



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



Pre-trial detention

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Introduction

- Legal framework
- Arrest data and profiles
- Attrition of cases
- Socio-economic impact of pre-trial detention

Legal framework

- There is no time limit within which a trial must commence and be completed, save that an arrested person must appear within 48 hours
- Legislated time limits is common in other African jurisdictions
- S49G of the Correctional Services provides a weak mechanism whereby the HoC must notify the court if a detainee had been in custody for 2 years. It does not say what the court must do with this information.
- Bail provisions are very restrictive – postpone for 7 days at a time if:
 - Insufficient information or evidence
 - Prosecutor tells court case is referred to DDPP for s 60(11A) confirmation (Schedule 5 and 6 offences)
 - State needs more time to procure more evidence (s 37 body-prints and bodily appearance of accused and convicted persons)
 - Necessary in the interests of justice.
 - S 60(11)(a-b): if charged with Schedule 6, remain in custody unless accused shows there are exceptional circumstances; Schedule 5 but not 6 – remain in custody unless accused shows it is in the interests of justice to be released.

Legal framework

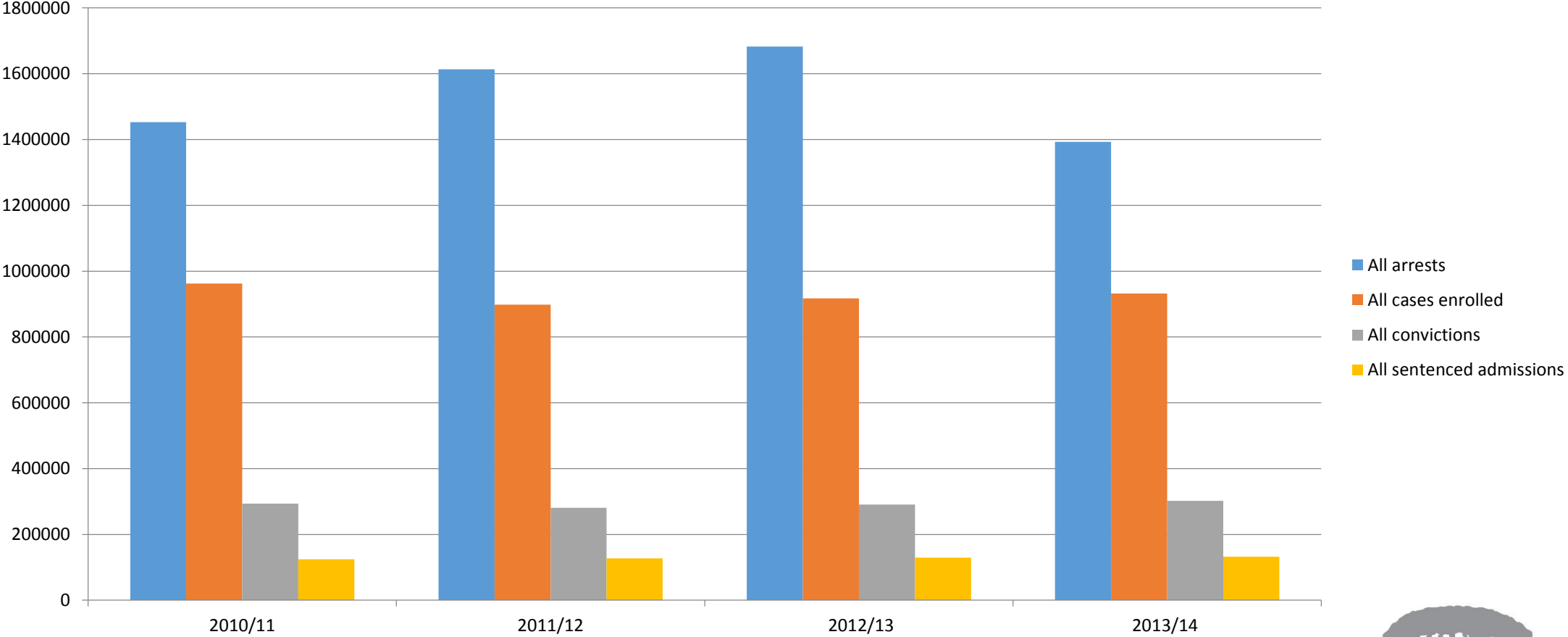
- The right to a fair trial is a peremptory norm of international customary law and enshrined in article 14 of the ICCPR. Articles 9, 10 and 15 of the ICCPR inform the content of a fair trial rights and establish that:
 - Arrested or detained persons must be brought promptly before a judicial officer and be entitled to trial within a reasonable time or to release;
 - It must not be the general rule that persons awaiting trial are detained in custody, and release may be subject to guarantees to appear for trial;
 - There must be a fair and public hearing by an independent and impartial tribunal;
 - There must be equality before the courts and tribunals;
 - There must not be arbitrary detention;
 - There must be restriction of the use of incommunicado detention;
 - There must be access for lawyers, doctors and family; and
 - There is independent internal and external oversight.
- See the ECtHR Judgement, *Bakmutskiy v. Russia*, ‘that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings.

Who is arrested and for what?

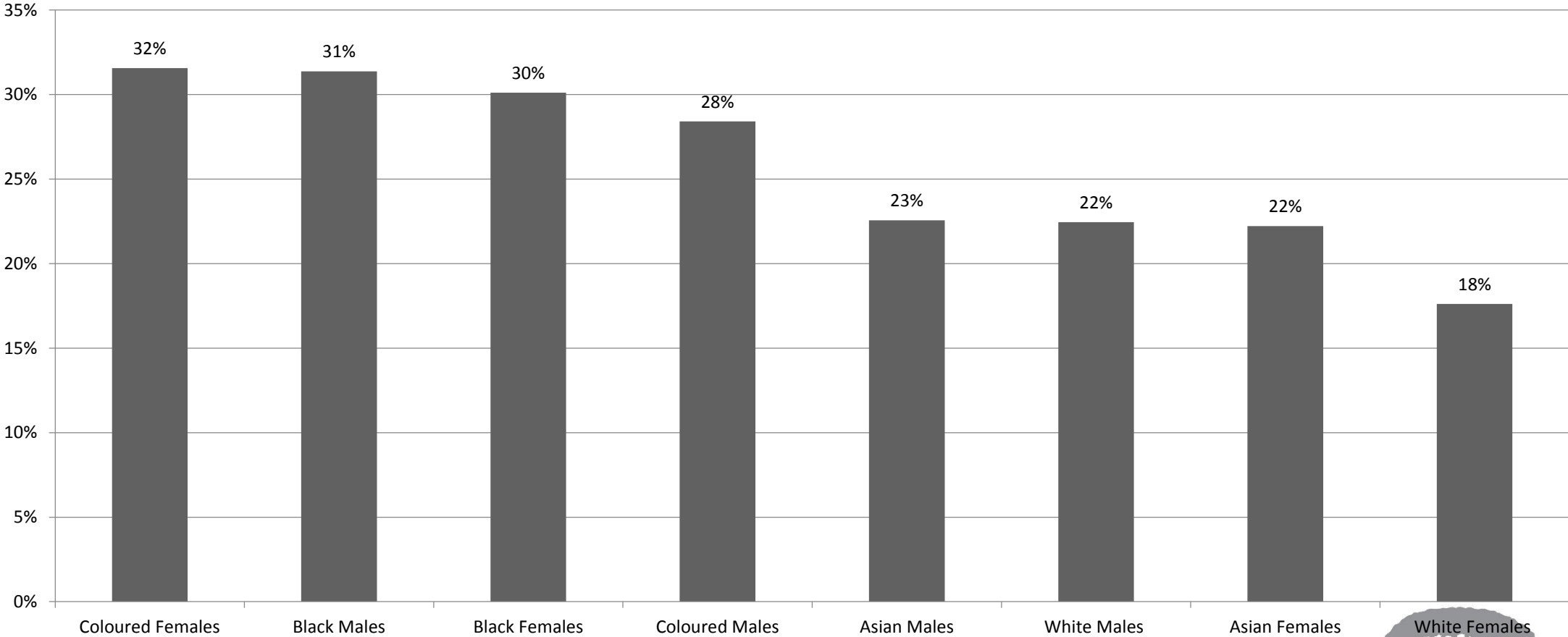
- SAPS make some 1.5 – 1.7 million arrests per year
- Between 1/8 and 1/13 adult men aged 18 -65 years are arrested annually

Offence	N	% of total arrests
Murder	16102	0.94
Assault gbh	148795	8.68
Aggr robbery	62310	3.63
Common robbery	19544	1.14
Drug related	294581	17.17
Shoplifting	70485	4.11
Other arrests	161059	9.39

Attrition from arrest to sentenced admission



Awaiting trial by race and gender



Socio-economic impact of pre-trial detention

- Kenya, Mozambique and Zambia; currently doing same at Pollsmoor
- In common to all three countries and contrary to popular opinion, the majority of detainees were not social outcasts living on the margins of society, but rather economically active individuals residing at fixed addresses and contributing to the support of several dependents.
- Complex set of factors that interact to either intensify or ameliorate the socio-economic impact of pre-trial detention: level of poverty of the household; the extent of prior reliance on the detainees' income or other contributions to the household; the number of dependents; the gender of the detainee; the number and age of children in the household; the duration and location of the detention, relative to the household; and the costs associated with the detention itself, such as providing food during police detention or attempting to secure legal representation.

Pre-trial detention - socio-economic impact

- *Level of poverty*: Median household income Kenya \$99 pm, Mozambique \$114, Zambia \$81
- In Zambia 94% of families interviewed experienced a loss of income as a result of the detention; in Kenya 75%, and in Mozambique 64%. Thus most households already experiencing a marginal livelihood prior to detention are forced into deeper poverty and food insecurity by the detention, so that the detention negatively affects households' right to an adequate standard of living and adequate food
- Forced into debt and borrow money: Kenya 39%, Mozambique 34%, Zambia 36%.
- Sell assets: Some 53% of respondents in Zambia said they had been forced to sell something, with 4% selling land or land rights. Some 22% of respondents in Kenya said they had been forced to sell at least one type of asset.
- Sell below market value in 50% of cases in Kenya.

Pre-trial detention - socio-economic impact

- *Extent of household reliance on detainee*: The median proportional detainee contribution to total household income in Kenya was 67%, in Mozambique 70%, and in Zambia 100%.
- *Number of dependents and household size*: The greater the number of people and the higher the proportion of those who cannot generate income (such as children, the disabled and the aged) who are dependent or partially dependent on the detainee's income, the wider the socio-economic impact is likely to be. The results suggest that most detainees either live in large households (Zambia and Mozambique) or are supporting a number of dependents residing elsewhere (Kenya).
- *Employability of other household members*: Can another person fill the gap? Children, aged and disabled.). In Kenya some 11% of respondents reported that at least one member of their household had a disability, 15% in Mozambique, and 5% in Zambia.

Pre-trial detention - socio-economic impact

- *Gender*: The research shows that gender is an important variable. While men are the numerical majority in pre-trial detention, the socio-economic impact is frequently felt by wives and mothers, who are more likely to visit and support detainees while attempting to maintain the family income. The majority of visitors to prisons are also female. They bear the burden of providing for the detainees' needs in detention, bringing food and other items at high costs of travel, while maintaining the family income.
 - The impact of their detention is more severe than that of males, and women also have fewer support structures whilst in detention as measured by the low number of visitors to them while they are in police detention and prison.
 - Their state of health was also compromised at the time of arrest and in total, 75% were ill at the time of arrest or became ill thereafter.
 - Esp. in Kenya, women in Nairobi are economic migrants.
 - When a woman is imprisoned, the social impact is frequently keenly felt by her children, as well as other children she cared for. In Kenya, all (100%) of the female detainees had either a child of their own or another dependant.

Pre-trial detention - socio-economic impact

- *Children*: Children are therefore affected by the loss of financial and non-financial support services previously rendered by the detainee and affected by the detention.
 - In Kenya, some 16% said that the children in the household were forced to move as a result of the detention; 11% of households with children reported that the children's behaviour had been adversely affected by the detention; 11% reported that the children missed school, while 3% reported that the children dropped out of school. In Mozambique, some 13% said the children in their household were forced to relocate, while in Zambia 13% referred to a child having to relocate.
- *The cost of visiting and supporting the detention*: Visits are associated with costs - transport for the visit, food, other materials (e.g. soap), clothing, medicine and so forth. Securing private legal or assistance from a state institution (e.g. Human Rights Commission) may also result in costs. Gathering cash for bail, borrowing money, using savings or paying a bribe are further costs associated with detention.
 - Pre-trial detention is therefore not only about losing financial and non-financial contributions, but also about incurring new and unplanned for expenses.

Pre-trial detention - socio-economic impact

- The median travel costs were found to be as follows: Kenya - US\$ 2.76; Mozambique - US\$ 1.27, and Zambia US\$ 17.00.
- The median one-way durations were recorded as listed here: Kenya – 90 minutes; Mozambique – 120 minutes; and Zambia – 90 minutes. Zambia data below

Item	Value ZK	US\$	Percentage
Household income	700.0	\$ 111.11	100.0
Travel cost	120.0	\$19.05	17.1
Other items	23.5	\$ 3.73	3.4
Food	75.0	\$ 11.90	10.7
Total	218.5	\$ 34.68	31.2
Balance of income	481.5	\$ 76.43	68.8

Pre-trial detention - socio-economic impact

- *Health:* In Kenya 75% of female detainees were either ill at arrest or became ill in prison or both. Of those who were ill at arrest, 69% developed additional illnesses while in prison. Some 77% of male detainees said they subsequently fell ill while in prison. In Mozambique 37% of detainees said they were or became ill during imprisonment; 47% of female detainees and 28% of male detainees. In Zambia 25% of detainees said they experienced ill health while in prison.
- *Existence of support structures:* It was particularly observed in Kenya where a notable proportion of women were economic migrants to the capital where they lived on their own and were remitting funds to households outside Nairobi. Having a spouse appears to be an important factor.
- *Lengthy durations of custody:* In Kenya the durations of detention recorded suggest that half of those still detained in prison are likely to have been detained for four months or more, while a quarter will have endured 204 days (almost 7 months) or more. In Zambia the admissions profile suggests that there is a high turnover of persons spending a short amount of time of remand in Lusaka Central, while at the same time a significant number spend years on remand. The duration of detention ranged from same day release to 1796 days. In Mozambique the admissions profile showed a range of 0 to 655 days (1.8 years) with a median of 66 days (2.2 months).

Pre-trial detention - socio-economic impact

- *Unaffordable bail*: In Kenya it was found that 65% of detainees claimed they could not afford the bail amount set by the court and an assessment of these values does lend credence to a claim that bail is set at disproportionate amounts with the an aim to make it unaffordable.
- *Access to legal assistance*: In Kenya only 16% of detainees said they had received some form of legal assistance, with female detainees being much less likely to have received legal assistance – only 6% compared to 19% of male detainees. In Mozambique just over half (54%) and in Zambia 26%
- Overall: the poor subsidise imprisonment in Africa; the action of the state are counter-development; offences do not pose a threat to public safety; state places obstacles *en route* to socio-economic rights fulfilment.

Conclusions

- Lack of data on which to formulate policy recommendations.
- Too many people are arrested for less serious crimes and they may end up in detention.
- Too little pressure on NPA to prosecute or account.
- Introduce custody time limits.

Thank you

