



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
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Arrest without a warrant in Kenya

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Introduction

This fact sheet deals with the process of arrest without a warrant in Kenya and aims to provide guidance on how police officers should test and use their discretion when contemplating an arrest without a warrant. It is indeed the case that large numbers of people are arrested every year in Kenya and this has been estimated to be as much as one in five people every two years.¹ Moreover, it has been estimated, based on 2013/14 figures, that some 38% of arrests fall in three offence categories, namely drunk and disorder, state offences (excluding traffic) and traffic offences.² There is thus more than enough reason to take a closer look at how the power to arrest without a warrant is described in Kenyan law.

The scope here concerns ordinary day-to-day law enforcement and thus excludes states of war, states of emergency or other highly unusual situations. Police officials are often the officials who perform the overwhelming majority of arrests although other state officials also may have the power to arrest without a warrant, e.g. prison officials. The focus here is on police officials.

Arrest is understood to mean the following, as per *Holgate-Mohammed v Duke*:

‘First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody (sc. by action or words restraining him from moving anywhere beyond the arrester’s control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate’s judicial act.’³

Police officials are entrusted with the power to arrest a person without having obtained a warrant of arrest from a judicial officer. It is necessary for the police to have this far-reaching power as the requirements of their work (e.g. to stop a person from committing a crime) necessitate that. However, the deprivation of liberty is a serious intervention in a

person's life and the authority to arrest without a warrant must therefore be used in a lawful manner and not to intimidate, scare or punish people.

In the below a brief overview is given of what guidance can be gained from international and regional law regarding arrest without a warrant. The following section deals with police discretion and this is followed by a review of the typical offences for which an arrest can be executed without a warrant. This will naturally differ from jurisdiction to jurisdiction, but will serve as a guide in this regard.

International law

The Universal Declaration on Human Rights (UDHR) guarantees the right to be free from arbitrary arrest, detention or exile.⁴ The International Covenant on Civil and Political Rights (ICCPR) in Article 9(1) reads:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The article acknowledges that the deprivation of liberty may be necessary in certain circumstances but that it must not be arbitrary and be done with respect for the rule of law.⁵ It is noted in General Comment 35 that the two prohibitions in Article 9(1) overlap in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Moreover, arrest or detention that lacks any legal basis is also arbitrary.⁶

The Merriam-Webster Dictionary defines arbitrary as: depending on individual discretion (as of a judge) and not fixed by law; autocratic, despotic; based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something; existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will.⁷

The UN Working Group regards deprivation of liberty as arbitrary in the following instances:

- When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
- When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (category II);

- When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
- When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
- When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).⁸

To summarise, arrest and detention are arbitrary if:

- the grounds for the arrest are illegal
- the victim was not informed of the reasons for the arrest
- the procedural rights of the victim were not respected
- the victim was not brought before a judge within a reasonable amount of time.⁹

Regional law

The African Commission on Human and Peoples' Rights adopted the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (Luanda Guidelines) in 2014 following extensive consultation. The Guidelines has a narrower definition of arrest than cited above, referring to it as “the act of apprehending a person”.¹⁰ The Luanda Guidelines also encourages the diversion of cases away from the criminal justice system, the use of alternatives to arrest and the use of arrest as “an exceptional measure of last resort”.¹¹ Furthermore, the grounds for arrest must be established in law, as is the case with the ICCPR Art. 9(1).

Moreover, the Luanda Guidelines set this requirement so that “Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.”¹² It is furthermore noted that arrest must not be executed on the basis of discrimination of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status.¹³ It should be noted that the Guidelines do not specifically name gender orientation as a basis for discrimination, but it can be read into “or any other status”.

The Luanda Guidelines limit the powers of arrest to police or by other competent officials or authorities authorised by the state for this purpose.¹⁴ In some jurisdictions it is only a judicial officer (judge or magistrate) that can issue a warrant of arrest, but in other (e.g. Mozambique until recently) this power was extended to a wide range of officials, such as

prosecutors and even administrative heads in rural areas.¹⁵ Further, an arrest shall only be carried out if authorised by a warrant of arrest or when there are reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.¹⁶ This fact sheet will focus on the power to arrest without a warrant, in other words where the arresting officer must have reasonable grounds to suspect that a person has committed an offence or is about to commit an offence.

The power to arrest without a warrant

The power to arrest a person without a warrant is afforded to police officials by the Criminal Procedure Code and the National Police Services Act.¹⁷ This further elaborated on in the Police Standing Orders.¹⁸ The power to arrest is, however, subject to at least the following:

- the rights of arrested persons listed in the Constitution¹⁹
- the offence must be cognizable as listed in Schedule 1 to the Criminal Procedure Code. In this Code, unless the context otherwise requires, “cognizable offence” means an offence for which a police officer may, in accordance with Schedule 1 or under any law for the time being in force, arrest without a warrant; “non-cognizable offence” means an offence for which a police officer may not arrest without warrant. There are least 328 cognizable offences listed in the Criminal Procedure Code.
- the police official may arrest and there is no requirement that a police official must arrest.²⁰
- The police official must conduct a clear and unbiased assessment of the facts before arresting any suspect.²¹

Even when a person had been arrested, the Standing Orders provide for an important internal oversight mechanism concerning the legality of the arrest in that the Commander of a police station, if he or she is satisfied that there is insufficient evidence to proceed with a charge, order the release of that person.²²

In the *Feisal* case, the court provided further clarity on reasonable suspicion:

In exercising the power to arrest, he had to act as an ordinary honest man would act on suspicions which had a reasonable basis and not merely on wild suspicion. However, the suspicion needed not be a matter of certainty or even probability, it had to not at the other extreme, be vague, remote or tenuous. It was a question of a feasibility possibility, a matter of likelihood. An arrest of a suspect should not be made unless and until his or her case had been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer was not to depart from the enforcement of a right to a fair hearing and due process.²³

As noted above, the power to arrest without a warrant is set out in the Criminal Procedure Code, Police Act and Standing Orders. A consequence of this description across three official documents is that they are not exactly the same, although

very close. Appendix 1 sets out these powers in the three documents and Table 1 provides a summary. The Criminal Procedure Code provides the most complete listing and is given below. Where offences appear or do not appear in either of the other two documents, this is indicated. It is, however, of no cause or consequence that an offence is listed in, for example, the Criminal Procedure Code and not in the other two documents as is the case of the last offence in Table 1 and goes under the heading “Arrest of vagabonds, habitual criminal etc” in the Criminal Procedure Code

Table 1

CPC	Police Act	Standing Orders
29. (a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;	Yes	Yes
(b) any person who commits a breach of the peace in his presence;	Yes	Yes
(c) any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;	Yes	Yes
(d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;	Yes	Yes
(e) any person whom he suspects upon reasonable grounds of being a deserter from the armed forces;	Yes	Yes
<u>(f) any person whom he finds in a highway, yard or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony;</u>	Yes	Yes
(g) any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself;	No	Yes
(h) any person whom he suspects upon reasonable grounds of having been concerned in an act committed at a place out of Kenya which, if committed in Kenya, would have been punishable as an offence, and for which he is liable to be extradited under the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) or the Extradition (Commonwealth Countries) Act (Cap. 77);	No	Yes
(i) any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on that person, any implement of housebreaking;	No	Yes
(j) any released convict committing a breach of any provision prescribed by section 344 or of any rule made thereunder²⁴	Repealed	Repealed
(k) any person for whom he has reasonable cause to believe a warrant of arrest has been issued.	Yes	Yes
30. An officer in charge of a police station may in the same manner arrest or cause to be arrested - (a) any person found taking precautions to conceal his presence within the limits of the station under circumstances which afford reason to believe that he is taking those precautions with a view to committing a cognizable offence;	No	No

How must an arrest be executed?

How an arrest, with or without a warrant, is to be executed is set out in the Criminal Procedure Code and there are three requirements:

- The police officer (or other person) making the arrest shall touch or confine the person, unless the person by word or action submits to custody.
- If the person forcibly resists the attempt to arrest him or her, the police officer (or other person) may use all means necessary to effect the arrest.
- If force is to be used to effect the arrest, this shall be no greater than what is necessary to apprehend the suspect.²⁵

Traffic offences

Data from prior to 2015 found that the police detained people for traffic offences and a not insignificant number of people ended up in police custody for such offences – some one in ten people in police custody at any one time.²⁶ The 2015 Traffic Act makes provision for the issuance of fines that can be contested in court. The Act still provides that all offences under the Traffic Act are cognizable offences to the police, but the clear intention is there that especially minor traffic offences should not result in arrest and detention but rather a fine.

County legislation

The 2010 Constitution adopted devolution of power as a key feature and part of that was to give the new counties the power to pass legislation and also to enforce such laws. Mwakuni notes that “some counties such as Mombasa, Nairobi City and Nakuru counties have enacted county legislation providing for the establishment of county laws enforcement units and their powers. Others such as Kakamega, Mandera and Trans Nzoia counties have hired county enforcement officers and/or county security officers through their respective County Public Service Boards to assist in the enforcement of county laws- including identifying, developing, implementing and maintaining security processes, protocols and programs to reduce risk, respond to incidents, and limit exposure; overseeing the physical security and safety of county government staff and assets; and enforcement of county legislation.”²⁷ From this it is evident that there is little consistency across the counties in how these powers are described in law. Nakuru and Nairobi counties have acts in place, whereas Mombasa, Nakuru and Taita Taveta have, as far as could be established, Bills in process.

The Nairobi City County Inspectorate Service Act 2017, establishes an Inspectorate with officials to enforce county laws and they have, amongst others, the power to arrest without a warrant a person breaching any county law, or obstructs an Inspectorate officer in the performance of their duties, or whom the Inspectorate officer suspects on reasonable grounds of having committed or is about to commit a breach of a county law.²⁸ The arrested person's rights are protected under section 49 of the Constitution with the additional requirement that the arrested person shall as soon as possible but not more than an hour after the arrested by handed over to the police station in the jurisdiction within which the offence was committed.²⁹ It is also a requirement in the Act that the Inspectorate officer shall use non-violent means to perform his or her functions.³⁰

There are some questions to be raised about the wide-ranging legislative powers of the county governments and how this has been utilised. The County Law Compliance and Enforcement Bill, 2018, seeks to bring consistency. The relevant section regarding the power to arrest reads:

15. (1) Where an enforcement officer has a reasonable ground to believe that an offence has been committed under this Act or any county law, the officer may arrest the person committing the offence.

(2) Where the offence under subsection (1) relates to a regulated activity, the officer may arrest -

(a) the proprietor of the activity;

(b) an employee of the proprietor; or

(c) any other person whom the officer reasonably believes is involved in the carrying out of the activity.

(3) Where a person who is believed to have committed a crime under any county law resists an arrest, an enforcement officer may use reasonable force to execute the arrest.

The fact remains that the wording of the County Law Compliance and Enforcement Bill still leaves wide discretion to enforcement officers, but also seem to encourage arrest above other less intrusive options. It also appears as if no offences are excluded from arrest and, unlike the Police Standing Orders, there appears not to be an internal oversight mechanism to verify that an arrest was done in compliance with the law.

Conclusion

By way of summary, the above covered international and regional norms on arrest and detention in order to prevent arbitrary detention emphasising that an arrest will be arbitrary if:

- the grounds for the arrest are illegal
- the victim was not informed of the reasons for the arrest

- the procedural rights of the victim were not respected
- the victim was not brought before a judge within a reasonable amount of time.³¹

It was also emphasised that there is no obligation to arrest, but that a police official may arrest to ensure the suspect's attendance at court. It is this discretion to arrest that if misused, or incorrectly applied, that can result in claims of arbitrary and unlawful arrest.

Further, there must be a reasonable suspicion or grounds for arrest. Apart from guidance in the applicable act, a police officer must *really* believe or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.

In addition to the suspicion being reasonable, (a) the arrester must have an open mind with regard to factors pointing to both innocence and guilt, (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested, and (c) for the suspicion to be reasonable, it must extend to all elements of the offence.³²

Ultimately, when arresting without a warrant the arresting officer would have to satisfy the court the above guidelines were complied with and that the arresting officer had truly considered the rights of the suspect.

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- ¹ Muntingh, L. and Redpath, J. (2016) *Criminal Justice System in Kenya: An Audit Understanding pre-trial detention in respect to case flow management and conditions of detention*, Study commissioned for the National Council on the Administration of Justice in cooperation with LRF and RODI Kenya, p. 85.
- ² Muntingh, L. and Redpath, J. (2016), pp. 85-86.
- ³ *Holgate-Mohammed v Duke* [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660. See also CCPR/C/GC/35 para 13.
- ⁴ Art.9 Universal Declaration on Human Rights (UDHR).
- ⁵ CCPR/C/GC/35 para 10.
- ⁶ CCPR/C/GC/35 para 11. 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.
- ⁷ <https://www.merriam-webster.com/word-of-the-day/arbitrary-2017-08-02>
- ⁸ Fact Sheet No. 26, The Working Group on Arbitrary Detention, <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> .
- ⁹ Trial International <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>
- ¹⁰ Guideline 1(a).
- ¹¹ Guideline 1(c).
- ¹² Guideline 2(a).
- ¹³ Guideline 2(b).
- ¹⁴ Guideline 3(a).
- ¹⁵ Judgment No. 4/CC/2013 of 17 September 2013.
- ¹⁶ Guideline 3(a).
- ¹⁷ S 29 Criminal Procedure Code and S 49 and 58 National Police Service Act.
- ¹⁸ Kenya Police Standing Orders, Chapter 15
- ¹⁹ S 49 Constitution.
- ²⁰ S 29 Criminal Procedure Code, S 58 National Police Service Act; Kenya Police Standing Orders, Chapter 15 S 1(1) and 1(3).
- ²¹ Kenya Police Standing Orders, Chapter 15 S 2(1).
- ²² Standing Order Ch. 15.2.3
- ²³ *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR, para 7.
- ²⁴ S 344 of the Criminal Procedure Code was repealed by Act No. 5 of 2003, s. 89 and S 344A. Repealed by Act No. 5 of 2003, s. 91.
- ²⁵ S 21 Criminal Procedure Code.
- ²⁶ Muntingh, L. and Redpath, J. (2016) pp. 85-86.
- ²⁷ Mwakuni, L. (2018) *Constitutional and legal framework for the enforcement of county laws in Kenya: challenges experienced and proposals for addressing them*, p. 4
[https://www.academia.edu/38268051/Constitutional and Legal Framework for the Enforcement of County Laws in Kenya Challenges Experienced and Proposals for Addressing Them](https://www.academia.edu/38268051/Constitutional_and_Legal_Framework_for_the_Enforcement_of_County_Laws_in_Kenya_Challenges_Experienced_and_Proposals_for_Addressing_Them)
- ²⁸ S 21 Nairobi City County Inspectorate Service Act 2017.
- ²⁹ S 22 Nairobi City County Inspectorate Service Act 2017.
- ³⁰ S 23 Nairobi City County Inspectorate Service Act 2017.
- ³¹ <https://trialinternational.org/topics-post/arbitrary-detention/#section-2>
- ³² Plasket, C. (1998) 'Controlling the Discretion to Arrest without Warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), p. 186.