

3. EXPERIENCES OF THE JUSTICE SYSTEM AND INCARCERATION

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



An earlier study we conducted with opinion formers in Kenya found many had concerns about the lack of legal protection for suspects and defendants charged with capital crimes and in particular about the treatment of suspects by police. Our interviews with prisoners suggest the opinion formers were right to be worried. We found that many death-sentenced prisoners were denied rights that should be provided to all criminal suspects and defendants.

The statistics contained in our study reveal a population for whom the basic standards of due process and the internationally-accepted human rights norm that there should be 'equality of arms' between defence and prosecution were conspicuous by their absence. Of our sample, 49% were not informed or given their legal right to remain silent, 53% were not given any chance to speak to a lawyer, and exactly half said they felt coerced to make a confession or supply evidence that could be used against them. Of those sentenced to death for murder, 59% had no lawyer present during their interrogation; for those sentenced for robbery, the figure was 64%. More than a quarter (26%) said their families were asked for a bribe in return for their release, and 17% said a bribe was demanded to secure a reduced charge.

Moreover, over half said they were subjected to psychological forms of torture, more than a third (37%) to physical abuse, almost a quarter (23%) were denied medical attention and 35% were denied any breaks during interrogation. There is a wealth of research suggesting that confessions and other evidence obtained by police under such conditions is inherently unreliable, and likely to lead to miscarriages of justice. When similar flaws in the evidence gathering process began to come to light in a series of high-profile cases in England from the 1970s on, they triggered wide-ranging reforms both to police methods and the criminal process as a whole.

At trial, our findings suggest that many defendants effectively became helpless pawns in a system they had no means to influence. Of our sample, 45% said they did not understand what was happening, over one in five of the prisoners claimed not to have been legally represented at trial, and 27% were denied an interpreter. The study shows that many defendants knew no English or Swahili, and so this imposed yet a further degree of unfairness.

Of those who were represented, most had state-appointed lawyers at each stage, and most rated their performance as 'poor'. Few were able to secure private legal representation, given their high levels of disadvantage and poor education. This is further evidence that those on Kenya's death rows can not be said to be the 'worst of the worst', but rather the most deprived and vulnerable. In 38% of cases, when it came to sentencing, the court failed to hear any mitigating evidence that might have prevented a death sentence. Almost half said they had no lawyer at appeal and almost two thirds had no representation for their clemency application.

Lengthy incarceration damages health and significant relationships. Two thirds of participants reported that their physical health had suffered since they had been in prison, and just under two thirds said their mental health had suffered. Two thirds said that their relationships with their families had worsened. Most participants reported that their families were coping 'badly' or 'very badly'.

If there is a silver lining in this part of our study, it is that despite the above, most prisoners did have opportunities for work and recreation, and had access to rehabilitation, and reported healthy relationships with prison officers. This suggests that while the Kenyan prison service struggles to provide adequate physical conditions, it takes an apparently positive approach to fostering rehabilitation and reform.

Conclusion

The weakness of due process protections for capital crime suspects and the system's failure to provide anything resembling 'equality of arms' at trial and on appeal is a further factor highlighted by this study which, in our view, should influence the debate over whether Kenya should abolish the death penalty *de jure*. These flaws have likely created miscarriages of justice, just as they were shown to in England three decades and more ago, with the disclosure of a series of wrongful convictions based on false confessions in high-profile trials. While capital punishment remains on the statute book, there will always be a risk that executions could resume. There can be no miscarriage of justice more terrible than the execution of a factually innocent person. Like their counterparts wrongfully convicted in England before the enactment of reforms, our Kenyan sample is vulnerable and deprived in numerous ways. This - as shown by the failure of most to secure private legal representation - can only increase their exposure to this risk.

Despite failures to provide procedural safeguards during investigations, trials and appeals, the experience of death row in Kenya is in some regards less damaging and more enriching than in some other jurisdictions, notably parts of the United States, where inmates endure lengthy periods of solitary confinement, and regimes are determined by the authorities' intention to reduce the risk of escape. In Kenya, the physical conditions of incarceration may be poor but in recent years the Prison Service has made efforts to facilitate opportunities for work, education and some rehabilitation for those who remain on death row. Such efforts appear to be conducive to good relationships between prisoners and between prisoners and staff. While the psychological burden of death row can never be underestimated, the Prison Service is mindful of prisoners' welfare.

This is one of three short papers drawn from the longer report '*Living With a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row*'. It is based on structured interviews conducted by our colleagues from the Kenya National Commission on Human Rights with a statistically significant sample of 671 prisoners (of whom 33 were women) sentenced to death in Kenya for murder (44% of the total) and robbery with violence (56%). Just over a quarter of the total sample have had their sentences commuted to life. The sample is large, covers the whole of Kenya, and is representative of all prisoners sentenced to death in the country.

Download the report

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