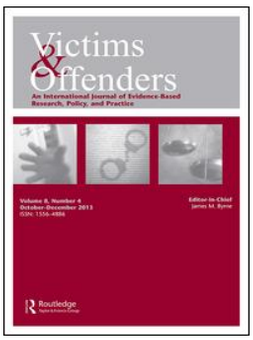

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The Silver Lining in the Covid-19 Cloud: An Appraisal of Accelerated Prison Decongestion in Kenya

Mercy Deche[a] and Conrad Bosire[b]

[a]School of Law, University of Nairobi, Mombasa, Kenya; [b]Secretariat, National Council on Administration of Justice, Nairobi, Kenya

ABSTRACT

Kenya, like most developing countries, has for a long time grappled with overcrowding in its penal institutions. Prison decongestion has hence been a key focus area of the penal reforms which were rolled out in 2002. The reforms have however been relegated to the back burner amidst competing priorities. When the country announced its first COVID-19 case on March 13, 2020, penal institutions were immediately identified as weak links in the containment of the pandemic. The Institutions were put on a total lockdown and de-congestion measures upscaled as a means of curbing the spread in prisons. So far, the exercise has resulted in the release of over 12,000 inmates. This paper discusses the implementation of the decongestion measures during COVID-19 amidst certain systemic challenges incidental to its implementation and how the gains from the COVID-19 period can be infused into long terms policies of prison decongestion.

KEYWORDS

Community service order; non-custodial sentence; prison decongestion; Covid-19; Pandemic; Alternatives to incarceration; Early release mechanisms; Prison reform

Introduction

Kenya, like most developing countries, has for a long time grappled with overcrowding in its penal institutions (Langat et al., 2020). Consequently, prison de-congestion has, among other key reform areas, been a specific focus for penal reforms in the country. Whereas the prison reform agenda was rolled out in 2002, it is the current Constitution, which was promulgated in 2010, that consolidated these reforms by providing a strong constitutional foundation. Important changes included the recognition of bail as a constitutional right for all offenses. In addition, there are in place numerous laws and policies that provide for various non-custodial punishment options especially for minor offenses.

Despite the existence of laws and policies to facilitate decongestion, implementation of the same has not always been as effective as expected. The prison population has remained high and beyond what penal institutions in Kenya can handle. A 2003 report, for instance, indicated that prisons in the country, at the time, held up to 40,000 prisoners against a capacity of 14,000 prisoners (UNODC, 2011).

The prevailing COVID-19 situation has, however, led to an accelerated and rapid prison de-congestion initiative, mainly as a public health measure to control and curb the spread of the virus. Since Kenya officially confirmed its first COVID-19 case on March 13, 2020, penal institutions have been on an extremely high alert, mainly because of its high

CONTACT Mercy Deche mercy@mercyconsultants.com School of Law, University of Nairobi, Post Office Box Number 88614-80100, Mombasa, Kenya.

and vulnerable prison population. Indeed, given the nature and identified patterns of spread of COVID-19, Kenyan prisons remain "high-risk" facilities (Langat et al., 2020). With confirmed COVID-19 cases approaching 40,000 and deaths steadily approaching 700, the country's Prisons Service remains cautious and vigilant. So far, not a single case of COVID-19 has been reported among the general prison population of over 40,000 inmates. The few cases reported in the media are from the quarantine facilities that have been established to temporarily hold new inmates for fourteen days pending their release to the general prison population (Kenya Prison Service, 2020a).

The relative success of the Kenya Prisons Service in preventing the spread of the virus in the main prisons is partly linked to the current robust prison de-congestion programme. Country statistics show that as at the end of 2019, Kenyan prisons were holding a total 53, 348 (NCAJ, 2019). However, statistics from prison authorities show that by August 2020, this number had fallen sharply to 41,155. An estimated 12,000 persons had been released from prison within a span of five months since March 2020. The majority of prison population has always been those who are in pre-trial custody. With the rapid prison decongestion programme, the majority of the current prison population (25,123) comprises those serving custodial sentences as opposed to pre-trial detention (Kenya Prison Service, 2020b).

The urgency that has been created by the COVID-19 situation has yielded a coordinated response by Kenya's justice sector, with the aim of achieving the much-needed coherence in the administration of justice. This effectiveness and early positive result lay a basis for sustained future measures. This paper, therefore, discusses the implementation of the decongestion measures during COVID-19 amidst certain systemic challenges incidental to its implementation and how the gains from the COVID-19 period can be infused into long terms policies of prison decongestion.

The paper is divided into six parts. The first part is the introduction which is followed by an overview of the normative and constitutional framework of prison decongestion programs. This then gives way to part three which provides a background to the core subject by discussing the decongestion initiatives before the COVID-19 pandemic. Part four unpacks the modalities that have been put in place for the rapid decongestion of prisons during COVID-19 crisis. This is followed by the identification of the silver lining in the "COVID-19 cloud" and thereafter the conclusion. The information in this paper is mainly from desk research of primary and secondary data sourced from the library and from the database of various justice sector entities. Unpublished, but publicly available data and information, on file with the authors, which has come into possession of the authors in the course of their official engagement with the justice sector, has also been utilized.

The normative and constitutional framework for Kenya's prison de-congestion programs

The phrase "prison de-congestion" has gained currency and prominence in prison reform debates albeit with vagueness and lack of clarity. Indeed, use of the term has received criticism for not only overshadowing the broader penal reforms initiatives, but for over simplification of a complex issue to mere reduction of numbers in prisons (Nairametrics, 2011). However, the comparative use of the term, which typically goes beyond reduction of numbers, implies the totality of state obligations with regard to penal reform. It thus

provides a clear lens and standard against which the effectiveness of penal reform can be measured. Applying that broader approach, prison decongestion can be used and appropriated within the context of access to justice. This is premised on the fact that persons who are held within prison facilities, whether on pre-trial detention or serving sentences, have certain rights, including access to justice. For instance, while the former Constitution precluded bail from persons accused of capital offenses, such as murder or robbery with violence, the 2010 Constitution now guarantees the right to bail for all accused persons, regardless of the offense committed. The exercise of such a right and adherence to this constitutional provision has a direct bearing on prison population, especially since majority of the prison population has always been pre-trial detainees (UNODC, 2013).

Apart from access to justice, other rights in the bill of rights section of the constitution reinforce the case for decongestion. As earlier observed, congestion creates an environment where the inherent rights of prisoners are likely to be abrogated. Griffiths and Murdoch (2009) observe that prison congestion:

> 'has a negative impact on the quality of nutrition, sanitation, programmes, health services, activities for prisoners, and the care for vulnerable prisoners or prisoners with special needs. It affects the physical and mental wellbeing of all prisoners, generates prisoner tension and violence, exacerbates existing mental and physical health problems and poses immense management challenges.'

From the above, it is clear that whereas congestion fraternizes with scarcity of resources as they are spread thin across the bloated numbers, decongestion invariably enhances the ability of the state to adequately meet its human rights obligations to persons held in lawful restriction.

Kenya's legal system is replete with constitutional and legislative provisions that are available to courts and other criminal justice sector institutions as appropriate tools to manage the numbers of those held in the penal institutions and thereby achieve their decongestion. As stated above, all offenses in Kenya are now bailable unlike under the previous constitutional dispensation where persons charged with capital offenses (such as murder and robbery with violence) were not entitled to bail. Pre-trial bail is therefore a constitutional right and it may only be denied where there are compelling reasons to do so. This right is reiterated in section 123 of the Criminal Procedure Code (2010) and unpacked in the Bail and Bond Policy Guidelines (2015). In addition, the Constitution explicitly provides that a person charged with an offense that is punishable by a fine or imprisonment of less than six months should not to be remanded in custody. Traditionally, inmates awaiting trial or appeals in custody have always outnumbered those serving custodial sentences. Bail is therefore a factor that indirectly contributes to the high number of persons remanded in custody, resulting in more prison congestion.

Beyond bail and bond, there are other entry points in the legal and policy framework meant to achieve the broad objective and purpose of prison decongestion. Where one is convicted of an offense at the end of a trial or on their own plea of guilt, the Penal Code provides for a raft of options beyond custodial sentences. These include fines, Community Service Orders, Probation Orders, and discharge.

The punishment of Community Service Orders (CSOs) is provided for and regulated by the Community Service Orders Act, which was enacted in 1998 and came into force in 1999. CSOs generally entail unpaid public work within a community for those who are found guilty of specified categories of offenses. Under section 3 of the CSOs Act, such community

service is usually imposed where the offender is convicted of an offense punishable by imprisonment for a term not exceeding three years, with or without the option of a fine. They are therefore appropriate for minor offenses such as: being drunk and disorderly, petty theft, assault, creating disturbance, and being in possession of illicit brew. The assigned work has typically included activities such as afforestation, environmental protection, construction, and maintenance of public roads. Useful tangible public projects such as afforestation/tree planting, construction of public utilities such as toilets, and farming (for example, fish and poultry keeping) have been realized through the CSO sentences. (UNODC, 2013). In *Gilbert Mwangi Kiai v Republic* ([2017] eKLR), the court underscored the importance and essence of CSOs as follows:

> The Community Service Order is therefore not meant to be an easy way out of a serious sentence. It is the sentence that ensures that an offender serves his sentence within his or her community, while going on with his or her normal life. It is a path to complete reintegration of an offender, who may even have committed a serious offence and who is on the way to recovery. It is the one sentence that is expected to grow the trust of the *Mwananchi* (ordinary citizen) that the Criminal Justice System works. That is why the offender is to do public work, in the eyes of the community he offended, as a form of payback, for the benefit of the community, while benefitting from its non-custodial nature. It is a serious sentence and must be accorded its place, because in addition it saves tax payers the money spent incarcerating offenders, reducing contamination by serious offenders and congestion in the prison (*Gilbert Mwangi Kiai v Republic*, 2017).

CSOs is therefore an important tool. It not only contributes in decongestion. It also assists in ensuring that offenders are afforded a chance to carry out work with a great potential of ensuring re-integration to the society.

Probation of Offenders Act (2012) affords the courts power to issue probation orders, either as a sentence or in lieu of sentence, under certain circumstances. Unlike the Community Service Order, the Probation Order does not require the offender to render community service. It requires a person to submit themselves to the supervision of a probation officer for a period between six months and three years. In addition, it contains conditions such as residence and movement restrictions and the requirement that the offender refrains from offending.

For those already serving custodial sentences, section 46 of the Prisons Act (2009) provides for remission of one-third of their sentences. This is available through industry and good conduct to those sentenced for a period exceeding one month. It however excludes those sentenced to life imprisonment, those serving sentences for the offense of robbery, and those detained at the President's pleasure. The issue as to whether remission is a function of the Prisons Service or the court has often arisen. The court has recently clarified in *Francis Opondo v Republic* [2017] eKLR), that the power of remission lies with the Prison's authorities and not the court.

Another opportunity for convicted inmates to leave prison is found in Article 133 of the Constitution. The provision empowers the President, on advice of the Power of Mercy Advisory Committee (POMAC) to intervene in the case of a person convicted of an offense. The intervention may be through granting them a free or conditional pardon, substituting their punishment for a lesser form, or remitting the whole or part of their punishment. The enabling statute is the Power of Mercy Act enacted in 2011, which establishes the Power of Mercy Advisory Committee.

Kenya's obligation to implement prison decongestion extends to certain regional and international obligations that Kenya is party to. Article 2(5) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. There are various international instruments that provide for prison decongestion measures, and which provide an additional layer of accountability and obligation for the Kenyan state to ensure prison decongestion is effectively implemented. Specific instruments include: the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), The Kampala Declaration on Prison Conditions in Africa (1996), the Kadoma Declaration on Community Service Orders in Africa (1997), and the Ouagadougou Declaration on Accelerating Prison and Penal Reform (2002). In addition, the Standard Minimum Rules for the Treatment of Prisoners sets standards that are consistent with decongestion. These include provision of accommodation that meets health requirements and in particular the cubic content of air, floor space, and ventilation.

There is no doubt that the Kenyan state has a normative and public duty to implement prison decongestion as part of the broader penal reform initiative. This is not to minimize the necessity and place of physical custody as a form of punishment and restraint. It should be interpreted and constructed as part of a wider framework of an appropriate state response in the balancing of rights and obligations and ensuring access to justice. COVID-19 has, no doubted, presented an opportunity to test the existing legal and policy frameworks and laws put in place to ensure prison decongestion. Before analyzing the rapid implementation of decongestion measures in response to the pandemic, it is important to review the factors and effectiveness of prison decongestion before COVID-19.

Implementation of prison decongestion programmes prior to March 2020

As discussed in the section above, Kenya has always had in place a constitutional, legal, and policy framework to facilitate prison decongestion. The implementation and uptake of the framework has however not had any discernible impact on the prison population over the years. This is evident from the numbers held in Kenyan prisons since the commencement of the prison decongestion programme. An Analysis conducted between 2000 and 2016 reveals little change in prison population during these years as indicated in the Table 1 below. Indeed, even the prison population rate (prisoners per 100,000) remains comparatively high. This may be indicative, among other factors, of unsatisfactory uptake of the opportunities for decongestion provided by the existing framework.

Table 1. Prison population trends 2000–2019.

Year	Prison population	Prison population rate
2000	40,100	129
2002	35,157	108
2004	52,000	150
2006	47,036	129
2008	46,150	119
2010	49,757	122
2012	52,000	121
2014	54,579	122
2016	50,900	108
2019	53, 348	105

Source: https://www.prisonstudies.org/country/kenya (with 2019 statistics added by authors).

The narrative remains unchanged even viewed from a different perspective. The Community Service Orders programme reveals a declining number of referrals for community service (Judiciary, 2018/2019). This may be indicative of the courts' preference for custodial sentences even where non-custodial options are available. Other reasons behind the declining referrals may be lack of operationalization of the governance structures established under the CSOs Act, coupled with other administrative inefficiencies and inadequate funds to support programmes, leading to the general ineffectiveness.

While the option of Probation Orders also has the potential for prison decongestion, it faces similar challenges to those of the Community Service Orders. Probation and Aftercare Services (PACS) are generally underfunded. Their services are often hampered by a shortage of human and financial resources required to support the probation function. In many cases, court decisions are made without probation reports due to the lack of capacity in the probation department to prepare reports in time. There are also reported cases of attacks on probation officers in the course of carrying out social inquiries in the community which hampers their work (Judiciary, 2018/2019). The potential of probation services to contribute to prison decongestion has hence not been optimized.

While the Power of Mercy that is exercised by the President is one of the measures to ensure prison decongestion, the slow progress in implementation of the Advisory Committee recommendations has proved a major challenge. For instance, whereas the committee had recommended the release of a total of 18,956 prisoners in the period between 2011 and 2014 only 7000 convicts were released (*Aloise Onyango Odhiambo & 2 others v Attorney General & another* [2019] eKLR). The exercise of the power of mercy is, nonetheless, a viable route to achieve prison decongestion, where appropriate.

From the foregoing, the pre-Covid 19 uptake of prison decongestion initiatives was of negligible impact on the prison population. It has taken intentional concerted effort of all the stakeholders in the criminal justice system to achieve the results which are now evident. These have been achieved through the modalities discussed in the following section.

Rapid implementation of prison decongestion during the Covid 19 pandemic

The first COVID-19 case in the Kenya was first announced on 14th March 2020. The following day, Kenya's justice sector institutions met under the auspices of the National Council on the Administration of Justice (NCAJ, 2020a). Before delving into the modalities of the rapid implementation of prison decongestion measures, it is important to provide a picture of the operations of the NCAJ, under whose supervision and control, the decongestion measures were carried out. The NCAJ is a high-level policy-making organ that brings together critical state and non-state actors in the justice sector in order to ensure coordination, coherence, and harmony in the administration of justice. It is established under national legislation (Judicial Service Act, 2011). It has representation from the Judiciary (with the Chief Justice and the Chief Registrar of the Judiciary as the chair and secretary, respectively), Director of Public Prosecutions, Police Service, Prisons Service, Probation and Aftercare Services, Department of Children Services, the Kenyan Bar, the Executive, and Non-Governmental Organizations. Section 35 of the Judicial Service Act outlines the core responsibilities of the NCAJ to include the formulation and development of policies and strategy for the administration of justice, and the mobilization of resources to assist in the administration of justice.

The NCAJ is devolved to the smallest unit at court station level as Court User Committees (CUCs). The CUCs are typically composed of justice sector agencies at the court level who assist in decentralized decision-making in the administration of justice. CUCs have been established at each of the 128 court stations in the country, and are headed by the head of court station. At the county level, the CUCs are headed by the Presiding Judge in the county. A CUCs manager, appointed by the Judicial Service Commission and based at the Secretariat of the NCAJ, assists in coordinating the major activities of the CUCs and compiles quarterly reports of activities undertaken by CUCs. The quarterly reports assist the NCAJ to distil and understand specific issues in the administration of justice for purposes of crafting appropriate policy responses to ensure effectiveness and efficiency.

Prior to the establishment of the NCAJ in 2011, the justice sector had no formal coordination mechanism that congregated the wide players in the justice sector under a common and concrete structure for policy-making. The closest that the justice players came to coordinated engagement was through the Governance, Justice, Law and Order Sector (GJLOS). This was a donor basket fund, of an *ad hoc* nature, which directly implemented justice sector activities in partnership with justice sector agencies (McCormick et al., 2007). The programs and activities of GJLOS were mainly donor-driven, which proved unsustainable in the long-run. In addition, they took the approach of direct implementation of activities and, thus, denied justice sector agencies development of internal capacities to undertake activities that the GJLOS was performing. The NCAJ, on the other hand, does not take over or directly implement activities of the respective council member agencies. Instead, the main emphasis and approach is policy formulation on cross-cutting justice sector issues, such as prison decongestion. This approach has assisted in ensuring effective coordination of justice sector issues, including the prison decongestion measures.

It was therefore under the auspices of the NCAJ that the collective decision to temporarily scale down services and activities in the justice sector, after the confirmation of the first COVID-19 case was arrived at. The decision was announced by the Chief Justice in his capacity as the chairperson of the NCAJ. The down-scaling was for an initial period of thirty days and was meant to allow the institutions time to monitor developments and put in place measures that would guarantee the safety of those working in the justice sector as well as members of the public (NCAJ, 2020a). In addition, the Chief Justice announced the formation of a sub-committee, chaired by the President of the Court of Appeal, to review the developing situation and make proposals to the NCAJ regarding administration of justice (NCAJ, 2020b).

The immediate concern for the Kenya Prisons Service (KPS), was the congestion in all the 129 prisons across the country and the need to take immediate measures to reduce the congestion. The same concern was expressed by the National Police Service with respect to the holding cells in the police stations across the country. In response to this, the NCAJ made a collective decision directing heads of police stations to administer police bonds for minor offenses and to ensure a minimal number of persons are held in police custody during the COVID-19 period (NCAJ, 2020a). For the prison authorities, the immediate reaction was to suspend all new admission to prison facilities (Kenya Prisons Service, 2020a). This decision was, however, untenable. This is because while the NCAJ Guidelines discouraged the arrest and detention of minor offenders, they made no provision for serious offenses (NCAJ, 2020a). The COVID-19 period has seen a sharp rise in

serious offenses especially gender-based violence offenses like intimate partner violence, rape, and defilement (Kombuthi-Kuria, 2020). Such offenses are not subject to police bond or bail. As a result, the decision to close all prison facilities to newcomers had the potential of transferring the congestion to police stations, which are not typically equipped to handle large numbers of persons in custody.

In order to forestall a crisis in police stations, the sub-committee that was formed to monitor justice sector operations made a recommendation to courts, through the CUCs, to allow plea-taking in serious offenses and the admission of such offenders to prison remand facilities where necessary (NCAJ, 2020c). These special arrangements ensured that there was plea-taking in cases involving serious offenses such as murder, defilement, and rape. To ensure that new admissions do not affect the vulnerable prison population, the Kenya Prisons Service designated regional facilities as quarantine facilities, or holding centers for new admissions, before they are allowed to join the general prison population. Initially, the KPS set aside a handful of these quarantine facilities to handle the new admissions. With time, this proved inadequate necessitating expansion to a total of 59 holding facilities across the country (Kenya Prison Service, 2020a). Currently, the courts are required to issue committal orders that are specific to the facilities identified for quarantine where those freshly charged with serious crimes and have compelling reasons to be denied bail are held for 14 days before they are allowed to join the general prison population.

The Prison facilities have managed to ensure zero infections among the serving inmates. The 318 COVID-19 cases detected in the Kenyan Prisons have been in the 59 holding facilities and not among the general prison facilities (Kenya Prison Service, 2020b). The success in preventing spread in prisons has mainly been as a result of the implementation of strict protocols in the management of the main prison facilities.

Other conditions put in place by the Prison authorities include mandatory screening for all prison officers (regardless of rank) and sanitization at all entry points, suspension of all visits to prisoners, regular disinfection of prison facilities, mandatory quarantine, and testing of all new inmates, use of Personal Protection Equipment (PPEs), and maintaining of a well-organized shift system for serving officers, among other measures. These conditions have ensured that there are no cases among the main prison population in the 129 prison facilities in the country (Kenya Prison Service, 2020b).

One of the earliest decisions made by the NCAJ sub-committee was to advise the High Court to review 19,000 files. The files were to be submitted by prison authorities and the review was for purposes of considering the release of deserving persons as a decongestion measure (NCAJ, 2020b). According to the National Coordinator of Community Service Orders, the Kenya Prisons submitted a list of 7,459 prisoners for sentence review during the 2019/2020 Financial Year. This covers the period when the COVID-19 cases began. Out of these 4,313 were released while 983 had their sentences reduced by 39 High Courts across the country. A further 15,433 cases were presented for consideration of CSOs out of which 15,379 offenders were placed on CSOs. The magistrates too reviewed files for accused persons remanded in custody for purposes of reviewing their bail terms. The courts then communicated the reviewed bail terms to the prison facilities where the accused persons were remanded. The prison facilities assisted in contacting their lawyers or next of kin. Those who were able to comply with the reviewed bail and bond terms were released from custody.

The upshot of the above is that while the population in Kenya's penal institutions was over 55,000 in March 2020, the number had dropped to 41,119 as at August 2020. This comprises 25,123 serving prisoners, 15,404 remandees, and 657 child offenders (Kenya Prison Service, 2020b). The categories of persons released from prisons since the onset of the Covid 19 pandemic include those who benefitted from the review of their bail terms, those serving short sentences of less than six months, and those whose longer sentences were coming to an end (remaining with 6 months or less of prison time).

There is the valid concern of the capacity of both the CSO and Probation Order systems to manage the offenders placed with them during the pandemic. The concerns stem from the fact that the systems operate within a community whose day to day processes and routines were disrupted by the pandemic. To begin with, the CSO work sites are mainly within public institutions like schools, courts, and hospitals. The CSO supervisors are drawn from the senior staff of these institutions. The schools were closed on the onset of Covid 19 while access to hospitals and courts was highly restricted. This has translated into shrinkage of available worksites for the offenders released to CSOs. For reasons yet to be ascertained, there is substantial social stigma associated with Covid 19 in Kenya. According to the immediate former National Coordinator for CSOs, M Atiang' (personal communication, September 12, 2020), most supervisors are uncomfortable with close interaction with offenders recently released from penal institutions during Covid 19. They are often wrongfully perceived as being capable of spreading the virus and shunned. The problem of scarcity of worksites for CSOs is therefore exacerbated by a shortage of supervisors.

With regard to the Probation Service Order regime, effective supervision requires access to the areas or communities that the offenders are released into. PACS however, PACS has only 84 serviceable vehicles that are shared between the headquarters in Nairobi and the 132 probation stations across the country. Their workload is heavy as during the 2019/20 Financial Year, they received 6,760 court referrals for probation supervision (SOJAR 2019/20). The already dire pre-Covid 19 situation has therefore been aggravated by the surge in numbers as a result of the decongestion program. The service is also understaffed, a situation which is likely to persist as the recruitment and promotion of 300 probation officers that was planned for the Financial Year 2019/20 did not take place due to Covid 19 related disruptions (KPAS, 2020).

Supervision of Probation Orders during the pandemic has therefore largely proceeded amidst the above resource constraints. The most viable cost-effective option has been remote monitoring by phone. Offenders with no access to phone services are required to physically present themselves to the nearest probation office periodically. Use of electronic monitoring of offenders is yet to be implemented in Kenya. Plans to introduce the same at a pilot stage in partnership with UNODC are however at an advanced stage (Probation and Aftercare Service, n.d.).

The silver lining

The pandemic has provided the much-needed thrust to decongest prisons that has eluded the justice sector players for over a decade. The fact that the system has managed to procure the release of over 13,000 inmates within a period of four months is remarkable. The first and most obvious sight of the silver lining in the overall "COVID-19 cloud" is in the numbers. Those that needed to leave prison have been facilitated to do so while those who

did not need to end up there have been kept away. Only those who must be in prison for one reason or another remain. It is therefore appropriate to conclude that but for the pandemic, such accelerated decongestion would not have been realized.

Prison decongestion programs rely on multiple institutions and it is only through cooperation that results can be achieved. The rapid results mentioned above have been as a result of coordinated effective cooperation between all justice sector agencies. The respective roles played range from the review of prison records, retrieval of files from court registries, placing of files before the Court and often times tracing of relatives and next of kin to process reviewed bail. As stated earlier in this paper, the platform for the institutional coordination is provided by the NCAJ. The crisis created in the justice sector by the pandemic has given the otherwise moribund NCAJ a new lease of life. Its activities have been revamped and visibility enhanced as its meetings have attracted representation from the highest office in each organization.

The enhanced visibility of the NCAJ, through its interventions during the COVID-19 crisis is important for the institution and the justice sector generally as it holds great promise for effective national coordination on issues of administration of justice. The visibility is also timely as it coincides with proposals for reform of the Council. Proposed reforms include expansion of its membership to include representation from the legislature and Council of Governors. Other proposals include having a stand-alone statute to govern the council away from the Judicial Service Act (National Committee on Criminal Justice Reforms. The NCAJ is deemed as a platform with the potential of bringing together the heads of the three arms of government that is the President, Speakers of the two Houses, and the Chief Justice, to engage directly on issues around administration of justice (JSC, 2019). Such an engagement would be critical for outcomes which require political will like prison decongestion.

The COVID-19 crisis has illuminated the focus of stakeholders in the justice sector to hitherto unacknowledged gaps that have led to an extremely slow uptake of decongestion measures. Some of the gaps are symptomatic of lack of capacity to apply alternative sentencing. Others relate to human and financial capacity which may be addressed through targeted capacity development. Whatever their nature, the crisis presents an opportunity to identify and address these capacity gaps through institution-specific interventions.

Finally, it is clear from the rapid response that there are some institutions that need to be retrieved from the back burner to the front row due to the critical role they play in prison decongestion. This includes the Probation and Aftercare Service (PACS) and the Executive Office of the Community Service Orders. Despite the central role they play, they are grossly underfunded. In the Financial Year 2019/20, for instance, PACS was allocated a total of Ksh1,756,092,977 which is equivalent to 16,210,300 USD. Over 90% of this allocation was spent on recurrent expenditure like including salaries. The remaining 10% went into the completion of four office and two hostel construction projects (KPAS, 2020). The upshot of this is that PACS often make recommendations they have no capacity to implement as they are heavily reliant on erratic donor funding (Judiciary, 2018/2019). The National Community Service Orders Committee, which is supposed to provide policy guidance on CSOs, has not been operational since 2016 when the term of the last one expired (Judiciary, 2018/2019). Administrative inefficiencies and plain bureaucracy leads to unnecessary delay in activating the team that is meant to give guidance to the CSOs process. Other challenges, which can be traced to the lack of clear policy leadership and guidance, include: delay in

gazettement of Community Service Orders District Committees, which offer supervision of implementation of CSOs. Training and capacity development initiatives have also not taken off.

Conclusion

This paper has contextualized prison decongestion within the wider initiative of prison reforms. It has interrogated it against the existing normative and constitutional framework before tracing its implementation before the COVID-19 Pandemic. The paper has established that the decongestion initiative before COVID-19 yielded scant results that had minimum impact. The paper has then discussed the initiatives that were put in place by the justice sector actors under the NCAJ and the results yielded. While the legal and institutional architecture to facilitate decongestion of penal institutions is intact, the gap is in the lack of focused implementation. The NCAJ provides a most useful platform of addressing the challenges in prison decongestion and active utilization of the platform can actually facilitate effectiveness.

It is apparent from the discussion in this paper that it has taken the COVID-19 pandemic for prison decongestion measures, which have been in place for the last decade, to be implemented to their near optimum. It is the results of the successful implementation that this paper hails as the silver lining in the "COVID-19 cloud." The gains incidental to the successful implementation are best retained, consolidated, and carried forward for posterity beyond the COVID-19 period. The starting point would be to address the gaps discussed earlier in this paper and thereafter sustain the momentum launched by the COVID-19 rapid response decongestion initiative. While it has taken a crisis to activate de-congestion measures in the prisons, the constitutional, legal, and policy gains should be identified and consolidated for longer-term action. After all, prison de-congestion is and should indeed be a long-term issue that is based on constitutional, legal, and policy foundations that go beyond a public health potential. There being no private-owned prison facilities and the state run ones being over stretched, decongestion should also not be seen as voiding punishment or undermining the core principles of criminal justice. It is an effective option of balancing justice and safety, and ultimately a sustainable way of ensuring access to justice.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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