicted of robbery and people convicted of murder holding permanent full-time employment during the year prior to their arrest is statistically significant,⁴³ with people convicted of murder being significantly more likely to be in permanent full-term occupations. Similarly, the difference between the proportions of those convicted of robbery and those convicted of murder working in temporary jobs is statistically significant,⁴⁴ with people convicted of robbery being overrepresented among temporary workers in our sample.

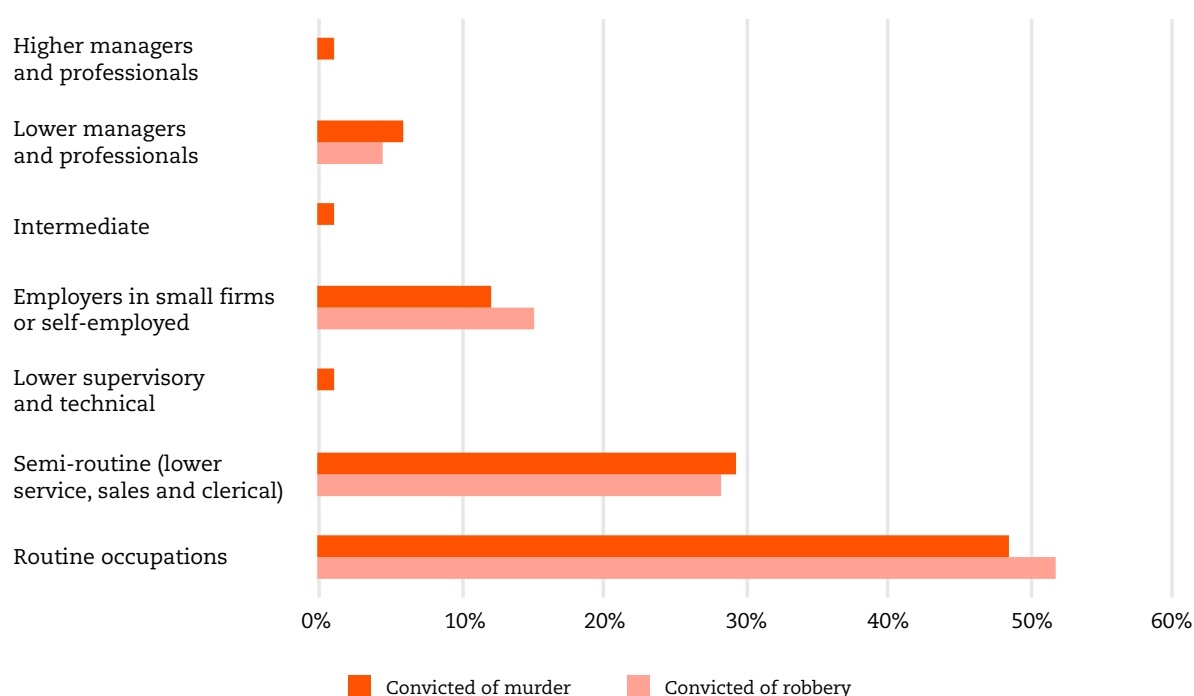
We asked participants what jobs they were employed in when they committed their offences. The 82% of our interviewees who were in employment provided us with their job title. As there is no agreed social stratification ranking system for Kenya, we categorised their job titles according to a British social stratification system.⁴⁵ We were able to allocate job titles to the stratification system for 98% of our interviewees (2% of the job titles offered were insufficiently precise to be able to place on the stratification table).

As Figure 6 illustrates, the vast majority (79%) of participants were in semi-routine and routine occupations, at the bottom of the stratification system, with only 1% higher managers and professionals, and only 5% lower managers and professionals. While all three of the professionals had been convicted of murder, there were no statistically significant differences between the offence categories and the type of jobs.

⁴³ $z = -3.04, p = .0024$.

⁴⁴ $z = 2.37, p = .018$.

⁴⁵ We used the UK National Statistics Socio-Economic Classification system, which allows for classification into seven categories: 1. Higher managers and professionals 2. Lower managers and professionals 3. Intermediate 4. Employers in small firms, self-employed 5. Lower supervisory and technical 6. Semi-routine 7. Routine. See www.ucl.ac.uk/soc-b-biosocial-doctoral-training/sites/soc_b-biosocial-doctoral-training/files/2_social_stratification_theory_measurement_and_inequality.pdf – accessed 16 May 2022. We are grateful to Dr Marlous van Waajenburg, at Harvard Business School, for her information and advice on how to code occupations according to social stratification systems.

Figure 6: Type of job at arrest (for those convicted of robbery and murder)

Finances and responsibilities

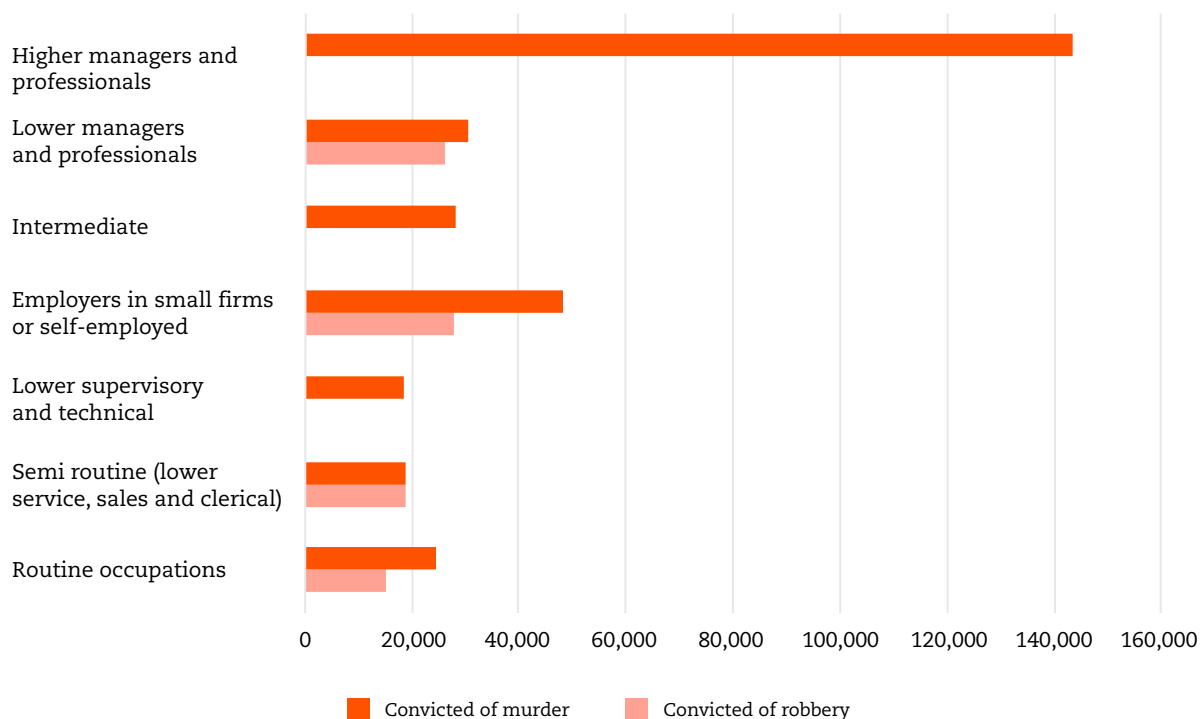
While the majority of the interviewees were in employment at the time of arrest, many were engaged in temporary and precarious work, especially those convicted of robbery, so we sought information on their financial situation, asking how much they earned during the year before they went to prison. They earned, on average, just more than 20,000 Kenyan shillings (about £133) a month,⁴⁶ which is below the living wage.⁴⁷

As Figure 6 showed, most people in our sample had routine or semi-routine occupations (79%) and, not surprisingly, were also the lowest earners, with an average of 18,959 Kenyan shillings and 18,800 Kenyan shillings a month respectively. However, our data show a significant difference between the salaries of routine workers convicted of robbery and routine workers convicted of murder, as shown in Figure 7, below.⁴⁸ While routine workers convicted of murder were earning, on average, 24,542 Kenyan shillings a month, routine workers convicted of robbery were only earning, on average, 15,241 Kenyan shillings. Employers in small firms, or those who were self-employed, and convicted of robbery were also earning less on average (27,750 Kenyan shillings) than those in the same types of jobs who were convicted of murder (48,133 Kenyan shillings), though this difference was not statistically significant.

⁴⁶ This is the mean average. The 'median' is 15,000 Ksh (approximately £100).

⁴⁷ tradingeconomics.com/kenya/living-wage-individual – accessed 21 May 2022.

⁴⁸ $t(147, 113) = -2.78, p = .0057$. Even when statistical 'outliers' (more than 100,000 Ksh) among the salaries of routine workers convicted of murder were excluded from analysis, the difference remained significant ($t(147, 110) = -2.53, p = .012$).

Figure 7: Type of job at arrest and salary (for those convicted of robbery and murder)

Earnings become meaningful in the context of demands on resources, which come from meeting basic personal needs, such as rent or food, from debts, and from meeting the needs of dependents, typically children, spouses, or other family members. Most of our participants (84%) had at least one child and, on average, they had three children [Q8]. However, if we include other people financially dependent on them, we find 89% were responsible for supporting at least one other person, and they supported, on average, five other people. Only a few (6%) had been financially dependent on other family members or on a partner. Indeed, just less than a third (30%) of participants were the only person in their household in legal employment and, therefore, able to support dependents.

Notwithstanding the demands of financially supporting dependents, most participants (80%) claimed that they had been able to afford their basic needs, and more than half (55%) had money left over after meeting those needs. However, more than a third (35%) were in debt.

Overall, the data presented above paints a picture of a population who, when they chose to commit their crimes, were relatively uneducated, comparatively poor, and in low-level, precarious jobs, with little financial security – yet they had considerable responsibility for others' financial welfare. In trying to understand people's pathways into crime, it is important not only to know the structural contexts within which they lived, including poverty and social and economic deprivation, but also other adverse influences, such as abuse within the home and dependency on drugs and alcohol.

2.1.3 Health and welfare at the time of offending

Families are a source of support and guidance and can have a positive impact on people's mental health, but they can also be a source of stress, specifically when financially dependent. Similarly,

poor health, and substance misuse or abuse, can be stressors, and put some people on the pathway to offending.

Significant relationships

Just one in 10 participants lived alone, with the majority living with just a partner (41%) or with their family (parents, siblings and/or children, 44%).⁴⁹ By and large, they were in supportive relationships, with 84% saying they felt supported by their family and only 7% unsupported. While 18% of participants had experienced abuse within their home or from someone close to them, this would appear to be a relatively low proportion. As our question was broad, including someone in the home and someone ‘close to’ the participant, it is difficult to find comparative data for the general population. However, one reliable source, the *Kenya Demographic and Health Survey*, conducted in 2014, suggests that 44% of Kenyans have experienced ‘domestic abuse’ since the age of 15.⁵⁰

That said, we found differences in our sample between male and female prisoners, with 17% of men having experienced abuse prior to arrest, but 30% of women. A small study of the life stories of 49 women imprisoned across Kenya (though not on death row) suggests that victimisation and disordered familial and intimate relationships are among the key pathways to crime for women, as has been found in studies in other jurisdictions.⁵¹ Those in our sample who revealed they had experienced abuse reported, on average, lower levels of health. However, while the difference is statistically significant, it is low.⁵²

Drugs, alcohol and health

At the time they were arrested, almost all participants (86%) enjoyed good (45%) or excellent (41%) health, with only 4% saying their health had been poor (10% said it had been ‘fair’). Fewer than a third (30%) were using drugs at the time of arrest and, as Figure 8 shows, the majority of those who were using drugs (80%) were using only ‘soft’ drugs, such as cannabis (56%) or khat⁵³ (17%), or a combination of both (7%).

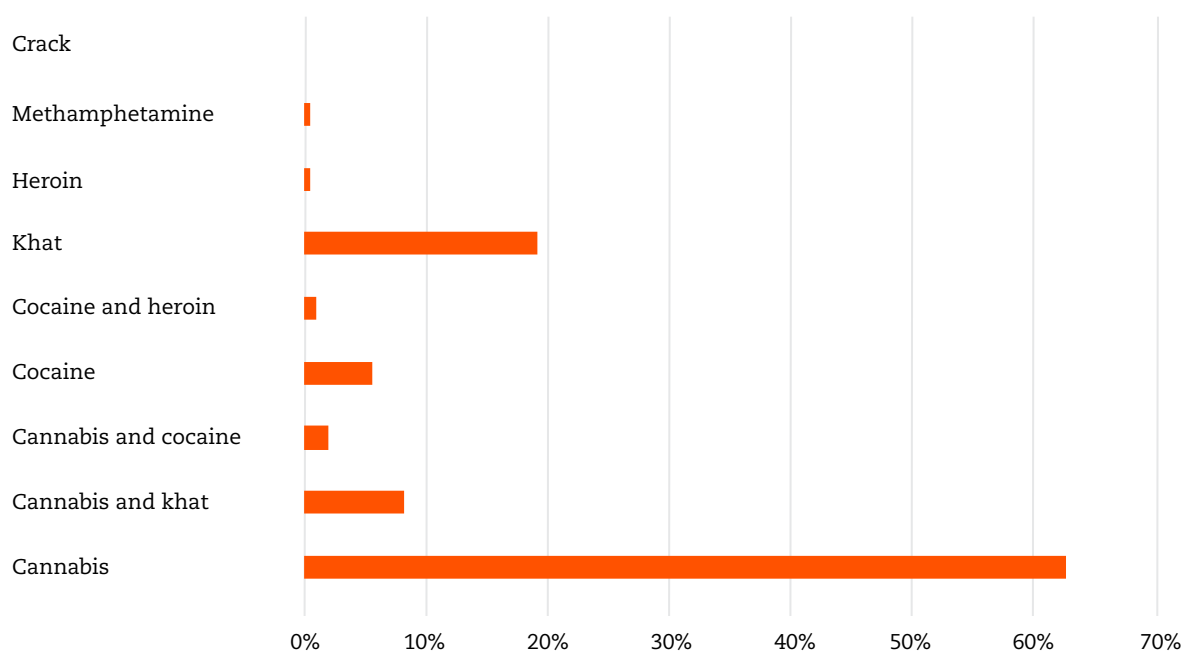
⁴⁹ A further 4% lived with a partner and family members, and 1% lived with a friend.

⁵⁰ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey* 2014, 2015 ii p293, available at dhsprogram.com/pubs/pdf/fr308/fr308.pdf – accessed 30 March 2022.

⁵¹ Jeffries S *et al*, *Women's Pathways to Prison in Kenya: Violence, Poverty, Familial Caretaking and Barriers to Justice*, pp50–61.

⁵² We used the Mann-Whitney *U* test to test whether the distributions of the reported levels of health differed between people who had suffered past abuse and those who had not. The distributions in the two groups differed significantly [Mann-Whitney $U = 27988.5$, $n_1 = 546$, $n_2 = 115$, $p = .045$ two-tailed].

⁵³ Khat is an amphetamine-like psychostimulant grown and chewed in Kenya. There is some evidence that chewing khat significantly elevates psychosis; Onger L *et al*, ‘Khat Use and Psychotic Symptoms in a Rural Khat-growing Population in Kenya: A Household Survey’, *BMC Psychiatry*, 19 2019, p137, doi.org/10.1186/s12888-019-2118-3 – accessed 30 March 2022.

Figure 8: Types of drugs used at the time of arrest

When we consider the proportion of the total population of our participants that were using drugs, we find 18% were using cannabis, 6% khat and another 2% cannabis and khat. A greater proportion (43%) had been 'relying on alcohol' at the time of arrest (drinking more than they thought they should be), and almost a third (32%) said they had a history of alcohol or substance misuse.

Almost all of the participants were men (95%) and close to three-quarters (71%) were in the age bracket of 30-49, arguably the demographic most likely to be drinking heavily. We would therefore expect our figures on alcohol misuse to be higher than across a random sample of the Kenyan population. Notwithstanding, a rigorous study of 3,136 households across Kenya, conducted in 2017, found only 12% misusing alcohol – and even for the most at-risk population (aged 25-35), this figure rises only to 15%, much lower than the 43% in our sample.⁵⁴ This suggests that the prisoners we interviewed were much more likely to be misusing alcohol at the time of arrest than other Kenyans.

In that study, 5.5% of 25-35-year-olds were using khat, and only 1% were using cannabis, a lower proportion than we found among our participants. Other studies have produced different findings, but none show drug or alcohol misuse as high as among our participants: 6% of the population of Kenya is reported to have an alcohol-use disorder.⁵⁵ The differences in the rates of those using khat over the past year are not great. In the general population, among the highest-using group of

⁵⁴ Kamenderi M, Muteti J, Okioma V, Kimani S, Kanana F and Kahi C, Status of Drugs and Substance Abuse Among the General Population in Kenya, *African Journal of Alcohol and Drug Abuse*, edn. 1, pp 54-59, available at nacada.go.ke/sites/default/files/AJADA/AJADA%201/JP9.%20AJADA%20Volume%20I%20-%20Status%20of%20drugs%20and%20substance%20abuse%20in%20Kenya%20-%20General%20population.pdf – accessed 20 March 2022.

⁵⁵ Data cited in Patel P, Kaiser B, Meade C, Giusto A, Ayuku D and Puffer E, Problematic Alcohol Use Among Fathers in Kenya: Poverty, People, and Practices as Barriers and Facilitators to Help Acceptance, *International Journal of Drug Policy*, 75 January 2020, available at doi.org/10.1016/j.drugpo.2019.10.003 – accessed 30 March 2022.

25-35-year-olds, there were less than 6% in 2012 – when use was higher than today⁵⁶ – a little lower than the 8% of our participants who were using khat at the time they were arrested (including those using both khat and cannabis). However, at 20%, the rates of cannabis use at the time of arrest among our sample (including those using both khat and cannabis) were much higher than studies of the general population in Kenya, which suggest cannabis use between 1-2% of the population.⁵⁷ It would seem that our participants made greater use of both cannabis and alcohol than we would expect to see in the general population according to various studies.

We sought to establish if those who were using drugs at the time they were making the decision to commit their offence reported worse health than those who were not, but found no significant differences in health between these two groups.⁵⁸ However, we did find a significant difference in health reporting in relation to alcohol misuse, with those who were misusing alcohol reporting, on average, lower levels of health.⁵⁹ Furthermore, and not surprisingly, analysis of our interview data revealed a significant relationship between reported levels of health and *history* of alcohol and substance misuse, with those with such a history reporting significantly lower levels of health.⁶⁰

Just 15 (2%) participants had been diagnosed with a learning or developmental disorder, 14% had been experiencing mental health problems *before* they committed the offence that led to their incarceration, and 15% were experiencing mental health problems *at the time* they committed the offence. The World Health Organization estimates that about 10% of the adult population experiences mental health problems at any given time.⁶¹ There is inadequate data on the prevalence of mental health problems in Kenya, but one study suggests that it is 4% for depressive disorders and 3% for anxiety disorders,⁶² while other estimates put the national average at about 10%.⁶³ This suggests that our participants may have experienced rates of mental health problems twice or, possibly, three times as high as the national average in Kenya, though we cannot be confident about these comparisons.

Unsurprisingly, we found the presence of mental health problems, both before the offence and at the time of the offence, to be significantly related to lower levels of overall health. This could be the result of prisoners reporting on their mental health as part of their overall health, or it could point to the presence of a positive association between lower levels of overall health (including physical health) and poor mental health.⁶⁴

⁵⁶ UNODC, Drugs and Age: Drugs and Associated Issues Among Young People and Older People, *World Drug Report 2018*, p14, www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_4_YOUTH.pdf – accessed 30 March 2022. One study found a much higher proportion of khat users, but that focused on two particular agrarian counties – Meru and Embu, in the eastern part of Kenya, which are the largest khat-growing regions in Kenya – to find the highest users to establish the link between khat use and psychosis; Onger L. *et al*, *Khat Use and Psychotic Symptoms in a Rural Khat-growing Population in Kenya*, p137.

⁵⁷ World Health Organization, The Health and Social Effects of Nonmedical Cannabis Use, 2016, available at www.who.int/substance_abuse/publications/msbcannabis.pdf – accessed 30 March 2022.

⁵⁸ Using a Mann-Whitney *U* test of significance.

⁵⁹ We used the Mann-Whitney *U* test to test whether the distributions of the reported levels of health differed between people who misused alcohol at the time of the arrest and those who did not. The distributions in the two groups differed significantly [Mann-Whitney *U* = 37665.5, *n*₁ = 370, *n*₂ = 275, *p* < .001 two-tailed].

⁶⁰ We used the Mann-Whitney *U* test to test whether the distributions of the reported levels of health differed between people with a history of alcohol and substance abuse and people without such a history. The distributions in the two groups differed significantly [Mann-Whitney *U* = 37337.5, *n*₁ = 438, *n*₂ = 205, *p* < .001 two-tailed].

⁶¹ Ministry of Health, *Kenya Mental Health Policy 2015-2030*, 2015, available at www.publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf – accessed 30 March 2022.

⁶² World Health Organization, *Depression and Other Common Mental Disorders: Global Health Estimates*, 2017, p17, available at apps.who.int/iris/bitstream/handle/10665/254610/WHO-MSD-MER-2017.2;jsessionid=946C52430206ABC9AC6C10D90672689F?sequence=1 – accessed 30 March 2022.

⁶³ World Mental Health Day: The State of Mental Health in Kenya, available at www.atmplatformkenya.org/the-world-mental-health-day-in-kenya-2020/ – accessed 30 March 2022.

⁶⁴ We used the Mann-Whitney *U* test to test whether the distributions of the reported levels of health differed between people who had experienced mental health problems *before the commission of the offence* and people who had not. The distributions in the two groups differed significantly [Mann-Whitney *U* = 16929.5, *n*₁ = 529, *n*₂ = 85, *p* < .001 two-tailed]. We used the same test for the distributions of the reported levels of health to see if they differed between people who had experienced mental health problems *at the time of the offence* and people who had not. The distributions in the two groups differed significantly [Mann-Whitney *U* = 15702, *n*₁ = 515, *n*₂ = 94, *p* < .001 two-tailed].

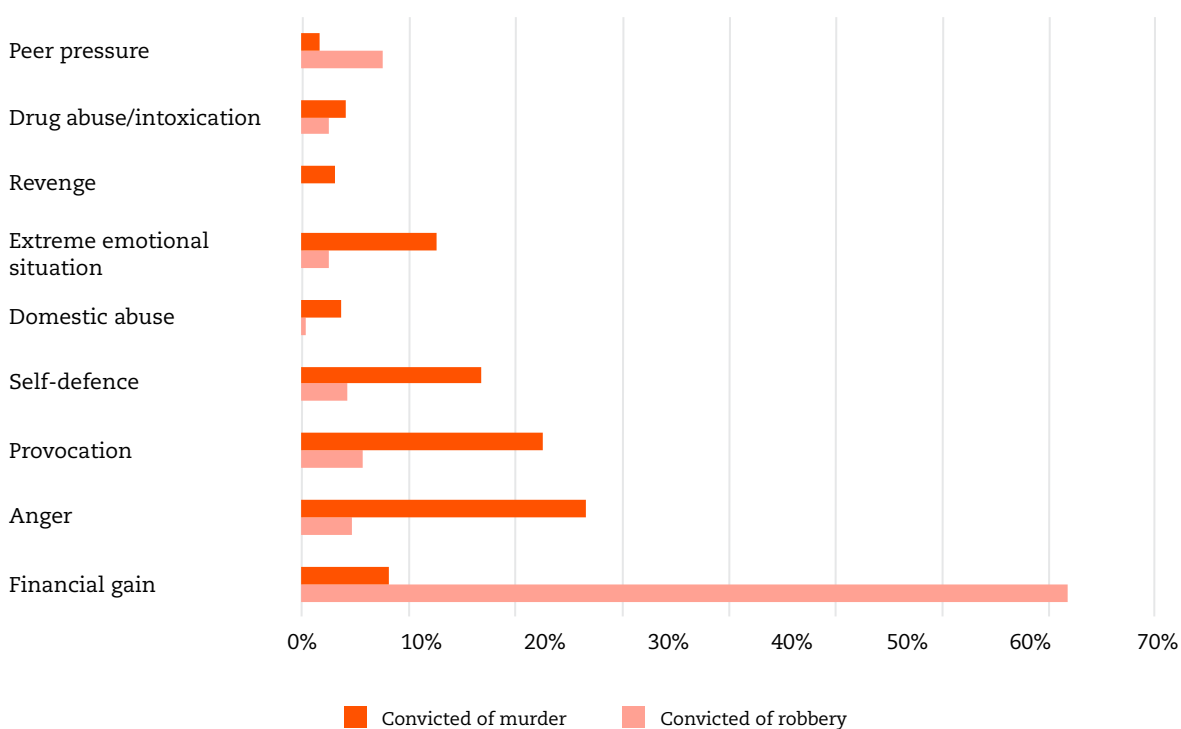
2.2 Prisoners' decisions to offend

While poverty, poor education, and limited life chances can shape decision-making and put some people on a pathway to crime, those who commit offences are not fully determined by their environments; at crucial stages they can navigate temptations and make decisions not to offend. It is important, therefore, to consider their decision-making, to explore the conscious thought processes that give purpose to and justify conduct. Hence, in this section, we consider how prisoners' backgrounds, as described above, may have shaped their decisions to commit serious offences, but also what psychological state they were in when deciding to offend, whether and how those close to them influenced these decisions, and the extent to which the law could have deterred them from offending. In other words, the extent to which they appeared to have been rational in processing and evaluating relevant information about the potential to be caught and punished for their actions.⁶⁵

2.2.1 Motivations for offending

To understand what motivates some people to commit serious offences, or what might create the conditions whereby people make that choice, we need more than information on financial need, not least because our participants did not present themselves as in dire financial need at the time they committed the crimes which led to their convictions, but also because, while robbery might be motivated by financial need, murder is less likely to be so. We asked our participants to mention any motivating factors and some mentioned more than one, so that the combined responses are more than 100% [Q26].

Figure 9: Motivations for offending (for those convicted of robbery and murder)



⁶⁵ Clarke R V and Cornish D B, Modelling Offenders' Decisions: A Framework for Research and Policy, *Crime and Justice*, 6 1985, pp147-185.

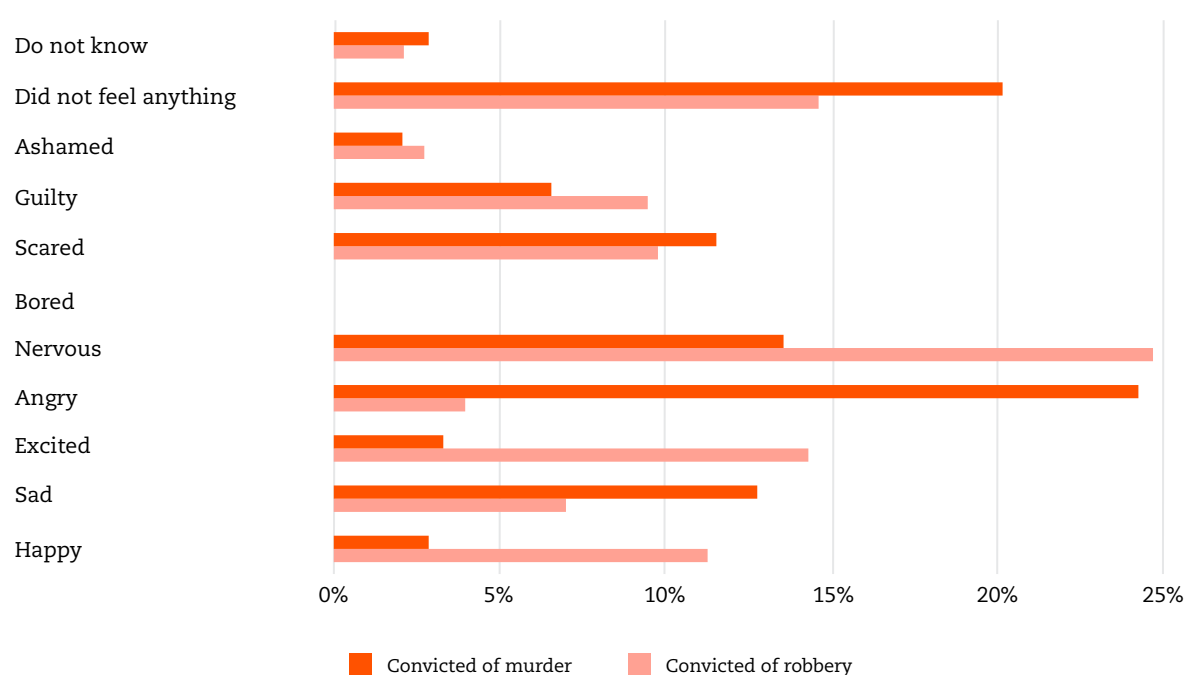
Figure 9 makes clear that the motivations for the two offence types are distinct. Most of those convicted of robbery (72%) were motivated by financial gain. As we saw in ss.2.1.2 and 2.1.3, above, more than half of those convicted of robbery were employed in routine occupations and in more precarious employment, for which they earned less, on average, than those employed in routine occupations but charged with murder (15,241 Kenyan shillings a month, compared with 24,542 for those convicted of murder). This may have increased their desire to engage in acquisitive crime.

The motivations for murder are diverse, with half being driven by anger (27%) or provocation (23%), and another 13% being triggered by an ‘extreme emotional situation’. Perhaps not surprisingly, 17% claimed to have acted in self-defence.⁶⁶ With almost two-thirds of those who committed murder stirred by a state of heightened emotion, it is crucial to ask about participants’ state of mind prior to offending.

Participants’ state of mind prior to offending

We asked participants how they were feeling when they were thinking about committing the crime [Q27]. As Figure 10 shows, we found differences between those who were convicted of robbery and those convicted of murder. While 20% of those convicted of murder and 15% of those convicted of robbery claimed to feel nothing, those in the former category were more likely to have experienced strongly negative emotions, such as feeling sad (13%), angry (24%) or scared (12%), while those convicted of robbery were more likely to feel nervous (25%), excited (14%), or even happy (11%), no doubt anticipating higher rewards than those contemplating murder. What is clear is that few were in a calm and rational state of mind when they thought about committing their capital offence; none felt ‘bored’.

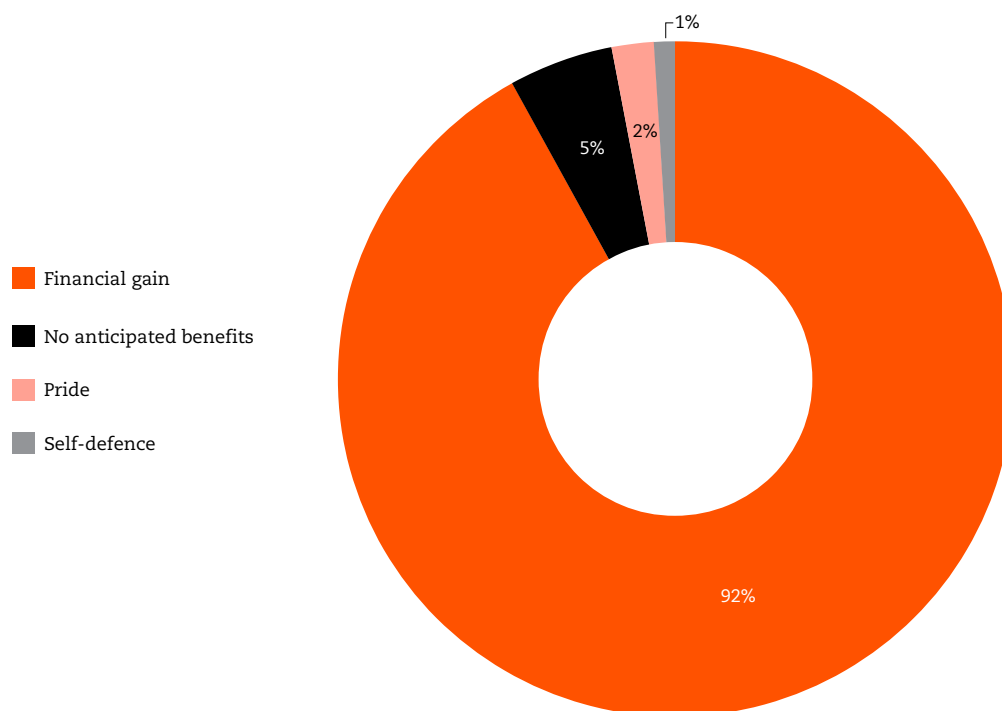
Figure 10: State of mind while deciding to commit the crime (for those convicted of robbery and murder)



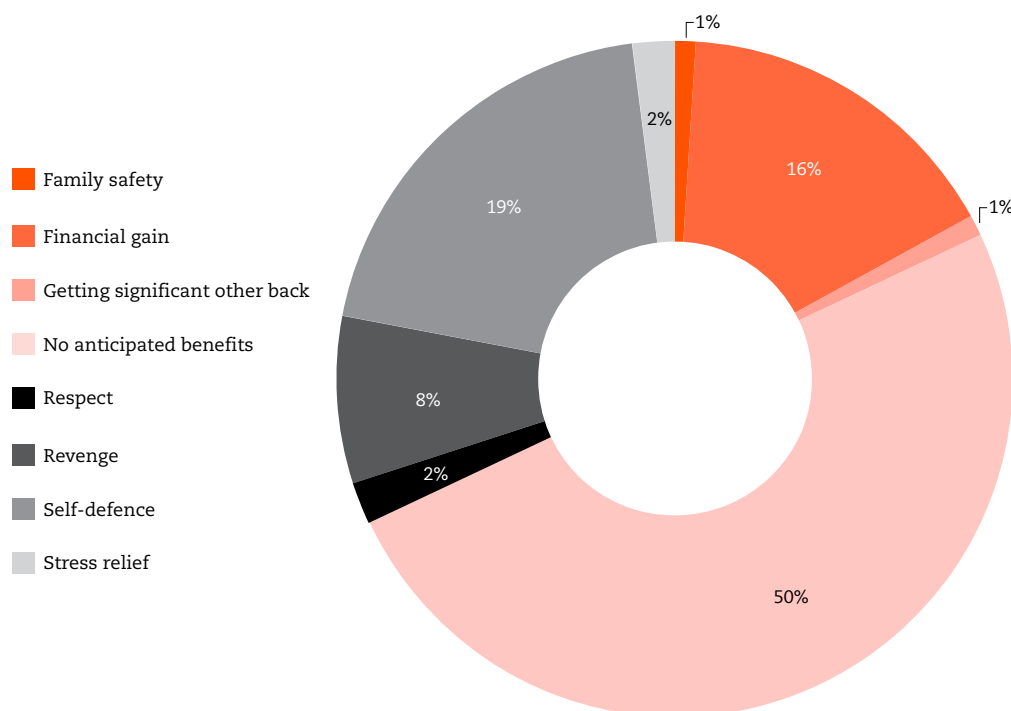
⁶⁶ A further two participants, not included in Figure 6, claimed to be motivated by witchcraft and another two by poor mental health.

Of course, it could be that, despite these emotions, those prisoners we interviewed had reasons to believe the crime could be beneficial for them. We asked about this in an open-ended question [Q28], coding responses into categories. While the data suggests that some participants were confused about the question, answering not about *anticipated* or potential benefits but *actual* benefits of committing the crime, the results are nonetheless informative. Again, and unsurprisingly, expressed anticipated benefits were different across the two crime categories, as shown in Figures 11 and 12.

Figure 11: Anticipated benefits of committing robbery



Predictably, almost all (92%) those convicted of robbery spoke about financial gain (see Figure 11). Half of those convicted of murder stated that they had not anticipated any benefits, but 16% thought there might be financial gain. Importantly, almost one in five (19%) claimed that they had committed murder in self-defence, suggesting here that the anticipated benefit was to avoid being hurt or even killed, and just 8% had anticipated that murder could satisfy a revenge impulse (see Figure 12).

Figure 12: Anticipated benefits of committing murder

The converse of conceivable benefits is the potential risks of committing offences. When asked what made the offence risky, the majority (62%) of participants mentioned arrest and/or imprisonment [Q29]. Some revealed fears about extrajudicial violence, with 13% mentioning ‘mob justice’ or retaliation. A further few (5%) had worried about being injured, with 7% concerned about being killed by the police.

We might have anticipated different perceptions of risk across the two offences (murder and robbery), but Figures 13 and 14 show that the responses were very similar.

Figure 13: Perceptions of risks of committing robbery

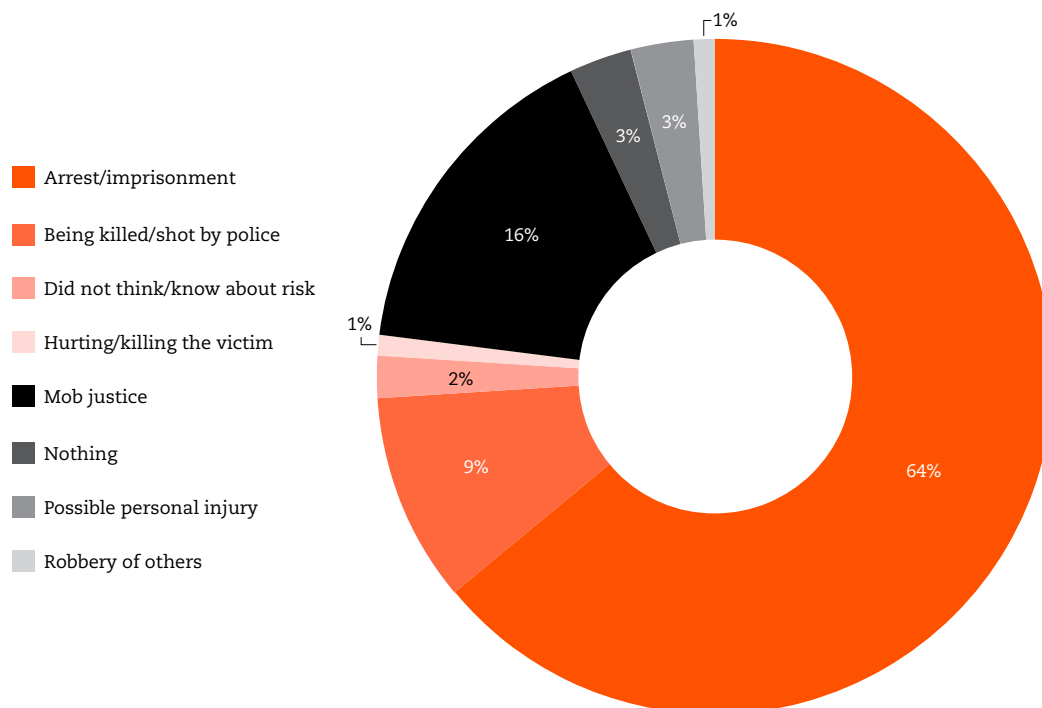
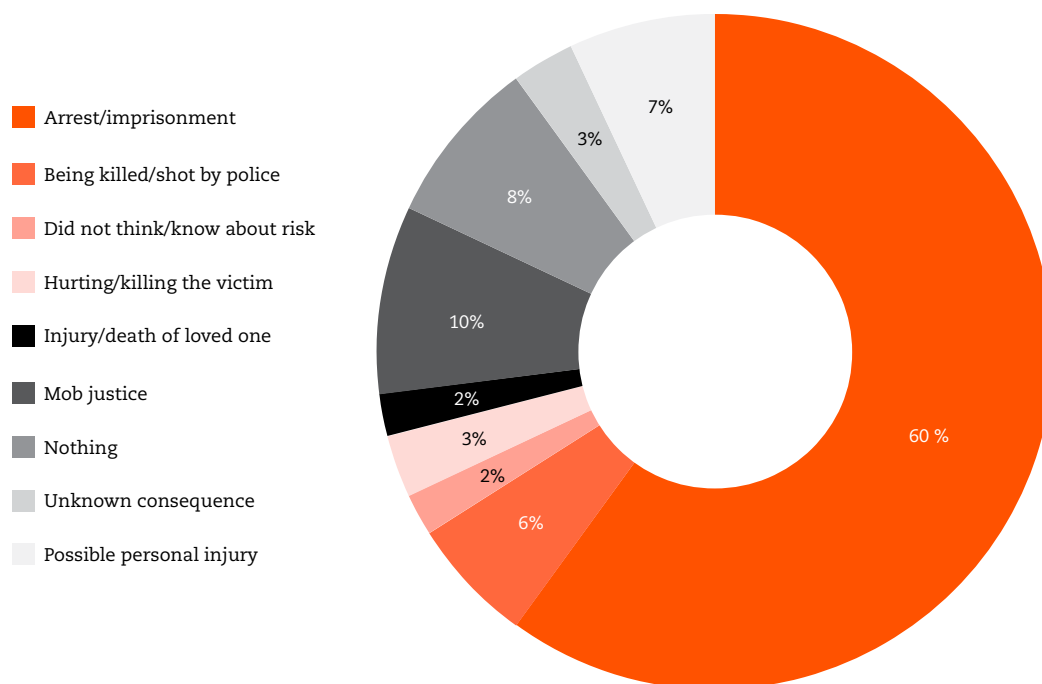


Figure 14: Perceptions of risks of committing murder

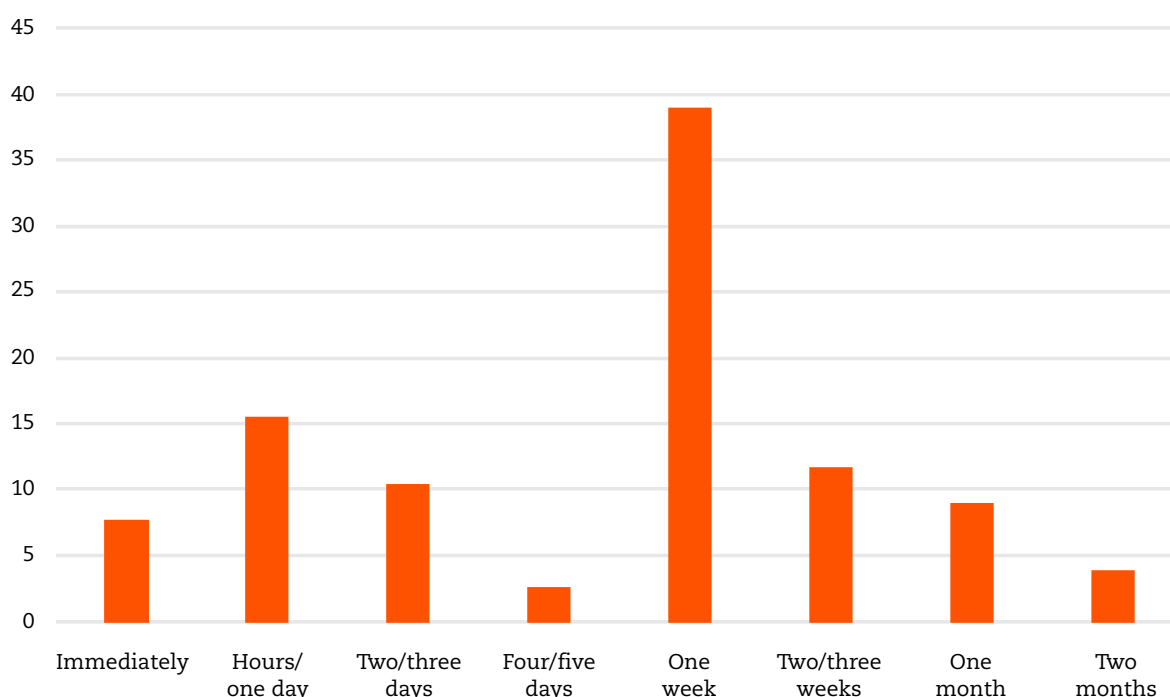


It is important to note that while the majority had been concerned about the risk of arrest and/or imprisonment when they were considering committing a crime, this was still less than two-thirds of the participants. Hence, more than a third were insensible to the most obvious risk, a point to which we return in s.2.5.3 below.

Others' influence on decisions to commit crime

Some people's decisions to commit offences – especially robberies – are influenced by peers.⁶⁷ Almost two-thirds of participants who had been convicted of robbery (64%) committed the crime with at least one other person. Furthermore, only 16% said they alone made the decision to commit the robbery, with more than half saying it had been someone else's decision; others said it was a joint decision [Q30]. Those who said that committing the offence was someone else's idea were asked how long it took them to decide to become involved. As Figure 15 shows, while only 8% decided immediately, more than three-quarters (76%) had decided within one week, suggesting a reasonably quick decision, perhaps with limited deliberation.

Figure 15: Time taken to decide to commit robbery



Perhaps surprisingly, a fifth of those convicted of murder had committed the crime with other people, with a quarter of those saying it had been their idea and 45% claiming it had been someone else's idea; 29% said it was a joint decision. Where someone else had instigated the murder, the vast majority (93%) of participants had agreed to being involved within a week, though the numbers are too small to be informative.

Regardless of whether they had co-offenders, all participants were asked if they had been coerced into committing the offence [Q31]. A small proportion (7%) said they had been coerced by threats and a further 7% said they had committed the offence as a favour to someone [Q32]. Interestingly, there was some overlap between these two groups, with 31% of those who were *threatened* also saying they committed the offence as a *favour* to someone. A further 15% had offended to try to help someone

⁶⁷ Rokven J J, de Boer G, Tolsma J and Ruiter S, How Friend's Involvement in Crime Affects the Risk of Offending and Victimization, *European Journal of Criminology*, 14(6) 2017, pp697-719. For a thorough review of the literature on the influence of peers see McGloin J M and Thomas K J, Peer Influence and Delinquency, *Annual Review of Criminology*, 1 2019, pp241-264.

else, though they had not been asked to do this (hence, this group is somewhat distinct from those who were asked to commit murder as a favour) [Q33].

We found differences across our two offence categories. Those convicted of murder were almost half as likely as those convicted of robbery to have committed the offence to help someone else (10% as opposed to 19%) and four times as likely to have been threatened into committing the offence (12% as opposed to 3%). It seems, therefore, that those committing robbery were sometimes motivated by helping others (linked to potential financial gains), while those committing murder were more likely to have acted under duress.

While acquaintances, and even friends or family, can have a negative influence, those who care may also attempt to dissuade people from offending. That said, only 7% of participants said those who cared about them knew they were planning to commit an offence [Q34]. Given the relatively small number, we cannot generalise from these participants. Nonetheless, it is worth noting that more than three-quarters of them reported that their loved ones had been alarmed by their plans [Q34a] and, in two-thirds of these cases, had tried to dissuade the participant from committing the offence [Q34b], with parents and friends being most likely to try to discourage them [Q34ba]. The arguments harnessed to dissuade participants included moral messages about the wrongfulness of such actions (25%) and specific pleas not to hurt the victim (48%); others warned about the consequences of being arrested or killed in the commission of the offence (10%) and some intervened actively by confiscating a weapon (13%) [Q34bb].

Given that most of those convicted of robbery were motivated by financial gain, it is possible that they could have been deterred from their crimes by harsh sanctions. However, many of those convicted of murder had different motivations and acted in a heightened emotional state, suggesting little potential to be deterred. Importantly, more than a third of participants were apparently unconcerned about being arrested and sent to prison when they made the decision to commit their offences, implying low potential for deterrence.

2.2.2 Why were prisoners not deterred from offending by harsh punishments?

The theory of deterrence relies on the *threat* of punishment being sufficiently credible, and the *amount* of punishment being sufficiently high, to influence behaviour. Hence, for those considering violent robbery to be deterred, states would need to deliver a clear message that robberies will be detected and that offenders will be punished with sufficient severity. If the rational actor of deterrence theory thinks there is a reasonably strong likelihood that they will be caught, convicted and punished if they engage in a violent robbery – and if they worry that the costs (long term of imprisonment or a death sentence) outweigh the benefits (financial rewards, excitement or elevated status) – they should avoid such activity. Thus, deterrence research is clear that the necessary preconditions of decision-making by potential offenders are that:

- They are knowledgeable about the law and its implications;
- They are rational in allowing their knowledge and understanding to influence their behaviour;
- They will avoid offending if they think it is likely they will be caught and convicted, and if they think the punishment outweighs the rewards.⁶⁸

⁶⁸ Fagan J, *The Feasibility of Systematic Research on the Deterrent Effects of the Death Penalty in Indonesia* (The Death Penalty Project 2019) pp11-12.

Knowledge about the law

We asked participants to reflect on the time before they committed the crime and recall what they had thought the penalty was for that offence [Q38]. As Table 3 shows, only a few thought that the penalty would be death. Given that the death sentence is the typical punishment for murder and robbery with violence, we might have expected a far greater proportion to have suggested this.

Table 3: Participants' thoughts on likely punishment before committing their offence

Participants' conviction	Didn't know	Didn't think about punishment	Prison	Death sentence	Fine	Other*
Murder	11%	13%	48%	8%	6%	14%
Robbery with violence	7%	4%	69%	4%	8%	9%

* 'Other' includes those who said, 'no penalty', or 'being killed by a mob', or who misunderstood the question and replied 'arrest'.

It is also surprising that a small proportion of participants thought that their punishment might be a fine. Indeed, twice as many people who went on to commit robbery had thought at the time that their punishment might be a fine than those who had thought it might be the death penalty. This is a remarkable finding.

Perhaps most interesting is that 13% of those who went on to commit a murder did not think about the possible punishment before committing the crime. This probably speaks to their mental state prior to the offence, as is illustrated in s.2.2.1 (Figure 10), which shows that they were in a heightened emotional state.

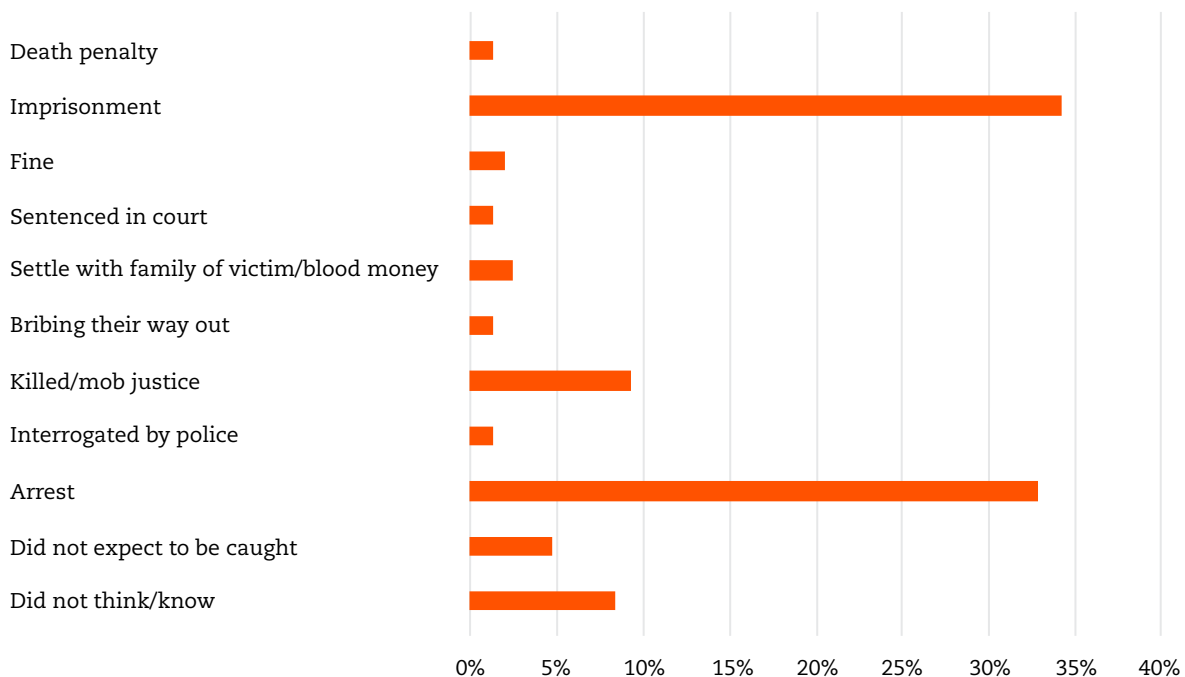
We asked participants explicitly if, when they were thinking of committing the crime, they knew that it was punishable by death [Q39]. The vast majority said they did not know: 95% of those convicted of robbery and 86% of those convicted of murder. Again, those who were contemplating murder were a little more aware, but still only relatively few were cognisant of the risk of being sentenced to death. Clearly, being oblivious to the risk of such a harsh punishment means that most could not have been deterred by the death penalty.

Participants were also asked an open-ended question about what they thought would happen if they were caught [Q40]. As Figure 16 shows, a third thought they would be arrested, but did not suggest what punishment might ensue, while a third said they would probably be imprisoned. Almost one in 10 thought they would be killed by 'a mob' or by someone seeking revenge, while 8% said they had not known what would happen to them or had not thought about it, and 5% did not expect to get caught for their offence. Only 1% thought they might get the death penalty (there were no significant differences between those convicted of murder and robbery).

These remarkable findings provide further evidence that almost all of those sentenced to death not only did not know that the death penalty was the typical punishment for their crime (as we saw from the data presented in Table 3, above), but did not imagine that they might be sentenced to death.

Again, this demonstrates clearly that only 1% of prisoners sentenced to death could potentially have been deterred by the death penalty. Evidently, participants did not meet the first criteria for being deterred: knowledge about the law and its implications.

Figure 16: What participants thought would happen if they were caught



Concerns about potential punishment

Understanding risks and being sufficiently worried about the consequence of taking those risks are separate, though related, cognitive processes. While our interviewees did not comprehend the risks they were exposing themselves to, we nonetheless sought information on whether knowledge about potential punishments might have influenced their decisions. Answers to only two questions [Q39b & Q39ca] suggested the potential for *some* participants to be deterred, but other responses strongly contradicted this.

Though the majority did not know before committing the offence that the punishment would probably be the death penalty, we asked if they would have behaved differently had they known this [Q39b]. Almost all (90%) of those convicted of robbery said they would have behaved differently and four in five (80%) of those convicted of murder said so. Hence, while lack of knowledge about the likely punishment for such crimes meant that those sentenced to death could not have been deterred, their response to this question suggests at least a potential for deterrence, though this question might produce misleading responses, as people may have answered in the affirmative to avoid appearing foolish after the fact.

Most (85%) participants did not know that there was a moratorium on executions, and we found no difference between the two offence categories in this regard. We asked the small proportion who knew if they would have acted differently if there had not been a moratorium in place; in other words,

might they have decided not to commit the crime if there had been a significant risk of execution, rather than just a death sentence [Q39ca]. Half (51%) of this small group said they would have, suggesting these few people may have been deterred from committing the crime if faced with a significant risk of execution. However, our other findings suggest that this population would not, in fact, have been deterred, as the other conditions for deterrence were not present.

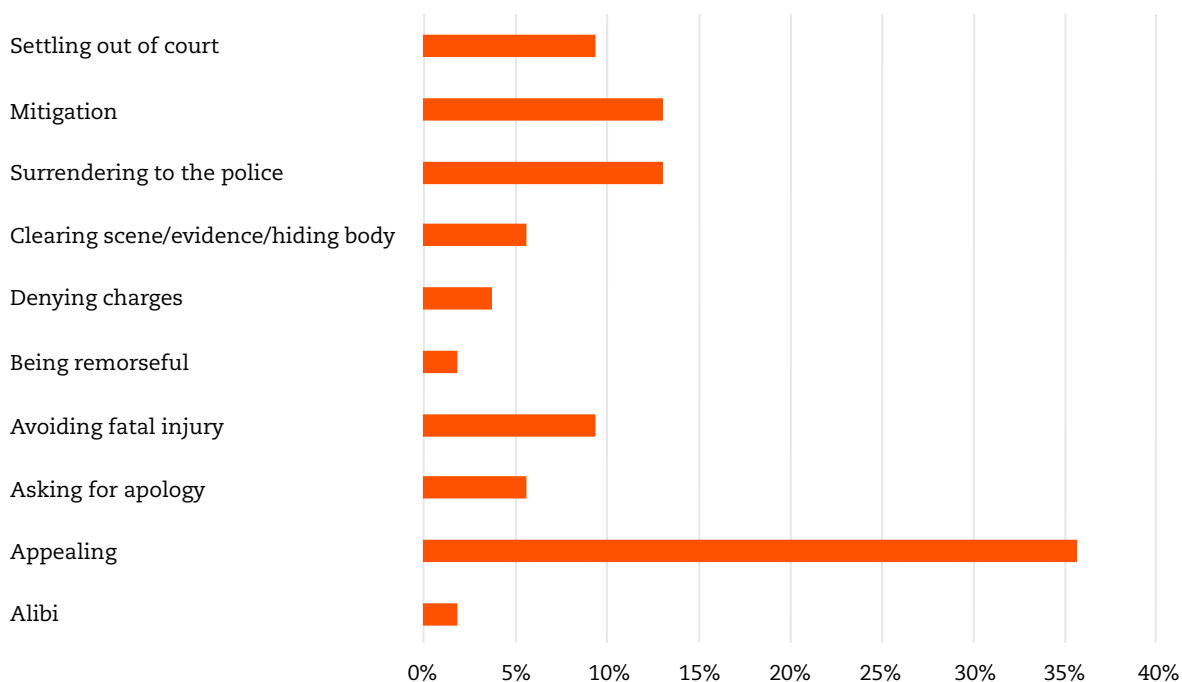
Of course, it is possible to ask people directly if knowledge about the law and the potential punishment had affected their behaviour – a perfect example of a question aimed at exploring deterrence – and we did, though they had all gone on to commit the offence for which they had been convicted and had clearly not been deterred [Q41]. However, less than a third (31%) said it had, with no significant differences between the two offence categories. They were asked if knowledge of the law and the punishment made them *hesitate*, but fewer than one in five (19%) said it had [Q42]. Here we saw a significant difference, with almost a quarter (23%) of those convicted of robbery hesitating because of knowledge of the likely punishment, compared with just 15% of those convicted of murder.⁶⁹ We further explored if knowledge of the law and the punishment made them *worry* about their decision to commit the crime [Q43]. Again, only just more than one in five (21%) admitted to worrying; a higher proportion of those convicted of robbery were worried (25%) than those convicted of murder (15%).⁷⁰

We further asked participants if knowledge of the law and the punishment affected the way they went about committing the crime, but only one in five said yes (24% of those convicted of robbery and 17% of those convicted of murder, a difference that was not statistically significant [Q44]). Less than a quarter (22%) took precautions to try to avoid receiving a more severe sentence; this small proportion is suggestive of low perceptions of risk [Q45]. Again, those convicted of robbery were significantly more likely to take precautions (26%) than those convicted of murder (17%).⁷¹ A small proportion (12%) thought of other ways to minimise the punishment (with no difference between the two offence categories) [Q46]. As Figure 17 shows, in the main, they considered cooperating with the police, presenting mitigating evidence, and appealing.

⁶⁹ The difference was statistically significant [X2 (1, N = 433) = 5.27, p = .02].

⁷⁰ The difference was statistically significant [X2 (1, N = 434) = 7.67, p = .005].

⁷¹ The difference was statistically significant [X2 (1, N = 439) = 5.56, p = .018].

Figure 17: Participants' efforts to minimise punishment

We sought to establish whether prisoners had, in fact, been worried about the potential punishment while deciding whether or not to commit an offence. Overall, more than half said they were worried about being caught and sent to prison, while only 11% worried 'a lot', and 43% were 'a little' worried. However, given the potential costs of the crimes that participants were planning to commit, it is quite remarkable that almost half (46%) were *not at all* worried [Q35].

We further asked them if they had been worried about being sentenced to death while deciding to commit the offence [Q36]. As Table 4 shows, far fewer people were worried about the death penalty: more than half said they had not been worried and fewer than one in 10 had been 'very worried'. (We found no significant difference in responses to these questions between people convicted of robbery and those convicted of murder).

Table 4: Concerns about imprisonment and the death penalty

	Not at all	A little	A lot
Worried about imprisonment	46%	43%	11%
Worried about being sentenced to death penalty	56%	35%	9%

Our data show that few prisoners who committed crimes that resulted in a sentence of death had – at the time of the offence – been worried about this potential outcome: they had not been worried, had not hesitated, and had not been influenced in their decisions about whether to commit the crime by concerns about a likely punishment.

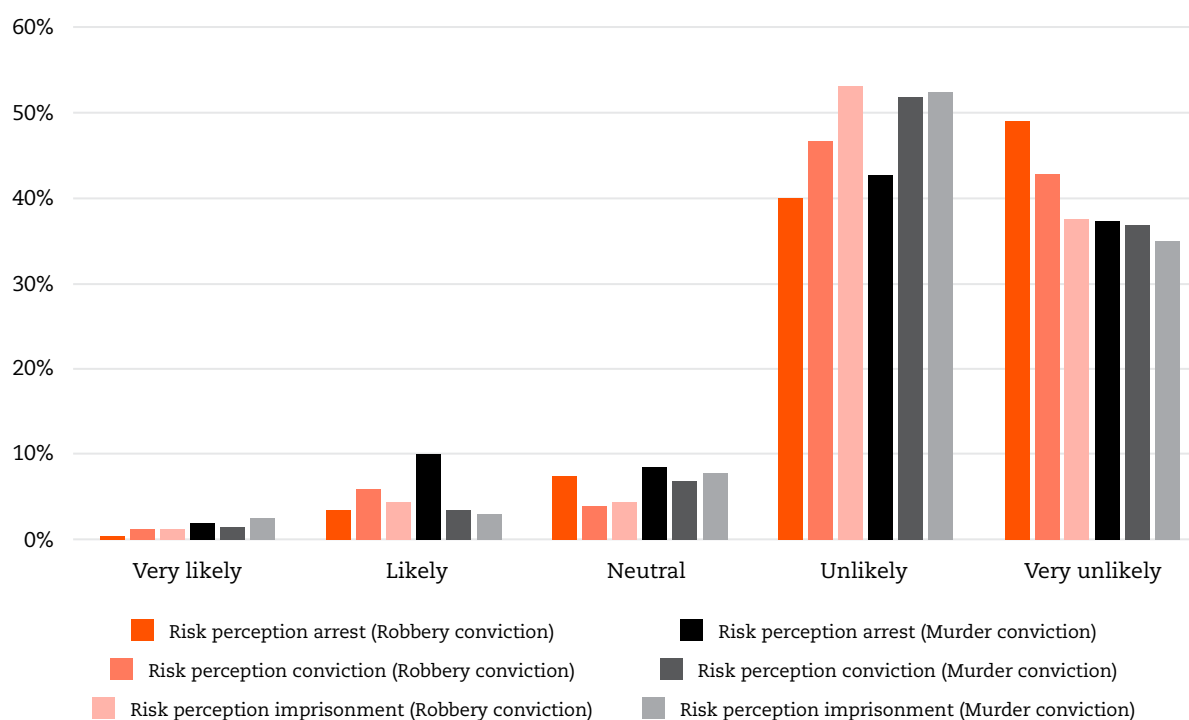
Perceptions of the risk of apprehension, conviction and punishment

Even if they had been knowledgeable about the law – and even if they had been worried about the consequences of their actions – knowledge of the law and fears about penalties may not be sufficient to deter someone who, nonetheless, thinks it unlikely that they *would be* arrested, convicted and punished. People can be worried about bad things happening to them, but still believe that it is unlikely that those events will transpire. In such cases, they may not be deterred.

When they were making the decision to commit the crime, the vast majority (85%) of participants thought it was ‘unlikely’ or ‘very unlikely’ they would be arrested, with only 1% thinking this was a ‘very likely’ outcome [Q47]. Similarly, 89% thought it was ‘unlikely’ or ‘very unlikely’ that they would be convicted, with only 1% thinking this was a ‘very likely’ outcome [Q48]. They were also confident that they would not be imprisoned, with 89% thinking this was ‘unlikely’ or ‘very unlikely’ and only 2% of the view that it would be ‘very likely’ [Q49].

As Figure 18 shows, though those convicted of murder were slightly more likely than those convicted of robbery to think arrest a ‘likely’ outcome, there was little difference among participants, with all having perceived there to be a low risk of arrest, conviction and imprisonment when making the decision to commit their offence.

Figure 18: Perception of the risks of arrest, conviction and imprisonment when deciding to commit offences (for those convicted of robbery and murder)

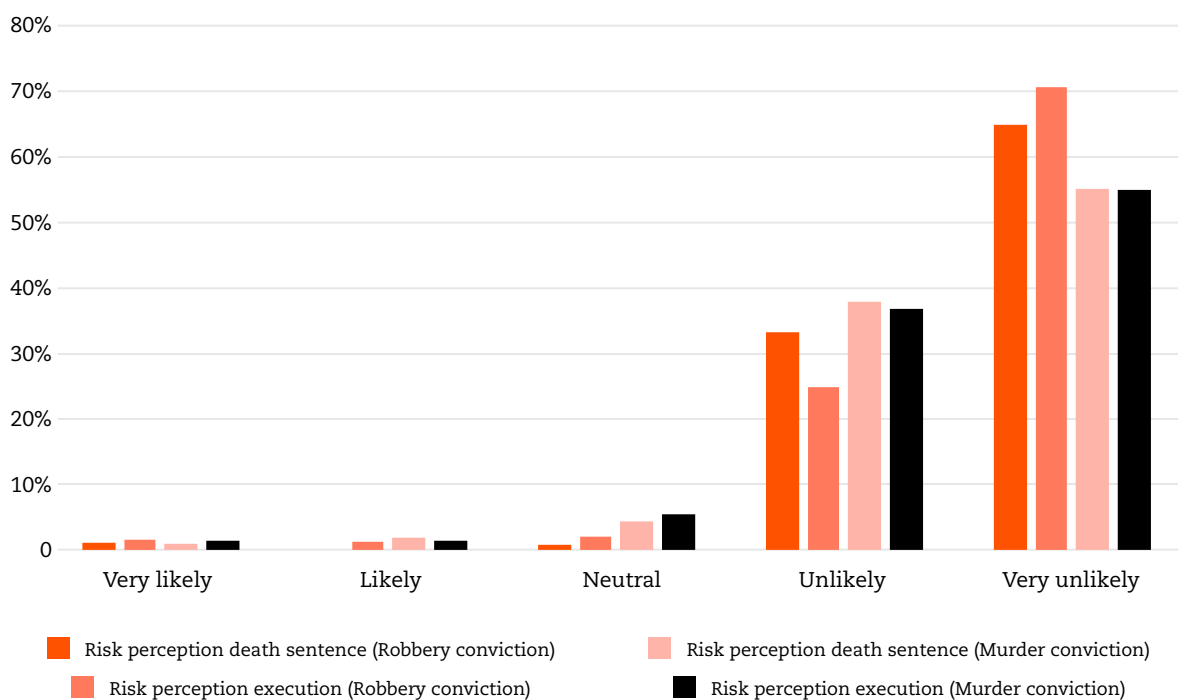


We asked similar questions about their perceptions of the risks of being sentenced to death and executed when they were deciding to commit the offence [Q50-51]. As Figure 19 shows, they perceived the risks to be very low. The majority of participants had thought it very unlikely that

they would be sentenced to death, with only 1% having thought it 'likely', with a further 1% having thought it was 'very likely'.

The data on perceptions of the risk of execution are very similar. While those convicted of murder perceived the risks to be slightly higher than those convicted of robbery, the overall pattern is clear: prisoners who have been sentenced to death in Kenya had not anticipated that this was a risk when deciding to commit the offence.

Figure 19: Perception of the risks of the death penalty and execution when planning offences (for those convicted of robbery and murder)



Though they had not perceived the risk of prison or a death sentence to be high when planning to commit the offence, we asked if they had been *worried* about these possible outcomes during the commission of the offence [Q52]. Only 6% had worried 'a lot', with just less than half (48%) admitting to being 'a little' worried (the differences between the two offence categories were not significant). Almost half were not at all worried.

Our findings are clear, the necessary preconditions for being deterred from committing capital crimes were not met in most of our cases. Our participants could not have been deterred as they had neither the knowledge nor concerns about risks of punishment. They did not know the law, they did not know they were at risk of being sentenced to death, and, more importantly, most were not particularly worried about this possible fate. Furthermore, as we recall from s.2.2.1 (Figure 10), few were in a calm and rational state of mind when they thought about committing their capital offence. While most of those who committed robberies were motivated by financial gains – and could, therefore, be said to have had a rational reason for criminal behaviour – their understanding of the likely, or even possible, punishments was so low that they cannot have made a sensible risk-reward calculus. Those who committed murder had motivations that do not speak to the rationale of deterrence theory.

Thus far, we have painted a clear picture of the people sentenced to death in Kenya. We have described their socio-economic and demographic profile, and explored their health and dependencies at the time they decided to commit crimes. These are not the wealthy and the powerful, with many opportunities for progression, but poor, uneducated people with responsibilities – and some with histories of alcohol and drug use. Several were influenced by peers in deciding to commit offences, and while many of those who committed robbery were motivated by financial gain, many of those who committed murder were acting on emotional impulses rather than rational considerations. They were largely ignorant about the law and the potential for punishment. Besides, they seemed not unduly perturbed by the risks of harsh punishments.

Research consistently demonstrates that those who are sentenced to death are the poor, the uneducated, the vulnerable, and those with mental health problems – and it is these people in particular who need equality of arms in defending themselves against the powerful state.⁷² This study of Kenyans sentenced to death shows that they too are most in need of effective safeguards to protect them in the criminal process leading to their incarceration. We turn now to consider to what extent participants were given appropriate due-process protections following their arrest.

2.3 Experiences of the justice system and incarceration

This final section considers the experiences of the prisoners we interviewed following arrest. It looks at the extent to which the detaining and prosecuting authorities provided prisoners with their due-process rights before going on to explore their experiences of imprisonment and the impact it has had on their lives.

2.3.1 Access to pre-trial and trial procedural safeguards

When arrested and detained by the police, suspects have certain rights to assistance and support. Under s.49 of the Constitution of Kenya, they have the right to: be informed in a language they understand of the reason for arrest; remain silent; communicate with an advocate; not to be compelled to confess; and be brought before a court as soon as reasonably possible. Further, s.77 of the constitution provides rights to the presumption of innocence, adequate legal assistance, assistance of an interpreter if the defendant does not understand the language of the court, a public trial by jury, appeal, and to seek pardon or commutation.

Recent research commissioned by The Death Penalty Project, in partnership with the Kenya National Commission on Human Rights, revealed considerable concerns about the lack of due process protections for suspects and defendants in Kenya, in relation to capital offences.⁷³ Interviews with ‘elite’ opinion formers who have jurisdiction over part of the criminal process, or who are considered to be influential in shaping or responding to public opinion,⁷⁴ found low levels of trust in the Kenyan criminal justice system to offer adequate safeguards for suspects and defendants. They thought that wrongful convictions happened often or even very often, and believed that suspects were never or only rarely treated fairly by the police.

⁷² Hood R and Hoyle C, *The Death Penalty: A Worldwide Perspective* 5th edn (Oxford University Press 2015).

⁷³ Hoyle, C and Harry L, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice: Part Two, Overwhelming Support for Abolition Among Opinion Formers*, London: The Death Penalty Project.

⁷⁴ These include those from social justice centres, civil society organisations, advocates, senior government officials, representatives of the media, elders, religious leaders, and magistrates and prosecutors.

Rights upon arrest

While that report was based on the perceptions and experiences of opinion leaders, here we present data based on the experiences of those subject to the criminal process, those with authority to speak directly to these concerns. We asked participants if they had been given their rights when they were arrested [Q53a-h]. As Table 5 shows, none of the rights that should uniformly be provided to all suspects and defendants had been provided to all participants.

Table 5: Rights given to participants at the time of arrest

Rights at the time of arrest	Given rights	Not given rights	n.
Right to be informed promptly, in a language you understand, of the reason for arrest, the right to remain silent, and the consequences of not remaining silent	57%	43%	665
Right to remain silent	51%	49%	667
Right to communicate with a lawyer	47%	53%	656
Right not to be compelled to make any confession or admission that could be used in evidence against you	50%	50%	668
Right to be held separately from persons who are serving a sentence	68%	32%	615
Right to be brought before a court as soon as possible, usually not later than 24 hours after being arrested	49%	51%	667
Right at the first court appearance to be charged or informed of the reason for the detention continuing, or to be released	76%	24%	665
Right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released*	67%	33%	651

*In Kenya, bail/bond is a right irrespective of the offence, even for capital offences. However, in such cases, the amount is set at a high level and there are strict conditions attached.

While more than three-quarters had their rights respected regarding correct procedures at the first court appearance, fewer than half of our participants were given their right to be brought before a court as soon as possible, and only half or just more than half were told they had the right to remain silent and the right not to be compelled to make any confession or admission that could be used in evidence against them.

These, and other rights shown in Table 5, are fundamental to due process, and in particular to the protection against wrongful conviction or a flawed sentencing decision. That less than half (47%) were given the right to communicate with a lawyer is undoubtedly associated with their lack of other essential rights at the time of arrest.

Rights under interrogation

If these rights are not respected, suspects can be particularly vulnerable during police interrogation, when they may be most likely to make incriminating statements and offer inculpatory evidence,

especially under conditions of corruption and abuse by agents of the criminal justice system. Table 6 provides evidence of such [Q54a-n].

Table 6: Police treatment of participants during interrogation

Abuse and breach of rights during interrogation	Yes	No	n.
BRIBERY			
I/My family was asked to pay a bribe to secure my release	26%	74%	661
I/My family was asked to pay a bribe to secure a reduced charge/sentence	17%	83%	662
PSYCHOLOGICAL ABUSE			
I was called names, yelled at and/or insulted by law-enforcement officers	40%	60%	660
I was threatened by law-enforcement officers	46%	54%	655
I was subjected to psychological torture	47%	53%	662
PHYSICAL ABUSE AND DEPRIVATION			
I was denied water and/or food	21%	79%	660
I was denied medical attention	23%	77%	627
I was restrained by police in handcuffs or other physical restraints	61%	39%	657
I was physically hurt by law-enforcement officials	37%	63%	659
I was denied rest or adequate breaks during interrogation	35%	65%	642
I was not allowed to see my family	28%	72%	660
DENIAL OF LEGAL RIGHTS			
I was denied legal assistance	36%	64%	659
I was denied my right to remain silent	37%	63%	655

The findings presented in Table 6 are disquieting. The research on opinion formers in Kenya, discussed above, revealed concerns among elites about denial of rights and corruption and abuse in the criminal justice system, with many interviewees describing the system as ‘plagued by bribery and corruption’, a finding that chimes with research conducted with death row prisoners in 2012.⁷⁵ Some spoke about the need to reform policing to eliminate systematic corruption and abuse of human rights, including extrajudicial killings and enforced disappearances. This is not a new phenomenon: a report published by the Kenya National Commission on Human Rights in 2007 reported that at least 23 judges of the High Court and Court of Appeal had been suspended in 2003 pending investigations into allegations of corruption and other malpractice.⁷⁶ Again, the voices of those subjected to that very criminal process provide powerful evidence in support of those findings.

More than a quarter of participants had experienced attempts at bribery by law-enforcement officers. Between 40% and 47% had experienced psychological abuse, including verbal abuse (40%), threats (46%) and psychological torture (47%). Denial of sustenance (21%) and adequate rest (35%), as well as being interrogated while physically restrained (61%) during interrogation, inevitably makes interrogation far more coercive, and increases the risks of false confessions and confused or unreliable testimony. Furthermore, more than a third of participants experienced physical abuse at this important

⁷⁵ Kenya National Commission on Human Rights, *The Effects of Death Penalty in Kenya, Results of the Survey (Second Phase)*, December 2012, p12 available at [www.knchr.org/Portals/0/Penal%20Reforms/KNCHR%20Death%20penalty%20survey%20report%20%20\(Phase%202\).pdf?ver=2018-06-08-154200-080](http://www.knchr.org/Portals/0/Penal%20Reforms/KNCHR%20Death%20penalty%20survey%20report%20%20(Phase%202).pdf?ver=2018-06-08-154200-080) – accessed 3 May 2022.

⁷⁶ Kenya National Commission on Human Rights, *Position Paper No.2 on the Abolition of the Death Penalty*, 2007, p11.

stage of the criminal process and almost a quarter were denied medical attention, which could, in some cases, have been related to the deprivation and abuse. The mental stress of such experiences may have been relieved somewhat by access to support from family members, but more than a quarter were not allowed to see their family. Finally, as with experiences at the point of arrest, more than a third were denied legal assistance and the right to remain silent.

Rights to legal assistance

Our participants were asked if they had legal representation throughout the criminal process [Q55]. As Table 7 shows, at no stage of the criminal process were all participants legally represented, and almost two-thirds had no lawyer when they were arrested and when they were interrogated by the police. Furthermore, almost half had no lawyer at appeal and, though it is much less surprising, almost two-thirds were not represented at their clemency application. However, what is most surprising is that almost a quarter (22%) claimed not to have had legal representation at trial.⁷⁷

Table 7: Legal representation of participants throughout criminal process

Stage	No lawyer (total)	No lawyer (robbery)	No lawyer (murder)	State-appointed lawyer	Private lawyer	n.
At arrest	61%	67%	55%	31%	7%	357
During police interrogation	62%	64%	59%	31%	7%	295
At trial	22%	34%	6%	63%	15%	506
At appeal	49%	50%	48%	34%	17%	357
For clemency application	64%	66%	61%	29%	7%	229

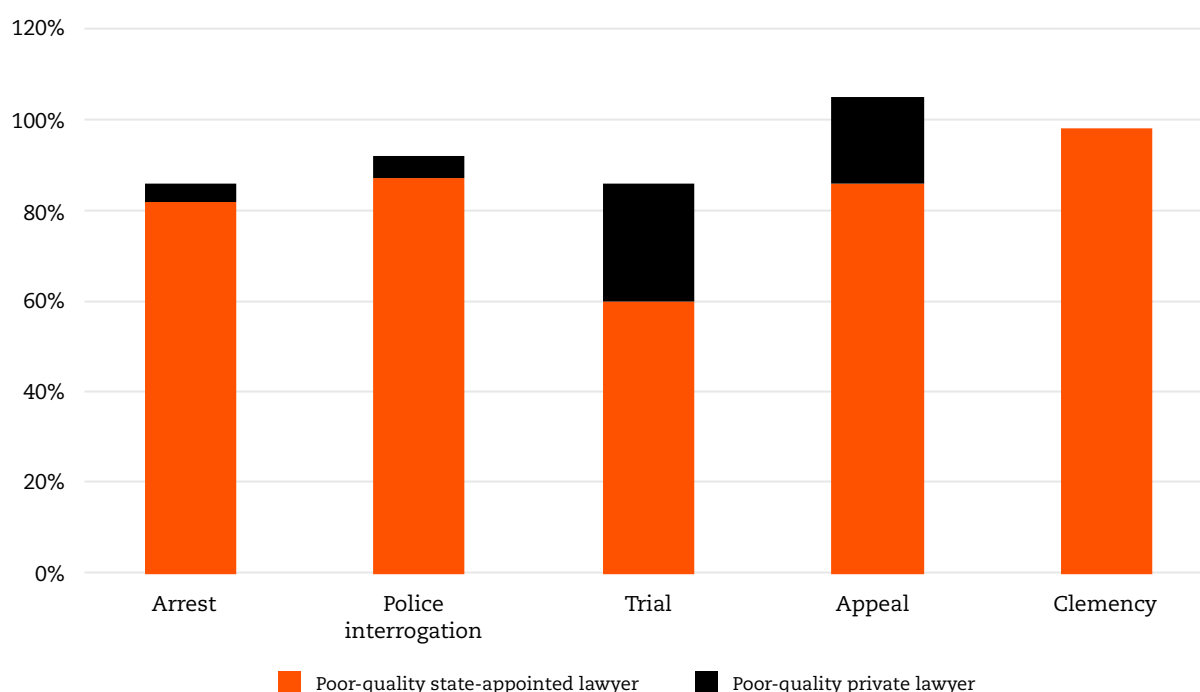
It is important to note that we believe these figures to be an underestimation of the problem. In the final column, we have included the number of participants who gave responses to this question as, for some stages, fewer than half provided information. Responses to other questions suggest that, in many cases, a lack of recorded data indicates that others too had no legal representation. For this reason, we suspect that our figures overestimate the proportion who had legal representation. Furthermore, legal aid by non-governmental organisations such as FIDA and Kituo cha Sheria tends to be limited to the cities – and, of course, many of our participants were from rural areas.

In Kenya, until 2016, while those charged with murder were entitled to state-funded legal representation, this was not a right for those charged with robbery with violence. Table 7 provides the proportions of each group (those who were convicted of robbery and those convicted of murder) and shows that a slightly higher proportion of the former had no access to legal representation at the various stages. It is most clear at trial, where only 6% of those convicted of murder were not legally represented, whereas more than a third of those convicted of robbery had no lawyer. In 2016, the Legal Aid Act called for state-funded legal representation for all who could not afford a lawyer. While this has not yet been fully implemented because of budget constraints, the focus has been to provide this to all those charged with capital offences.

⁷⁷ A survey in 2012 found that the majority of death row prisoners claimed not to have had legal representation; see Kenya National Commission on Human Rights, *The Effects of Death Penalty in Kenya, Results of the Survey*, p 11.

Given their economic background, as described above in s.2.1.2, it was somewhat unexpected to find that a small proportion of participants had secured the services of a private lawyer at the different stages of the criminal process, especially at trial and appeal. We asked participants for their views on the quality of legal representation and found that the majority thought that their state-appointed lawyer was ‘poor’⁷⁸, while most of those who had employed private lawyers were pleased with their performance, as Figure 20 shows. Hence, even where there is the least difference – legal representation at trial – we see that only a quarter of the 76 participants who had a private lawyer judged their performance to be ‘poor’, compared with 60% of those with a state-appointed lawyer, and at arrest and at police interrogation, only one participant felt that their private lawyer was poor, compared with 82% and 87% of those who were represented by a state-appointed lawyer.

Figure 20: Proportion of participants ranking their lawyers’ quality as ‘poor’ (by type of lawyer)



It is interesting that none of the lawyers who represented participants at clemency applications were thought to have performed *well*; all the state-appointed lawyers were rated ‘poor’ and the private lawyers rated only ‘OK’. Similarly, at police interrogation, only private lawyers were rated ‘good’; state-appointed lawyers were mostly rated ‘poor’, with just a few deemed to be ‘OK’.

To explore the effectiveness of legal representation, we asked if participants were given sufficient time to talk to their lawyer throughout the criminal process, and found that 44% were not [Q56]. It is crucial that those facing the death penalty should be able to discuss their case with their legal representative in private, away from the ears of law-enforcement officers in particular. It is deeply concerning, therefore, that almost half (49%) said they had not had that opportunity [Q57].

⁷⁸ A finding that reflected the views of prisoners in 2012, *ibid.* p11.

Experiences at trial

Having explored participants' experiences at arrest and while in police detention, we asked for their experiences at trial [Q60]. A small minority claimed to have experienced abuse from court officials (7%) and even police officers (16%). A significant minority (43%) said they did not understand what was happening at trial. They would have benefited from legal assistance, and some may have benefited from an interpreter. However, about a quarter of all participants were denied legal assistance and just more than a quarter were denied access to an interpreter. Furthermore, more than a third (38%) claimed that the court did not hear mitigating evidence about them or their case (see Table 8).

Table 8: Experiences at trial

	Yes	No	n.
I didn't understand what was happening at trial	43%	57%	664
The court did not hear mitigating evidence about me or my crime	38%	62%	665
I was called names, yelled at and/or insulted by court officials	8%	92%	668
I was threatened by court officials	7%	93%	670
I was threatened by police officers	16%	84%	670
I was physically hurt by court officials	7%	93%	670
I was denied legal assistance	24%	76%	663
I was denied an interpreter at trial	27%	73%	490

Given that English is the language of law and the courts, not having English as a first language might disadvantage many of those arrested for capital crimes. As we discussed in s.2.1, above, though around 5% of the population uses English as their first language, none of the prisoners we interviewed did. English is the main language of instruction in schools, and as the literacy level in Kenya is about 78%, we can conclude that more than three-quarters of the population have some mastery of English. However, people vary widely in their proficiency. While those in the cities, in relatively affluent households, will be proficient, others in small, rural communities will find few opportunities to practise English outside of classrooms.⁷⁹ Furthermore, our participants were not, by and large, well educated, and their proficiency in English is likely to be lower than average. Many participants may, therefore, have struggled to understand fully the legal proceedings against them and to engage effectively with legal counsel if those proceedings were in English or Swahili.

Our interviews demonstrate clearly that due process protections were not available to all our participants all the time. It goes without saying that some may be factually innocent; others may have been sentenced to death inappropriately. We turn now, in our final section, to explore how they fared in prison.

2.3.2 Experiences of prison

Over the past half-century, sociologists in the US, UK and Europe have identified the various 'pains of imprisonment', using this analytical framework to show how prisoners are affected by deprivations of

⁷⁹ Michieka M and Ondari H, English in Kenya: The State of the Art, in Michieka M & Elhindi Y (eds), *The Changing Roles of English in Eastern Africa* (Common Ground Publishing 2015), pp15-33.

liberty, goods and services, heterosexual relationships, autonomy, and security.⁸⁰ Research in the UK has built on this work, identifying further ‘pains’, such as ‘uncertainty and indeterminacy, psychological assessment, and government’, particularly for those serving long-term or life sentences.⁸¹ Indeed, research on long-term prisoners suggests that they face existential challenges to their identity.⁸² The pains of long-term imprisonment include having to follow others’ rules, missing people on the outside, not being able to completely trust people in prison, and longing for more privacy, among other things.⁸³ Long-term prisoners are lonely, experience suicidal ideation, and feel that life is being wasted.⁸⁴

It is important to note that 55 of the prisoners in our sample were under the age of 30, and many more will have been in prison during their early twenties. Research on young people serving life sentences in the UK suggests that, while long-term imprisonment is unsettling for all, it is uniquely ‘cataclysmic’ for young people. While the most painful aspects of long-term imprisonment are relational, with those pains being similarly experienced across all age groups, the temporal pains of imprisonment were more acute for young people. The sense of having one’s youth stolen, of being deprived of those life experiences and increasing autonomy that typically comes with development, was overwhelming for young people.⁸⁵

Those on death row are not only ‘long-term’ prisoners in jurisdictions where death sentences are imposed but not executed, but suffer additional trauma associated with the perpetual possibility of execution. Human rights norms have developed on the issue of ‘death row phenomenon’, or ‘syndrome’, since the landmark case of *Soering v UK*⁸⁶ was decided by the European Court of Human Rights in 1989. That court held that it would be a breach of Article 3 of the European Convention on Human Rights for the UK to extradite the prisoner, who would face the death penalty in the US state of Virginia, because his inevitably long wait on death row would amount to inhuman and degrading treatment and punishment. This speaks to the *additional* suffering occasioned by a long period on death row awaiting execution under conditions that could be described as torture.⁸⁷ The jurisprudence is clear: the longer the time on death row, the greater the harm to prisoners. In Kenya, those whose death sentences are not commuted can spend decades on death row.

Prior studies, conducted more than a decade ago, found Kenya’s prisons to be overcrowded, including for those serving death and life sentences. In 2008, the UN Committee against Torture raised concerns about the dire conditions on death row, including overcrowding, lack of appropriate health services, and high levels of violence in the prisons.⁸⁸ A report by Penal Reform International claimed that:

“The conditions make it difficult to provide basic needs to death row and life sentenced prisoners, including adequate living conditions and access to medical and psychiatric care. There is a lack of

⁸⁰ Sykes G, *Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press 1958).

⁸¹ Crewe B, Depth, Weight, Tightness: Revisiting the Pains of Imprisonment, *Punishment & Society*, 13(5) 2011, pp509–529.

⁸² Cohen S and Taylor L, *Escape Attempts: The Theory and Practice of Resistance in Everyday Life*, (Routledge 2003).

⁸³ Wright S, Crewe B and Hulley S, Suppression, Denial, Sublimation: Early Adaptations to Long-term Imprisonment, *Theoretical Criminology*, 21(2) 2017, pp225–246.

⁸⁴ Flanagan T J, The Pains of Long-term Imprisonment: A Comparison of British and American Perspectives, *The British Journal of Criminology*, 20(2) 1980, pp148–156.

⁸⁵ Crewe B, Hulley S and Wright S, *Life Imprisonment from Young Adulthood: Adaptation, Identity and Time* (Palgrave MacMillan 2020).

⁸⁶ *Soering v United Kingdom and Germany*, 161 Eur Ct HR (Ser A) 34 (1989).

⁸⁷ In 1993, in the case of *Pratt & Morgan v AG of Jamaica*, (1995), the Privy Council ruled that a period of more than five years’ delay in carrying out a death sentence constituted cruel and inhuman punishment, and therefore violated Jamaica’s constitution.

⁸⁸ UN Committee against Torture: Kenya, 19 January 2009, CAT/C/KEN/CO/1, para. 15.

appropriate resources allocated to the Kenya Prison Service, including the shortage of prison staff and a lack of infrastructure within the prison system to deal with the growing prison population.”⁸⁹

Given that the Constitution of Kenya guarantees that the state will provide for the humane treatment of those in prison, it is important to consider how prisoners today experience conditions of incarceration.

Deteriorating health of prisoners

Two-thirds of participants said their physical health had suffered since they had been incarcerated [Q61]. Those still under the sentence of death were a little more likely to say that they had suffered poor health (67%) compared with those whose death sentences had been commuted and who were now serving a life sentence (63%). Some time away from death row may have improved their health, though the difference was not statistically significant. However, we did find a significant difference between men and women, with men being more likely to report decreased physical health following incarceration (67%) than women (45%).⁹⁰

While just less than two-thirds (63%) of the participants said their mental health had suffered since going to prison, this was a little higher for death sentenced prisoners (65%) than for those now serving a life sentence (57%) [Q62], though, again, the difference was not statistically significant. There were no differences between men and women reporting on their mental health.

Deteriorating relationships

Two-thirds of participants said their relationships with their families had suffered since being sent to prison [Q63], though we found no differences between our two differently sentenced populations, nor between men and women. We also asked prisoners if their relationships with friends had deteriorated [Q64] and more than four in five (81%) answered in the affirmative; this was higher for those still on death row (84%) than for those now serving life sentences (73%).⁹¹ It was also higher for men (83%) than for women (53%), suggesting men's relationships with friends will suffer more from long-term or permanent incarceration.⁹²

In recent years, criminologists have turned their attention to the pains of imprisonment experienced by those beyond the prison gate – the families and friends of the incarcerated. When people are sentenced to death and their relationships with family members are strained, it causes inevitable harms to families. A study by the Kenya National Commission on Human Rights found that families felt neglected, and those who had been financially dependent on the prisoner were particularly anxious, and experienced extreme poverty, prejudice and stigmatisation, with death sentences often leading to direct and immediate breakdown of the family unit. Families also experienced poor mental and physical health following a death sentence.⁹³

⁸⁹ Penal Reform International, *The Abolition of the Death Penalty and its Alternative Sanction in East Africa: Kenya and Uganda*, p17.

⁹⁰ This difference was statistically significant: $\chi^2 (1, N = 670) = 6.617, p = .010$.

⁹¹ This difference was statistically significant: $\chi^2 (1, N = 662) = 9.99, p = .0016$.

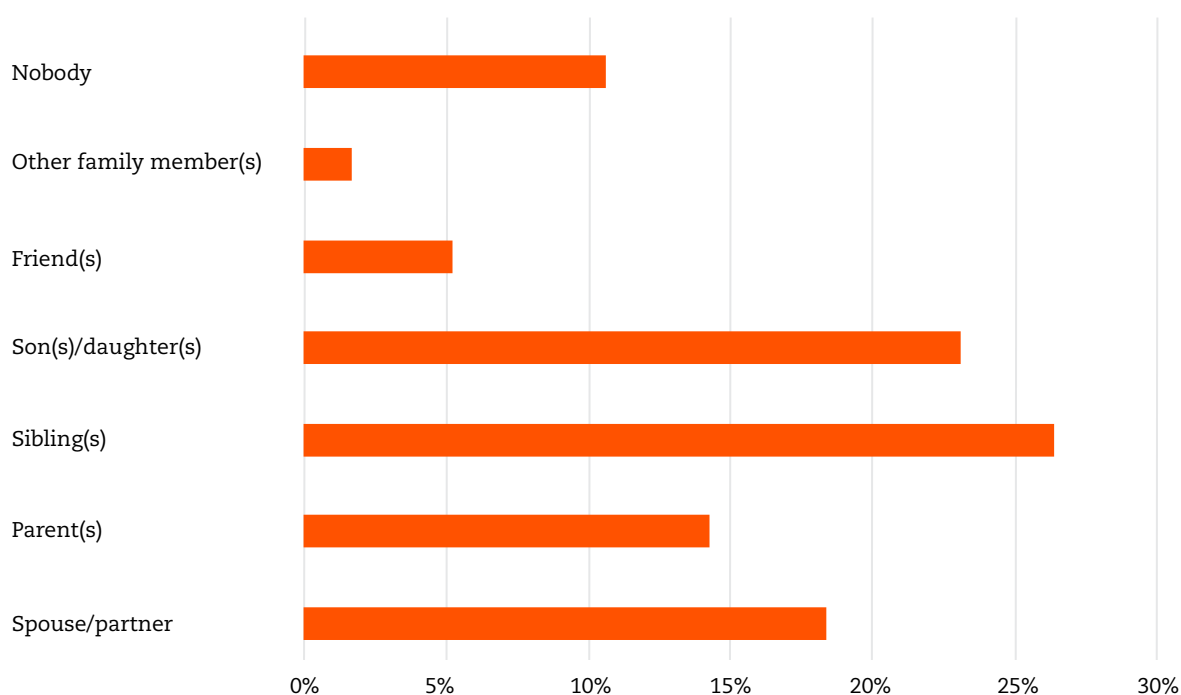
⁹² This difference was statistically significant: $\chi^2 (1, N = 666) = 20.131, p < .001$.

⁹³ Kenya National Commission on Human Rights, *The Effects of Death Penalty in Kenya, Results of the Survey*, pp6-8.

The vast majority (73%) of participants reported that their families were coping ‘badly’ or ‘very badly’; this was the case for more than three-quarters (76%) of our death sentenced participants, as opposed to less than two-thirds (63%) of those whose sentences had been commuted to life [Q65]. Furthermore, the men in our sample were more likely to say that their families were not coping well, when compared with the women.⁹⁴

We sought information on who they received visits from, as contact from family and friends is a lifeline for most prisoners, but particularly for those who are sentenced to death or who will probably spend the rest of their lives in prison. As Figure 21 shows, most visits are from family members, rather than friends, particularly from siblings, children and partners, though more than one in 10 had no visitors (there were almost no differences in this regard between those on death row and those now serving life sentences).

Figure 21: Prisoners’ visitors



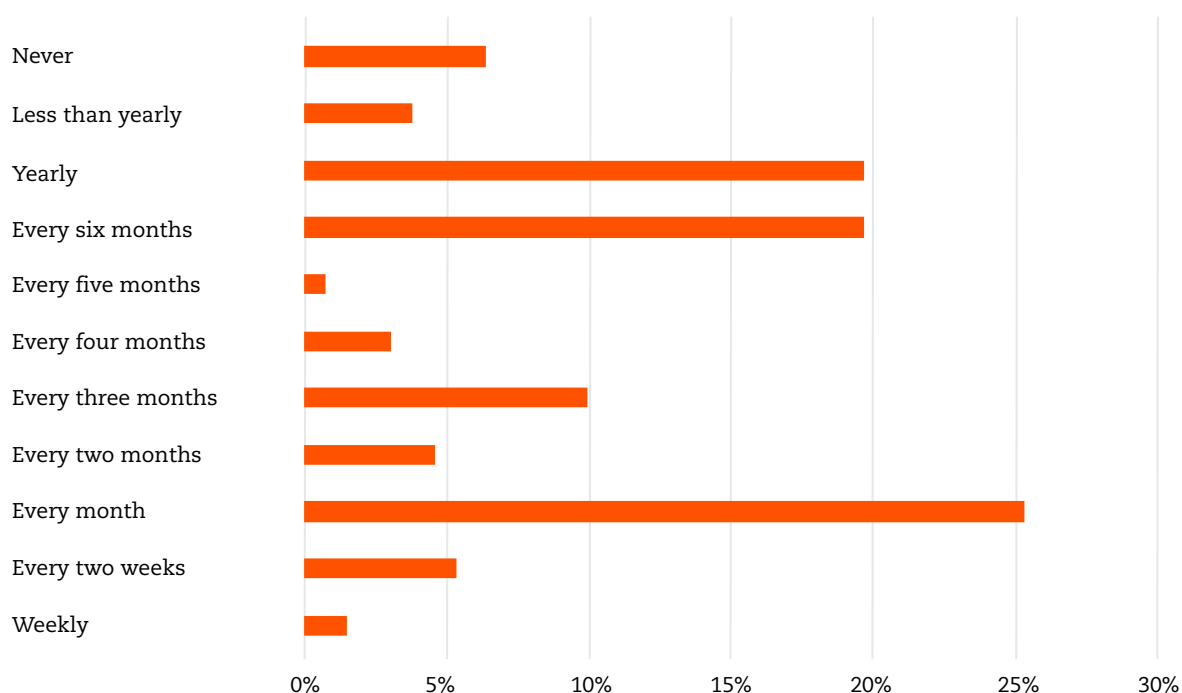
Though the physical conditions of incarceration for those on death row and those serving life in Kenya have been described as inadequate, these prisoners enjoy regular visitation rights from their families, unlike in some jurisdictions that retain the death penalty. However, the survey conducted by the Kenya National Commission on Human Rights, in 2012, found that some families abandon their relatives once they are sentenced to death, with most prisoners complaining that they are never visited as the families regard them as already ‘dead’, with wives also abandoning some, taking their children away from the area.⁹⁵

⁹⁴ This finding was statistically significant: Mann-Whitney $U = 7412.0$, $n_1 = 613$, $n_2 = 33$, $p = .006$ two-tailed

⁹⁵ Kenya National Commission on Human Rights, *The Effects of Death Penalty in Kenya, Results of the Survey*, p6.

We asked participants how often they received visitors, and while a quarter reported being visited by their loved ones on a monthly basis, 40% only received visitors every six months to one year, and a small proportion (6%) were never visited (Figure 22),⁹⁶ with some attributing this to the distance between the prison and the homes of potential visitors.

Figure 22: Frequency of prison visitations



Prison life can be particularly demeaning if physical and emotional needs are not attended to. However, just more than a third (35%) of participants claimed they did not have sufficient nourishing food in prison [Q67] and, of deeper concern, a similar proportion (31%) said they did not have adequate access to medical care [Q68]. Here we found a difference between men and women, with almost all women reporting adequate access to medical care.⁹⁷ While this speaks to the conditions of detention and available facilities, it may partly reflect women's greater assertiveness in seeking medical care.

Attention to psychological welfare

Over the past decade, there have been changes within the Kenya Prison Service towards far greater attempts to reform and rehabilitate prisoners, including those on death row.⁹⁸ This follows the introduction of an 'open door policy', which allows access to death row from those outside of the prison estate, who may, for example, assist with education and rehabilitation programmes, and which facilitates greater access to amenities and to prisoners in the general prison population. Hence, opportunities for rehabilitation of those sentenced to death are increasingly available, on a case-

⁹⁶ Some of our participants talked about when the last visit had been, rather than the frequency of the visits, and as this may have been impacted by the Covid-19 pandemic restrictions, we excluded these data from analysis. Furthermore, a sizeable portion of respondents did not give a specific timeframe, but rather responded that they had been visited 'frequently', 'occasionally', 'less often', or 'not often'. We did not include these responses in our analysis, as it was not possible to quantify what these definitions meant to the different participants.

⁹⁷ This difference is statistically significant: Fisher's Exact Test, p-value ($p < .001$).

⁹⁸ Penal Reform International, *The Abolition of the Death Penalty and its Alternative Sanction in East Africa: Kenya and Uganda*, p18.

by-case basis, in facilities where the officer in charge deems it to be reasonable and manageable, given limited resources. However, though there is an appetite for such opportunities by prisoners, availability can be modest, given the continued severe overcrowding across the prison estate.

Access to work, to ‘hobbies’ and to education are vital for prisoners’ mental health, for giving them a sense of purpose, self-respect, and motivation in their daily lives, and, in Kenya, this has the potential to provide better psychological and emotional conditions for prisoners than elsewhere. However, a study by the Kenya National Commission on Human Rights, published in 2012, found that many prisoners on death row were not given the opportunity to take advantage of recreational activities and, in some institutions, prisoners were given only limited time to interact with other prisoners serving lesser sentences. Additionally, they were exposed to high levels of security measures and confinement, leaving them feeling isolated.⁹⁹ Again, conditions are better today than they were in the past, and opportunities are greater, but limited resources militate against access for all prisoners.

Clearly, there have been – and there remain – differences in access to such resources across prisons in Kenya. But some retentionist jurisdictions do not make such efforts, seeing death row prisoners as entirely disposable. For example, more than half of all US death row prisoners are, or have recently been, incarcerated in prolonged conditions of solitary confinement, in isolation for between 22 and just less than 24 hours a day without meaningful human contact, and subject to greater deprivation and harsher conditions than other prisoners. Such conditions of confinement are in clear violation of the UN General Assembly ‘Mandela Rules’¹⁰⁰ and inevitably impact on prisoners’ mental health. Notwithstanding variability in experiences, prisoners in Kenya are more likely to experience more humane conditions of incarceration in terms of access to activities and rehabilitation and, importantly, association with other prisoners.

As Table 9 shows, almost half of the prisoners still on death row that we interviewed were working or had worked, compared with three-quarters of those now serving a life sentence. Here our data suggests that women (73%) are more likely to work in prison than men (55%).¹⁰¹ The aim is to learn skills that will assist them should they have their death sentence commuted and be released back into the community. Hence, while the prison service might benefit from their manual, skilled and unskilled labour, for which prisoners are typically paid very little, it is also an aspiration that prisoners will be able to seek employment, or even be self-employed, if released.

Under the colonial regime, a ‘hobbies’ scheme was introduced into the prison service. This allows time and opportunities for prisoners to practise their craft at other times of the day or week, so that they can make goods to send to families and further hone their skills. Just more than half of those sentenced to death were able to take advantage of the ‘hobbies’ scheme, compared with almost three-quarters of those whose sentences had been commuted to life, clearly related to the differences in opportunities to work.

Rehabilitation is of significant importance to all prisoners, but often denied to those sentenced to death in other jurisdictions. In Kenya, a significant portion of both groups claimed that they had

⁹⁹ Kenya National Commission on Human Rights, *The Effects of Death Penalty in Kenya, Results of the Survey*, p5.

¹⁰⁰ Pontier M, Cruel But Not Unusual: The Automatic Use of Indefinite Solitary Confinement on Death Row, *Texas Journal on Civil Liberties and Civil Rights*, 26(1) 2020.

¹⁰¹ The relationship was statistically significant, though only just: $\chi^2 (1, N = 663) = 3.963, p = .047$.

received rehabilitation of some sort (83% of those sentenced to death and 87% of those serving life). This is much higher than we had anticipated, and most certainly reflects changes to the state's attitude towards death sentenced prisoners over the past 10-15 years, a time that has also seen mass commutations of death sentences. Similarly, access to education has been improved quite dramatically since the introduction of the 'open door policy' and we found that almost three-quarters of both groups of prisoners had received or were receiving education. Similarly, the vast majority (86% and 83%) were able to take exercise.¹⁰²

Table 9: Proportion of prisoners taking advantage of work or recreation

	Death row prisoners	Life sentenced prisoners
Work	48%	75%
Hobbies	54%	74%
Rehabilitation	83%	87%
Education	73%	74%
Exercise	86%	83%

Prison life can be made more or less tolerable by prisoners' relationships with each other and with prison officers. Contemporary models of prison management encourage the development by staff of positive relationships with prisoners, while being mindful of the prisoners' personal circumstances – including the risk posed to prisoners and staff – an approach sometimes referred to as 'dynamic security'.¹⁰³ This not only helps prisoners, but also prison staff. Prison officers' mental health can suffer greatly from the coercive conditions of their work environments and from vicarious trauma caused by being responsible for the day-to-day lives of those exposed to cruel and inhuman punishments, compounding the anxiety and depression to which prison officers are already especially vulnerable.¹⁰⁴

Among our total sample, only 2% reported 'bad' relationships with prison officers, whereas more than three-quarters (79%) said they were 'excellent' or 'good' [Q75]. While those serving life sentences were more likely to report 'excellent' relationships (42%, as opposed to 24% of those still on death row), there was almost no difference in those reporting bad relationships (3% of those serving life as opposed to 2% of those with death sentences), and none of our participants described their relationships with prison officers as 'very bad'. Furthermore, there were no differences in reported relationships with prison officers between the women and men in our sample. These are encouraging findings, and suggest a move away from the poor prisoner-staff relationships, characterised by abuse and neglect, that were common 15 or more years ago.

Overall, participants' relationships with other prisoners were reported to be 'excellent' (26%) or 'good' (57%), with only a few saying they were 'bad' (1%) or 'very bad' (1%) [Q76]. Again, there were differences between our two populations only in regard to whether the relationships were 'excellent' or 'good', with 36% of those serving life sentences describing these relationships as 'excellent' compared

¹⁰² We had asked participants whether they had been offered the opportunity for work, hobbies, rehabilitation, education and exercise before asking if they had taken advantage of those opportunities [Q69-73], but our findings were inconsistent, suggesting that they had not understood the difference between something being available and them making use of those opportunities. Hence, we report only the responses to Q74, as that question appears to have been interpreted accurately and can, therefore, provide data on whether or not they had received or used these opportunities.

¹⁰³ 'Dynamic security' is 'the development by staff of positive relationships with prisoners... in combination with an understanding of their personal situation and any risk posed by individual prisoners' (Council of Europe, Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners, Adopted by the Committee of Ministers on 9 October 2003, para. 18(a)).

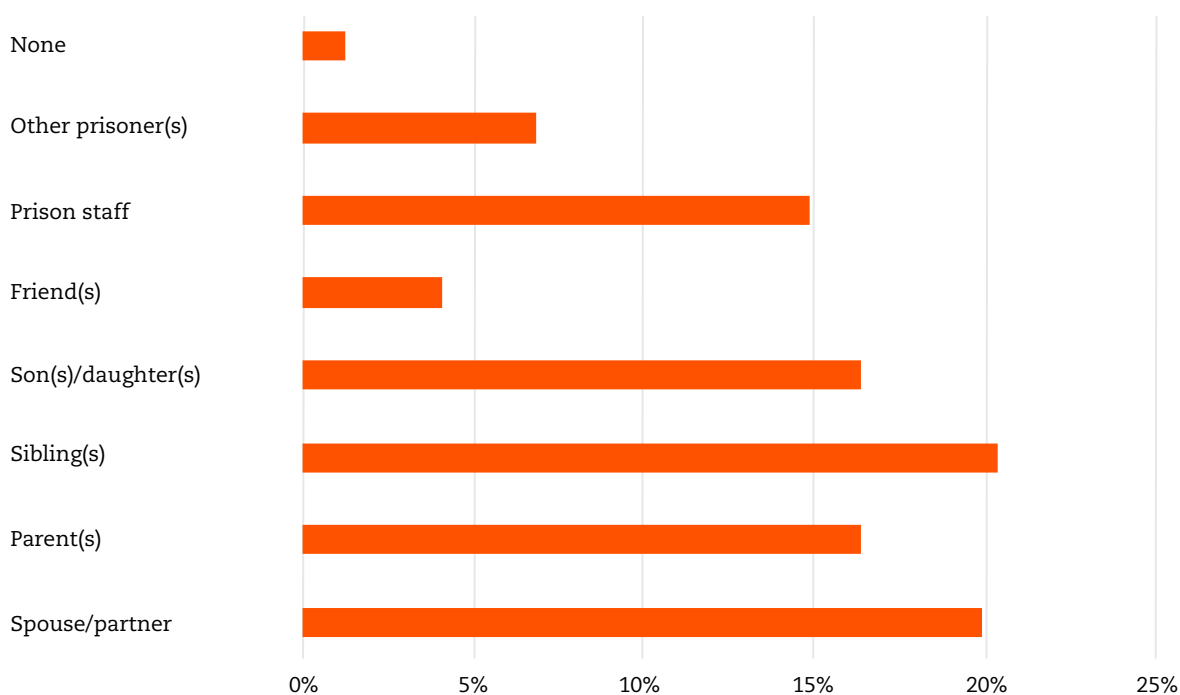
¹⁰⁴ Penal Reform International, *Prison Guards and the Death Penalty*, Briefing Paper, 2015, available at www.penalreform.org/resource/prison-guards-and-the-death-penalty – accessed 4 May 2022.

with 22% of those still on death row. In other words, those on death row are more likely than those now serving life to describe their relationships with prisoners as ‘good’ rather than excellent (there were no differences in reported relationships with other prisoners between the women and men in our sample).

Given what we know about ongoing relationships with family and friends, and with those working or living in prison, we were interested in prisoners’ main source of support. Though we asked for a ‘main’ source, most participants mentioned a combination of two or more sources, and as we found little difference between those on death row and those now serving life sentences, we present aggregate data in Figure 23 [Q77].

To some extent, these findings reflect information, reported above (see Figure 21), on who typically visits prisoners: sons and daughters, siblings, parents, and spouses or partners are the main sources of support, and these were the people most likely to visit prisoners, with relationships with friends not nearly so significant. Perhaps most interesting is that 15% of participants said that prison officers were one of their main sources of support – just more than twice those who mentioned other prisoners. Just as we found that relationships were slightly better between prison officers and prisoners serving life sentences than those on death row, so too we found that more than one in five (21%) of ‘lifers’ said prison staff were a main source of support, compared with 12% of those on death row. Otherwise, the differences between the two populations were small.

Figure 23: Participants’ main sources of support



We also asked participants the converse of this question: who has not given you support since your arrest that you would have liked support from? [Q78]. While just more than one in five (21%) said that no one had been unsupportive, all others mentioned at least one person they felt had let

them down (we found almost no difference in responses to this question among our two groups of participants).

Figure 24: People who had been unsupportive of participants

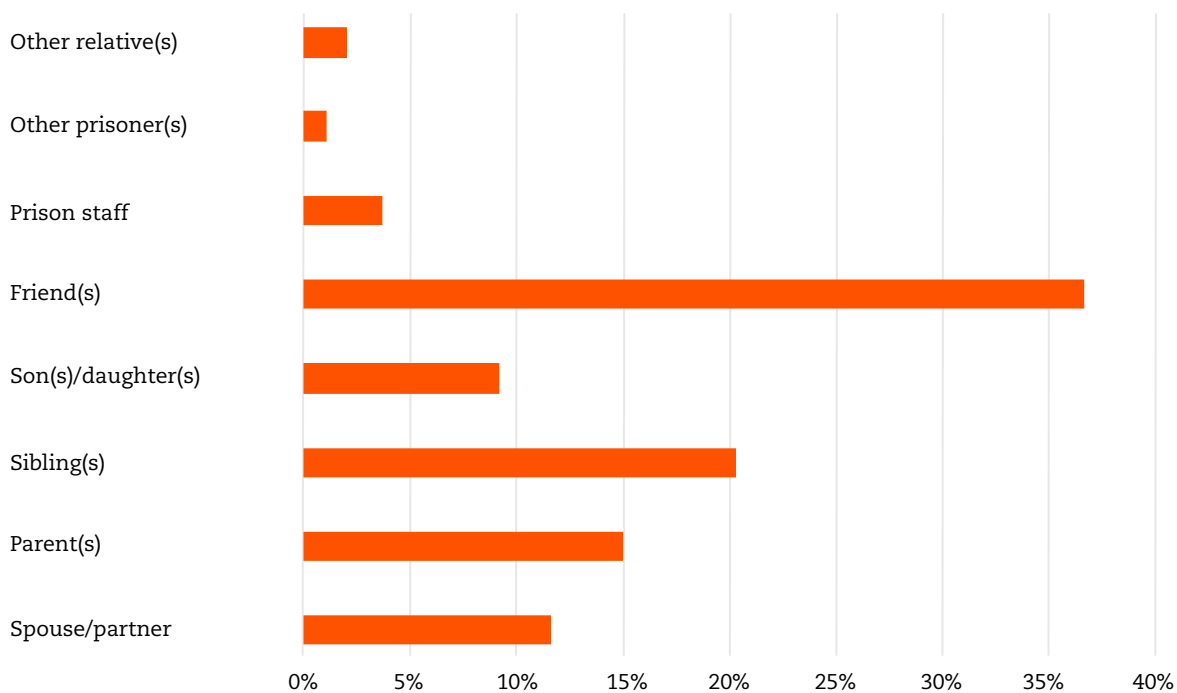


Figure 24 gives further evidence for other findings presented in this section – that friends most often disappoint prisoners. While partners and families are most likely to be prisoners' main sources of support, they are also, for some prisoners, insufficiently supportive. It is clear that, if only 20% of prisoners say their partner is a main source of support, there will be others – also with a spouse or romantic partner – who feel that they are insufficiently supported by that person. The same is true for family members. While 16% of participants felt that their parents were a main source of support, a further 15% felt let down by unsupportive parents from whom they had expected more.

While participants had clearly suffered from chronic pains of long-term imprisonment since incarceration, with declining mental and physical health and relationships – and while their families, too, continued to pay a heavy price – the conditions of incarceration in Kenya today, at the very least, allow for reasonably good relationships within the confines of custody, with other prisoners and, particularly, with prison officers. Furthermore, the majority of participants had access to opportunities for rehabilitation and activities that must help towards normalising the extreme, harmful conditions of what may be permanent deprivation of liberty.

PART THREE

Conclusion



The movement towards universal abolition of the death penalty has come not only from global human rights bodies, such as the UN Human Rights Committee,¹⁰⁵ but also from regional bodies such as the African Commission on Human and Peoples' Rights, which, in 2015, recognised the importance of abolition for securing other rights, such as to life, dignity and to be free from torture and cruel, inhuman or degrading treatment.¹⁰⁶ Furthermore, developing jurisprudence across the continent from the African Commission and from national courts points firmly in the direction of abolition.¹⁰⁷ Most recently, in 2021, Sierra Leone became the 22nd country in 'sub-Saharan Africa' to abolish the death penalty for all crimes and, the previous year, executions were recorded in only three countries.¹⁰⁸

Notwithstanding efforts towards abolition, Kenya retains capital punishment, albeit without executions. This has produced a reasonably large death row population within an under-resourced prison estate, kept somewhat in control by irregular mass commutations, though these serve to increase the population of life sentenced prisoners. While there is something unique about being under a sentence of death, not least in terms of the psychological stress caused by the possibility that the state might take a life at any time, there are many parallels between death and life sentenced communities.

This report took a large, statistically significant sample of 671 of those who have been sentenced to death in Kenya – just more than a quarter of whom had their sentences commuted to life – and sought information, through interviews with prisoners, on their past, their reasons for committing offences, and their experiences of the justice process and of imprisonment. The sample is large, covers the whole of Kenya, and is representative of all prisoners sentenced to death in the country. Inferences can therefore be made from our findings to the wider population of prisoners sentenced to death.

3.1 Socio-economic and welfare profile of prisoners

Those sentenced to death in Kenya are poorly educated. Most are not in permanent full-time employment and many are in precarious work. The vast majority are also in routine or semi-routine jobs, with those in routine work but convicted of robbery having been earning considerably less than those in the same types of jobs but convicted of murder, a finding that speaks to their greater financial need. Overall, the average wage of our participants was below the Kenyan minimum wage, though most were responsible for supporting dependents. Not surprisingly, more than a third were in debt.

At the time of arrest, 43% of prisoners had been relying on alcohol and almost a third had a history of alcohol or substance misuse, rates that are much higher than the national average across Kenya. Specifically, the reported rates of cannabis use at the time of arrest were much higher than has been reported across Kenya in national health studies, and a greater proportion had been experiencing mental health problems at the time they committed the offence than we would expect to see across the general population of Kenya.

¹⁰⁵ HRC, General Comment No36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (124th session, 2018), UN doc CCPR/C/GC/36 (2018), para 50.

¹⁰⁶ African Commission, General Comment No3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (57th ordinary session, 2015), para. 22.

¹⁰⁷ Chenwi L, The Downfall of the Mandatory Death Penalty in Kenya, *Journal of African Law*, 63(1) 2019, pp25-51.

¹⁰⁸ Amnesty International, *Death Sentences and Executions in 2020, 2021*, pp47-54.

3.2 Prisoners' decisions to offend

While most (72%) of those convicted of robbery were motivated by financial gain, with almost all (92%) seeing this as the likely positive outcome of offending, the motivations for murder were diverse, with almost two-thirds motivated by factors suggestive of a state of heightened emotion, including sadness, anger and fear. Half had not anticipated any positive outcomes, with others mentioning self-defence (19%), revenge (8%) and financial gain (16%) as possible benefits.

Deterrence theorists argue that, for potential offenders to be deterred, they need to see the risks as salient. They need to know about the laws and punishments, they need to rationally weigh up the costs and benefits of offending and think that the punishment will outweigh the benefits. In other words, deterrence research is clear that the necessary preconditions of decision-making by potential offenders are that:

- They are knowledgeable about the law and its implications;
- They are rational in allowing their knowledge and understanding to influence their behaviour;
- They will avoid offending if they think it is likely they will be caught and convicted, and if they think the punishment outweighs the rewards.¹⁰⁹

On the first point, those prisoners we interviewed who had been sentenced to death were not at all knowledgeable about the law and its implications. Most did not know that the death penalty was the likely punishment for their offence. Furthermore, they did not imagine they would be sentenced to death for that offence. Hence, this first precondition was not met.

On the point about rationality, while there was some evidence of rational thinking in deciding to commit the crime among those convicted of robbery, there was little evidence of this among those convicted of murder, whose responses to various questions suggested they were in a heightened state of emotion when deciding to commit an offence, and largely motivated by emotional, rather than rational, reasons.

More pertinently, while the majority of participants said they would have behaved differently if they had known the punishment for their offence would probably be death, less than a third of participants said that knowledge of the law and possible punishments had affected their behaviour. While less than a quarter of those convicted of robbery had hesitated to *consider* potential consequences before committing their crime, only 15% of those convicted of murder had done so. The proportions of those who were *worried* about potential punishments were equally low. These findings show that this population are particularly unlikely to be deterred by harsh punishments.

Notwithstanding, we sought to establish whether prisoners had, in fact, been worried about the potential punishment while deciding whether to commit an offence, finding that only 11% were very worried about being sentenced to prison and almost half were not worried at all. The majority were not worried about being sentenced to death.

Worrying about possible punishment and believing it is likely that they will be caught and punished are related, but distinct, features of decision-making. However, not only were most of our participants

¹⁰⁹ Fagan J, *The Feasibility of Systematic Research on the Deterrent Effects of the Death Penalty in Indonesia* (The Death Penalty Project 2019) pp11-12.

not very worried about punishment, particularly the death penalty, when making the decision to commit their crimes, but very few thought it likely they would be arrested and convicted, and only 6% were worried about the possible risks of punishment while they were committing their offence.

Our findings make clear that the necessary preconditions for being deterred from committing capital crimes were not met in most of our cases. Not only were participants not deterred, given that they had committed their offences, but they could not have been so, as they had neither the knowledge nor concerns about risks, and most were not acting particularly rationally. While most of those who committed robberies were motivated by financial gains and could, therefore, be said to have a rational reason for criminal behaviour, their understanding of the likely or even possible punishments was so low that they cannot have made a sensible risk-reward calculus.

3.3 Experiences of the justice system and incarceration

Interviews we conducted with opinion formers across Kenya in a previous study found considerable concerns about the lack of due-process protections for suspects and defendants in relation to capital offences. Our interviews with prisoners suggest that opinion formers were right to be concerned; none of the rights that should uniformly be provided to all suspects and defendants at the point of arrest were provided to all participants, with more than half not afforded the right to communicate with a lawyer and just less than half not given the right to remain silent, for example.

The research on opinion formers in Kenya also revealed concerns about police treatment of suspects, and corruption and abuse in the criminal justice system. Prisoners' descriptions of their experiences of police treatment during interrogation suggest opinion formers' concerns were valid, as between a fifth and almost two-thirds reported different forms of psychological abuse and physical deprivation, with some reporting attempts to bribe suspects or their families. Furthermore, more than a third were denied legal assistance and denied the right to remain silent during interrogation.

More than one in five of the prisoners claimed not to have been legally represented at trial, almost half said they had no lawyer at appeal, and almost two-thirds had no representation for their clemency application.

While the majority who were represented had a state-appointed lawyer, a few secured private legal representation at various stages of the criminal process, notwithstanding their relatively poor financial standing. In the main, these prisoners thought the performance of their private lawyers was good, while the majority who were represented by state-appointed lawyers thought they were 'poor'.

Incarceration for a long time can be damaging to health and prisoners' significant relationships. Two-thirds of participants reported that their physical health had suffered since they had been in prison and just less than two-thirds said their mental health had suffered. Two-thirds said their relationships with their families had suffered and more than four in five said their relationships with friends had suffered, and this was higher for those still on death row than those now serving life sentences. Furthermore, most of our participants reported that their families were coping 'badly' or 'very badly'.

Prison life can be particularly demeaning if physical and emotional needs are not attended to. Just more than a third of participants claimed they did not have sufficient, nourishing food in prison,

and, of deeper concern, a similar proportion said they did not have adequate access to medical care. However, research in exemplar prisons that claim to operate at the height of humane confinement, such as in Norway, can still be experienced as depressing and dehumanising places, notwithstanding money invested in the physical infrastructure and resources.¹¹⁰ Others, such as in the US, make no pretence about motivations towards rehabilitation; these institutions of mass incarceration have ‘warehousing’ as their key rationale, with little thought for the dignity of the people within.¹¹¹

Nonetheless, the majority of prisoners were able to take advantage of opportunities for work and recreation, and had access to rehabilitation. Furthermore, they reported healthy and positive relationships with prison officers and with other prisoners. This suggests that, while the Kenyan prison service clearly struggles to provide adequate physical conditions – given limited resources and severe overcrowding – it takes an apparently positive approach to the psychological welfare of prisoners, and to supportive relationships within the estate, based, in part, on the empathy shown by individual prison officers towards those in their care. Access to activities that bring prisoners into contact with one another is in stark contrast to the high use of solitary confinement in the US, a regime that is organised almost solely around principles of risk reduction, creating intolerable conditions of isolation for death row prisoners. In this regard, other jurisdictions might learn something from the Kenyan example.

3.4 An opportunity to imagine a better way

As our introduction made clear, Kenya has been equivocal on its position on the death penalty. While various attempts have been made to move towards abolition, and mass commutations have taken hundreds of prisoners off death row, Kenya regularly abstains in the vote to bring about a worldwide moratorium on the death penalty.¹¹² However, in abolishing the mandatory death penalty, the decision by Kenya’s Supreme Court of Appeal is thought to be a significant step towards total abolition.¹¹³

In 2015, the African Commission on Human and Peoples’ Rights called on states with moratoria in place to take steps to formalise abolition in law, allowing no further executions, and insisted that prosecutors should refrain from seeking the death penalty and judges should choose not to impose it.¹¹⁴ Most recently, following the fourth Universal Periodic Review of Kenya, conducted in March 2021, the UN Human Rights Committee called on Kenya to ‘take concrete steps towards the *de jure* abolition of the death penalty and consider acceding to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty’.¹¹⁵

Reflecting on the histories, decision-making and experiences of incarceration of those subject to the death penalty in Kenya, detailed in this report, provides an opportunity to better understand the lives fractured by trauma and lack of certitude within a system that continually exposes some of those

¹¹⁰ Jewkes Y, ‘An Iron Fist in a Silk Glove’: The Pains of Halden Prison, in Crewe B, Goldsmith A and Halsey M (eds), *Power and Pain in the Modern Prison* (Oxford University Press 2022).

¹¹¹ Simon J, The Real Human: Reimagining the ‘Real Man’ in The Society of Captives, in Crewe B, Goldsmith A and Halsey M (eds) *Power and Pain in the Modern Prison*, (Oxford University Press 2022).

¹¹² Most recently in December 2020; Adoption of the 8th UN General Assembly Resolution for a Moratorium on the Use of the Death Penalty.

¹¹³ Amnesty International, Kenya: ‘Landmark’ Death Penalty Judgment Must Lead to Full Abolition, 2017, available at www.amnesty.org.uk/press-releases/kenya-landmark-death-penalty-judgement-must-lead-full-abolition – accessed 2 May 2022.

¹¹⁴ African Commission, General Comment No3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4) (57th ordinary session, 2015), para 23.

¹¹⁵ UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Kenya, CCPR/C/KEN/CO/4, paras. 22&23, available at documents-dds-ny.un.org/doc/UNDOC/GEN/G21/105/49/PDF/G2110549.pdf?OpenElement – accessed 2 May 2022.

prisoners to the threat of execution. Any further attempts to explicate how prisoners under such conditions navigate their everyday lives within such ambivalent conditions will probably produce similar findings, here and elsewhere.

Prisoners under the sentence of death can try to do their best to adapt, to reconstruct their lives, but the structural and interactional constraints will impact on all their relationships and any attempts at psychological growth or healing, creating the inevitable conditions for moral decline, notwithstanding the best efforts of at least some prison staff.

Though Kenya has not executed its death sentenced prisoners for decades, while death sentences continue to be imposed the threat of execution remains, as prisoners know that policy or practice could change – for example, with a new government. If Kenya abolished the death penalty, removing the threat of execution for those currently on death row and those convicted of murder or robbery with violence in the future, prisoners would be better able to reflect on the harms they have caused in their past, on the right conditions for living their best lives during incarceration, and on the potential for reform in preparation for release at a time when the appropriate review authorities consider that to be safe. Better lives can be imagined, not only for prisoners, but also for their families and for those who care for them during incarceration, the prison staff. We thank all our participants for sharing their stories and are confident that the experiences of those who have been sentenced to death in Kenya will inform those who are able to bring about abolition, not least by reminding them of the vulnerability and humanity of those we condemn.



APPENDIX

Interview Schedule

[Demographics]

1) What is your date of birth? (*Month/Year*) _____

2) What is your sex?

Female	
Male	
Non-binary	
Prefer not to say	
Other (<i>Specify</i>) _____	

3) [*If not Kenyan*] What is your **nationality**? _____

4) What is your first **language**? _____

5) Do you practise a **religion**?

Yes	
No	

5a) [*If yes*] What religion do you practise? _____

6) What is the highest level of education you have completed?

I have never been in school	
Completed lower primary (class 4)	
Completed primary school (class 8)	
Completed secondary school (form 4)	
Post-secondary education (diploma, vocation training)	
Graduated from university	

7) How would you describe your **relationship** status?

Single	
Married, or in a domestic partnership	
Seperated/divorced	
Widowed	
Other (<i>Specify</i>) _____	

8) How many **children** do you have? _____

[Offence details]

9) What were you convicted for?

Treason	
Murder	
Robbery with violence	
Attempted robbery with violence	
Other (<i>Specify</i>) _____	

10) What was your sentence? _____

10a) Prompt: Has your sentence been commuted to life?

Yes	
No	

11) When were you arrested (*month/year*)?

12) When did your trial start and end (*month/year*)?

13) Have you appealed?

Yes	
No	

14) What sentence are you currently serving?

Death	
Life	
Other (<i>Specify</i>) _____	

15) How long have you been in prison (*years and months*)?

16) How long have you/were you on death row (*if different*)?

17) Were you ever before convicted and sentenced for another crime?

Yes	
No	

[Pathways to offending]

I want to ask you about your life before you went to prison for this offence:

18) Who did you live with? Check all that apply

I lived alone	
I lived with my partner	
I lived with siblings/parents/family	
I lived with friends	
Other (<i>Specify</i>) _____	

19) Which of the following best described your relationship with your family in the weeks and months before you were arrested?

I felt supported by my family	
I felt neither supported nor unsupported by my family	
I felt unsupported by my family	

20) How many people worked legally in your family at that time?

None	
Only me	
Only my partner	
Both my partner and I	
Siblings or parents	
Other relatives	

21) Did you have people financially dependent on you for basic needs?

Yes	
No	

21a) *[If no]* Who was financially responsible?

21b) *[If yes]* How many people depended on you?

21c) *[If yes]* How many of these dependents are children?

22) What was your work life like? Were you in gainful employment (*either employed or self-employed*) at the time that you were arrested for the offence(s) that you are now in prison for?

Yes	
No	

22a) *[if yes]* What was your job?

22b) *[If yes]* What type of job was it?

Permanent full-time	
Permanent part-time	
Temporary	
Seasonal	
Independent contractor/freelancer	
Self-employed	
Other (<i>Specify</i>) _____	

23) What was your financial situation? How much money were you making during the last year before you went to prison (*per month*)?

Kenyan shillings

23a) Could you afford basic needs (e.g. rent, food)?

Yes	
No	

23b) Did you have money left over each month after meeting your basic needs?

Yes	
No	

23c) Were you in debt?

Yes	
No	

24) How was your health?

Excellent	
Good	
Fair	
Poor	
Very poor	

24a) Were you using drugs at the time of the arrest that led to you being in prison?

Yes	
No	

24aa) [If yes] What type(s) of drugs were you using? (Check all that apply).

Cannabis	
Khat	
Cocaine	
Heroin	
Methamphetamine	
Crack	
Other (Specify) _____	

24b) Were you relying on alcohol at the time of your arrest (or drinking more than you thought you should be)?

Yes	
No	

24c) Do you have a history of alcohol or substance misuse?

Yes	
No	

24d) Had you experienced mental health problems before you committed the offence? (Mental health problems would include conditions such as anxiety disorders, mood disorders, psychotic disorders, post-traumatic stress disorders, dissociative disorders, etc.)

Yes	
No	

24e) Were you experiencing mental health problems at the time you committed the offence?

Yes	
No	

24f) Have you been diagnosed with any learning or developmental disorders? (Learning disorders mean conditions such as dyslexia or dyscalculia, which impair one's ability to learn. Developmental disorders are conditions limiting one's motor, psychological, linguistic, and social development)

Yes	
No	

25) Have you experienced abuse within your own home or from someone close to you?

Yes	
No	

[Motivation for criminal behaviour]

26) What motivated you to commit the crime? *(Check all that apply).*

Financial gain	
Anger	
Provocation	
Self-defence	
Domestic abuse	
Extreme emotional situation	
Revenge	
Other (<i>Specify</i>) _____	

27) When you were thinking of committing the crime, how did it make you feel? *(Check all that apply).*

Happy	
Sad	
Excited	
Angry	
Nervous	
Bored	
Scared	
Guilty	
Ashamed	
I did not feel anything	
I don't know	
Other (<i>Specify</i>) _____	

28) What made this crime potentially beneficial for you?

29) What made it risky?

30) Did you commit the crime you are convicted for together with other people?

Yes	
No	

30a) *[If yes]:* Who came up with the idea of committing the crime?

I did	
Someone else did	
We all did	
I don't remember	

30aa) *[If someone else came up with the idea]:* How long did it take you to decide you wanted to be involved in the criminal activity?

31) Did anyone threaten you to do it?

Yes	
No	

32) Did you do it as a favour for someone?

Yes	
No	

33) Were you trying to help someone else?

Yes	
No	

34) Did people who care about you know you were going to do this/doing this?

Yes	
No	

34a) [If yes] What did they think about it?

34b) Did anyone try to dissuade you?

Yes	
No	

34ba) [If yes] Who tried to dissuade you?

Parent	
Sibling	
Friend(s)	
Other (<i>Specify</i>) _____	

34bb) [If yes] What did they do or tell you to dissuade you?

35) Some people worry about the likelihood of going to prison while deciding whether or not to commit an offence. Did you think about that?

Not at all	
A little	
A lot	

36) Some people worry about the chance of being sentenced to death while deciding whether or not to commit an offence. Did you think about it?

Not at all	
A little	
A lot	

37) When you were making the choice as to whether or not to commit this offence, how important did you consider these outcomes? (Write the number next to each statement)

- (1) Not important at all
- (2) Somewhat unimportant
- (3) Neither important nor unimportant
- (4) Somewhat important
- (5) Very important
- (9) Not applicable

I would be suspended from my job	
I would lose respect from my close friends	
I would lose respect from my family members	
I would lose respect from important neighbours or other adults	
I would lose respect from my girlfriend/boyfriend	
It would make it harder to find a job in the future	
It would make it harder for me to live in places where I want to live	

[Knowledge and Perception]

38) Before you committed it, what did you think the penalties for the offence you committed were?

39) When you were thinking of committing the crime, did you know that it was punished by death?

Yes	
No	

39a) [If yes] Would you have behaved differently if you had known that the maximum penalty for all such offences was life in prison instead of the death penalty?

Yes	
No	

39b) [If no] Would you have behaved differently if you had known that this crime attracted the death penalty?

Yes	
No	

39c) Did you know there was a moratorium on executions?

Yes	
No	

39ca) [If yes] Would you have acted differently if there was not a moratorium in place?

Yes	
No	

40) What did you think would happen if you got caught?

41) Did your knowledge of the law and the punishment affect your behaviour?

Yes	
No	

42) Did that knowledge make you hesitate with the decision?

Yes	
No	

43) Did it make you worry about the decision?

Yes	
No	

44) Did it affect the way you went about committing the crime?

Yes	
No	

45) Did you take precautions not to receive a more severe punishment?

Yes	
No	

46) Did you think of any other way of minimising the punishment?

Yes	
No	

46a) [If yes] Which ones?

47) At the time when you were making the decision to commit the crime, how likely did you think it was that you would be arrested?

Very unlikely	Unlikely	Neutral	Likely	Very likely

48) At the time when you were making the decision to commit the crime, how likely did you think it was that you would be convicted?

Very unlikely	Unlikely	Neutral	Likely	Very likely

49) At the time when you were making the decision to commit the crime, how likely did you think it was that you would be imprisoned?

Very unlikely	Unlikely	Neutral	Likely	Very likely

50) At the time when you were making the decision to commit the crime, how likely did you think it was that you would be sentenced to death?

Very unlikely	Unlikely	Neutral	Likely	Very likely

51) At the time when you were making the decision to commit the crime, how likely did you think it was that you would be executed?

Very unlikely	Unlikely	Neutral	Likely	Very likely

52) Some people worry about going to prison or being sentenced to death in the period of time when they are committing the crime. Did you think about it?

Not at all	
A little	
A lot	

[Procedural Safeguards]

53) I'm now going to ask you about what happened after you were arrested for the crime you are currently convicted for. When arrested and detained by the police, suspects have certain rights to assistance and support (under s.49 of the Constitution of Kenya). Can you tell me if you were given these rights when you were arrested?

Time of arrest	Yes	No	Not Applicable
a) The right to be informed promptly, in a language you understand, of the reason for arrest, the right to remain silent, and the consequences of not remaining silent			
b) The right to remain silent			
c) The right to communicate with a lawyer			
d) The right not to be compelled to make any confession or admission that could be used in evidence against you			
e) The right to be held separately from persons who are serving a sentence			
f) The right to be brought before a court as soon as possible, usually not later than 24 hours after being arrested			
g) The right at the first court appearance to be charged or informed of the reason for the detention continuing, or to be released			
h) The right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released			

54) How did the police treat you during the interrogation: did any of these things happen after your arrest?

During interrogation	Yes	No	Not Applicable
a) I/My family was asked to pay a bribe to secure my release			
b) I/My family was asked to pay a bribe to secure a reduced charge/sentence			
c) I was called names, yelled at and/or insulted by law-enforcement officers			
d) I was threatened by law-enforcement officers			
e) I was denied water and/or food			
f) I was denied medical attention			
g) I was restrained by police in handcuffs or other physical restraints			
h) I was physically hurt by law-enforcement officials			
i) I was subjected to psychological torture			
j) I was denied legal assistance			
k) I was denied an interpreter			
l) I was denied my right to remain silent			
m) I was not allowed to see my family			
n) I was denied rest or adequate breaks during interrogation			
Other (please specify) _____			

55) Did you have a lawyer after your arrest at these various stages and, if so, was that a private or state-appointed lawyer?

Legal assistance throughout criminal process			
Stage	Private lawyer	State-appointed lawyer	Quality of legal representation
a) At arrest			Good. Bad. OK.
b) During police interrogation			
c) Trial			
d) Appeal			
e) Clemency application			

56) At these various stages, were you given enough time to talk with your lawyer?

Yes	
No	

57) Were you able to talk with your lawyer in private (*so other people couldn't hear you*)?

Yes	
No	

58) [*Only if the person's first language isn't English*] Were you given an interpreter?

Yes	
No	

58a) Was the interpreter there during the interrogation?

Yes	
No	

58b) Was the interpreter there during the entire trial?

Yes	
No	

59) *[Only for foreign nationals]* Was the embassy of your home country notified of your case?

Yes	
No	
I don't know	

60) How was your experience at trial: did any of the following things happen to you?

During trial	Yes	No	Not Applicable
a) I didn't understand what was happening at trial			
b) The court did not hear mitigating evidence about me or my crime			
c) I was called names, yelled at and/or insulted by court officials			
d) I was threatened by court officials			
e) I was threatened by police officers			
f) I was physically hurt by court officials			
g) I was denied legal assistance			
h) I was denied an interpreter at trial			
Other (please specify) _____			

[Experiences of prison life]

61) Has your physical health suffered since you came into prison?

Yes	
No	

62) Has your mental health suffered since you came into prison?

Yes	
No	

63) Have your relationships with family suffered since you came into prison?

Yes	
No	

64) Have your relationships with friends suffered since you came into prison?

Yes	
No	

65) How are your family coping now that you are in prison?

Excellent	
Good	
OK	
Bad	
Very bad	
Further details: _____	

66) Who do you have visits from?

Spouse/partner	
Parent	
Sibling	
Son/daughter	
Friend	
Other (please specify) _____	

66a) Prompt: How often? _____

67) Do you have sufficient, nourishing food in prison?

Yes	
No	

68) Do you have adequate access to medical care?

Yes	
No	

69) Do you have opportunities to work?

Yes	
No	

70) Do you have opportunities to pursue hobbies?

Yes	
No	

71) Do you have opportunities for rehabilitation?

Yes	
No	

72) Do you have opportunities for education?

Yes	
No	

73) Do you have opportunities for exercise?

Yes	
No	

74) Which of the opportunities you have access to have you used?

	Yes	No	Not Applicable
a) Work			
b) Pursue hobbies			
c) Rehabilitation			
d) Education			
e) Exercise			

75) What are your relationships with prison officers like?

Excellent	
Good	
OK	
Bad	
Very bad	
Further details: _____ _____	

76) What are your relationships with other prisoners like?

Excellent	
Good	
OK	
Bad	
Very bad	
Further details: _____	

77) Who is your main source of support?

Spouse/partner	
Parent	
Sibling	
Son/daughter	
Friend	
Prison staff	
Other prisoners	
Other (please specify) _____	

78) Who has not given you support since your arrest that you would have liked support from?

Spouse/partner	
Parent	
Sibling	
Son/daughter	
Friend	
Prison staff	
Other prisoners	
Other (please specify) _____	

Thank you so much for participating in our study. Your answers have been very helpful.

Interviewer gives compensation and stops recording

**Interviewer records admin information:*

Date of interview: _____

Participant Id: _____

City: _____

Prison: _____

Name of interviewer: _____

About the authors

**Carolyn Hoyle**

Professor Carolyn Hoyle has been at the University of Oxford Centre for Criminology since 1991. She is Director of the Oxford Death Penalty Research Unit, and co-author of the leading international study on the death penalty, *The Death Penalty: A Worldwide Perspective*, the last edition of which was published in 2015 by Oxford University Press. She has conducted several empirical projects for The Death Penalty Project, including studies of opinion formers' views on the death penalty in India, Bangladesh, Zimbabwe, Taiwan, and, most recently, in Kenya. She is also working closely with The Death Penalty Project and other leading international and national NGOs on a study of foreign nationals at risk of the death penalty in Asia and the Middle East.

**Lucrezia Rizzelli**

Lucrezia Rizzelli is a doctoral candidate at the University of Oxford Centre for Criminology. She has a BSc in psychological sciences and techniques from the University of Florence, Italy, and a MA in forensic psychology from John Jay College of Criminal Justice, USA, where she conducted research on false confessions and forensic linguistics. Rizzelli's current research is about whether capital punishment deters people from committing drug-related offences in the Indonesian context.

The Death Penalty Project

The Death Penalty Project is a legal action NGO in the UK, with special consultative status before the United Nations Economic and Social Council.

For more than three decades, it has provided free legal representation to death row prisoners around the world, to highlight miscarriages of justice and breaches of human rights. It also assists other vulnerable prisoners, including juveniles, those who suffer from mental health issues, and prisoners who are serving long-term sentences.

The Death Penalty Project has been commissioning, supporting and publishing independent academic research on attitudes towards the death penalty for almost a decade. It uses original data from public opinion surveys and other empirical research to engage in dialogue with policy-makers and politicians, and to challenge popular misconceptions around the death penalty.

In Kenya, we have previously published two studies on *The Death Penalty in Kenya: A Punishment that has Died out in Practice* (Part One on 'A Public Ready to Accept Abolition' and Part Two on 'Overwhelming Support for Abolition Among Opinion Leaders').

All publications by The Death Penalty Project are available to view and download at www.deathpenaltyproject.org

The Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is an independent national human rights institution created by Article 59 of the Constitution of Kenya and established through the KNCHR Act of Parliament (the Kenya National Commission on Human Rights Act, 2011). It is the state's lead agency in the promotion and protection of human rights. The operations of the KNCHR are guided by the United Nations-approved Paris Principles on the establishment and functioning of independent national human rights institutions. The National Commission has been accredited by the International Coordinating Committee of National Human Rights Institutions (ICC) and is a member of the Network of African National Human Rights Institutions, the ICC's regional grouping for Africa.

The Commission has two key, broad mandates, acting as a watchdog over the government in the area of human rights and providing key leadership in moving Kenya towards upholding human rights as a state. The main goals of the KNCHR are to investigate and provide redress for human rights violations, research and monitor the compliance of human rights norms and standards, conduct human rights education, facilitate training, campaigns and advocacy on human rights, and collaborate with other stakeholders in Kenya.

For further information, please visit: www.knchr.org



Design and production: CPL www.cpl.co.uk

In partnership with: Author's affiliation:



Co-funded by the European Union and the UK Foreign, Commonwealth & Development Office:



Foreign, Commonwealth
& Development Office

