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**BEYOND POLICE ACCOUNTABILITY:**

**Responses to police abuse by people at Kenya's urban margins**

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## Abstract & Lay Summary

Police abuse of power has been a persistent problem in Kenya from the colonial era to the present day, and disproportionately impacts people belonging to marginalised groups. Over the decades, there have been calls for the government to address this problem. The calls for police reform gained momentum in the 1990s, as part of the clamour for democratisation. However, significant efforts to reform the police emerged in the 2000s, triggered by the ascendancy of the opposition coalition into government in 2002 and the subsequent post-election violence that rocked the country in 2007-8. Police accountability was widely advocated as the way to address the problem of police abuse. These proposals were adopted into policy in the wake of constitutional reform in 2010 that saw the restructuring of the state police and the establishment of accountability institutions, of which the most potentially powerful is the Independent Policing Oversight Authority (IPOA), a civilian-led police oversight agency that receives and handles complaints against the police. Understandably, many studies have addressed the relative successes and failures of IPOA. In this thesis, however, I argue that there is a need to broaden our analytical lens and move beyond state-centric mechanisms of police accountability to understand how victims respond to police abuse, and why.

This thesis is focused on Kenya's urban margins, where many people are frequently subjected to police abuse. It draws primarily on interviews, focus groups and observation with people belonging to marginalised groups who are frequently victimised by the police, including poor, young men, political protestors, sex workers and queer people. My research, conducted between October 2018 and January 2021, was primarily focused in Kenya's three largest cities: Nairobi, Mombasa, and Kisumu.

This study makes an empirical contribution to studies of state policing in Africa by providing a reappraisal of responses to police abuse, ten years after the instigation of IPOA. While some studies have provided valuable glimpses into this issue from the perspective a specific group or organisation, this study provides a comprehensive account of responses to victimisation by multiple groups on the urban margins.

The study also makes an important theoretical contribution to the study of police accountability by moving away from state-centric analyses to focus on the perspectives and experiences of the victims of police abuse on the urban margins. As a result, rather than focusing on responses to police abuse as an institutional state process, I frame them as a social negotiation. In this process, people deploy individual and collective self-help strategies, and recruit intermediaries to help them counter power imbalances, navigate officialdom, and avoid further harms. By tracing the responses of victims we see that seeking accountability for police abuse through the state becomes one of several justice outcomes that victims may pursue. Moreover, victims may value multiple forms of state action, which stretch beyond prosecution or career-based sanctions and, in the process of pursuing these goals, informal and formal procedures blur. Alongside this pursuit of justice outcomes sits a range of

strategies that victims employ to limit or resist police abuse. These vital responses to police abuse are missed in state-centric accounts, which focus on the success or failure of formal accountability mechanisms.

The complex responses of victims to police abuse demonstrates that the strategies that people use and the ends that they seek are dynamic. These shifts over time are mainly due to access to additional information or the responses of other actors. Thus, I argue that people make strategic decisions on how to respond their victimisation by the police, at any point in time, based on their structural condition, their political subjectivity and the resources they are able to deploy in their response.



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## **Declaration**

29th April 2022

I declare that, except where otherwise indicated, this thesis is entirely my own work, and that no part of it has been submitted for any other degree or professional qualification.

Kamau Wairuri

## Acknowledgements

Throughout my doctoral studies, I have received incredible support, love and care from so many that I cannot possibly acknowledge them all. I have also learnt so much from so many people. I believe it will take still much longer for me to fully understand and appreciate the depth and significance of the things that people said to me and the questions they asked. For now, I will directly acknowledge the support I have received from a few individuals.

I have dedicated this work to my mother who sadly passed away as I was just starting to carry out the fieldwork for this study. This made the journey harder. My mother was everything to me. Despite the many hardships that we both faced, we took on the world together. She was my rock, my strongest backer. Mom: this is just a moment for me to say thank you. I still remember when you told me those words of our people *'Īreragīra rūkū-inī ikaya kūigana.'* This is just the beginning not the end.

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To these, and many others that I have not mentioned, I credit you with any meaningful contributions that this study makes. For the shortfalls, errors and omissions in the work, I take the blame.

## Abbreviations & Acronyms

AP	Administration Police
APHRC	African Population and Health Research Center
BHESP	Bar Hostess Empowerment and Support Programme
BME	Black and Minority Ethnic
CBO	Community Based Organisation
CEO	Chief Executive Officer
CHRI	Commonwealth Human Rights Initiative
CID	Criminal Investigations Department
CIPEV	Commission of Inquiry into the Post-Election Violence
CJ	Chief Justice
CPC	Criminal Procedure Code
CREAW	Centre for Rights, Education, and Awareness
CSO-Network	Civil Society Organisations Network
CoK	Constitution of Kenya
DCC	Deputy County Commissioner
DCI	Directorate of Criminal Investigations
DIG	Deputy Inspector General
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
ECK	Electoral Commission of Kenya
ERS	Economic Recovery Strategy
ERT	Equal Rights Trust
FIDA-Kenya	Federation of Women Lawyers- Kenya
GALCK	Gay and Lesbian Coalition of Kenya
GJLOS	Governance, Justice, Law & Order Sector ( <i>GJLOS</i> ) Reform Programme
GSU	General Service Unit
HOYMAS	Health Options for Young Men on HIV/AIDS/STI
HRW	Human Rights Watch
IAU	Internal Affairs Unit
ICJ	International Commission of Jurists
IEBC	Independent Electoral and Boundaries Commission
IG	Inspector General of the National Police Service
IJM	International Justice Mission
IMLU	Independent Medico-Legal Unit
IP	Inspector of Police
IPOA	Independent Policing Oversight Authority
IPSK	Inter-sex Persons Society of Kenya
JKUAT	Jomo Kenyatta University of Agriculture and Technology
KANU	Kenya National African Union
KBC	Kenya Broadcasting Corporation
KCPF	Kenya Christian Professionals Forum
KES	Kenya Shilling
KHRC	Kenya Human Rights Commission

KHRC	Kenya Human Rights Commission
KISWA	Kisumu Sex Workers Alliance
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
KP	Kenya Police
KPS	Kenya Police Service
KPU	Kenya People's Union
LGBT	Lesbian, Gay, Bisexual and Transgender
LGBTQ+	Lesbian, Gay, Bi-sexual, Transgender, Queer,
MDT	Multi-Disciplinary Team
MSJC	Mathare Social Justice Centre
MSM	Men who have Sex with Men
MUHURI	Muslims for Human Rights
NACOSTI	National Council for Science and Technology
NARC	National Rainbow Coalition
NASA	National Super-Alliance
NASCOP	National AIDS and STI Control Programme
NCAJ	National Council on the Administration of Justice
NCLR	National Council for Law Reporting
NCRC	National Crime Research Centre
NGLHRC	National Gay and Lesbians Human Rights Council
NPS	National Police Service
NPSC	National Police Service Commission
NSWP	The Global Network of Sex Work Projects
NWCPC	National Water Conservation and Pipeline Corporation
NYARWEK	Nyanza, Western and Rift Valley Kenya Network
NYPD	New York Police Department
OCPD	Officer Commanding Police Division
OCS	Officer Commanding Police Station
ODPP	Office of the Director of Public Prosecutions
OHCHR	Office of the United Nations High Commissioner for Human Rights
PC	Police Constable
PRIC	Police Reforms Implementation Committee
RoK	Republic of Kenya
SAPS	South African Police Service
SAPs	Structural Adjustment Programs
SGBV	Sexual and Gender-Based Violence
SJWG	Social Justice Working Group
SRIC	Security Research and Information Centre
SSO	Service Standing Orders
TEA	Transgender Education and Advocacy
TJRC	Truth Justice and Reconciliation Commission
UK	United Kingdom
UNHSP	United Nations Human Settlements Programme

## Dedication

To my mother,  
Margaret Wairuri Wahome

## Chapter One

### Introduction

#### 1.1 Laying the groundwork

##### **Kianjokoma Brothers**

On the evening of 1<sup>st</sup> August 2021, six police officers arrested two brothers – 22-year-old Benson Njiru Ndwiga and 19-year-old Emmanuel Mutura Ndwiga – in Kianjokoma town in Kenya’s Embu County.<sup>1</sup> The two brothers, later widely known as the Kianjokoma brothers, were college students who were back home during the closure occasioned by the Covid-19 pandemic. On that day, they had opened a pork butchery in the town to keep themselves occupied until their colleges reopened. When they closed the shop that evening, they went to a local club to meet the childhood friends John and Chris. Having left the club just after 10pm, in the company of their friend Chris; they soon saw a police vehicle and attempted to get away. The police officers arrested Benson and Emmanuel but Chris managed to hide from them. Benson and Emmanuel never made it home. It would later emerge that they had died while in police custody.

Their parents were worried. The brothers had called their mother to say that they were heading home. When they did not arrive she kept calling them, but their phones went unanswered. At about midnight, the phones went off. Knowing they could not do much to find them in the night, especially due to the curfew, they waited until morning. Early the next morning (2<sup>nd</sup> August 2021), unaware of what had transpired the previous night; their parents began searching for Benson and Emmanuel. They called Chris who told them that police officers from an unidentified station had arrested the two brothers. Benson and Emmanuel’s father went to Manyatta Police Station, the nearest fully-fledged police station to them, to search for his sons. There was no record of them being there. Meanwhile Chris walked around Kianjokoma town with other friends, asking if anyone knew where the police vehicle they had seen was from. That was when they first heard the rumour that Benson and Emmanuel had died. The day ended without certainty about what had happened to Benson and Emmanuel or where they were.

The next day (3<sup>rd</sup> August 2021), alongside other members of the Ndwiga family and their friends, Benson and Emmanuel’s parents went to the Manyatta police station to demand to know the whereabouts of their sons. The unfolding saga attracted significant media attention. Abdulahi Yaya, the Officer Commanding Police Station (OCS) of the Manyatta Police Station, called the parents into his office and told them that Benson and Emmanuel had died after jumping from a moving police vehicle. The parents later found their bodies at the Embu Hospital Mortuary. Media coverage of the story intensified as members of the public,

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<sup>1</sup> The case attracted massive media coverage and the details provided here are drawn from various media sources: Munene, 2021; Standard Digital Videos, 2021; Mugo, 2021; NTV Kenya, 2021; Kendi, 2021; KenyanBytes, 2021; Achuka, 2021; Nyagah, 2021; KBC, 2021; Nairobi Now, 2021; CitizenTV, 2021.

the media, and human rights organisations picked up and amplified the family's demand for answers. Family members alleged that the police had killed Benson and Emmanuel. The police disputed these claims. Emily Ngaruiya, the Sub-County Police Commander (later I refer to this position by the old term OCPD as per Footnote 2),<sup>2</sup> issued a public statement insisting that the two brothers had died after jumping from a moving police vehicle while attempting to escape arrest. She further claimed that the police officers who had arrested them only became aware that the two were missing when they arrived at the police station and did a headcount. The questions why they had taken so long to provide that information and how the bodies ended up at the mortuary remained unanswered.

In the broader context of widespread police brutality (Nyabola, 2021; Wairuri, 2021) the account offered by the police failed to convince the Ndwiga family or the public. Instead, many people saw the police's narrative as an attempt to cover up their culpability. In response, the Independent Policing Oversight Authority (IPOA), Kenya's civilian police oversight agency, announced that they were opening an investigation into the case. The investigation included autopsies of the bodies of the two brothers to establish the cause of death. Three pathologists conducted these autopsies: the family appointed Dr Martha Mwangi, Dr Doris Namu from Embu Hospital represented the government pathologist, and the Independent Medico-Legal Unit (IMLU), a human rights organization based in Nairobi, appointed Dr Ndegwa. The autopsy found that Benson and Emmanuel died from various injuries – head injuries, broken ribs and broken limbs – inflicted by blunt objects (Nyaga, 2021). This contradicted the account offered by the police and thus intensified calls by members of the public, politicians, and human rights organisations for the police officers involved to be held accountable (Kendi, 2021; Munene, 2021). Diana Mukami, an older cousin to Benson and Emmanuel is quoted as saying 'what we need is justice for our young boys' (Nairobi Now, 2021). The residents of Kianjokoma town staged protests to demand action against the police officers. They demanded that IPOA launch an immediate investigation into the matter. Wambugu Gakinya, a local activist, said 'we're giving IPOA an ultimatum. They must come here immediately and begin investigations because that is their job' (KBC, 2021). The police responded to the protest with violence, resulting in several injuries and one fatality.<sup>3</sup>

The leadership of the National Police Service (NPS), Kenya's state police organisation, responded by imposing career-based sanctions on the officers involved. They interdicted the six police officers – Benson Mbuthia, Consolota Kariuki, Nicholas Cheruiyot, Martin Wanyama, Lilian Cheron and James Mwaniki – who were involved in the arrest of the two brothers. The two senior police officers – Abdulahi Yaya (OCS) and Emily Ngaruiya (OCPD) – were also suspended from duty for what was termed as attempts to frustrate accountability. After completing their investigations, IPOA recommended murder charges against the six police officers to the Director of Public Prosecutions (DPP). The DPP concurred and issued

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<sup>2</sup> The titles for the police officers have changed recently. Ward Police Commander replaced the title OCS. However, the title of OCS remains more commonly used and so I use this term. The position immediately above this is the Sub-County Police Commander, which maps on to the old position Officer Commanding Police Division (OCPD). The old title remains in common usage.

<sup>3</sup> Moses Kimantheni Njiru, a 35-year-old man, was shot dead by the police during these protests. His death did not receive much attention, but the family is now demanding for justice (Mugo, 2021).

arrest warrants against the officers in question. Each of the officers was charged with two counts of murder at the High Court in Nairobi. They rejected the charges and pleaded their innocence. The court case is ongoing at the time of writing.

### **Beyond police accountability**

The Kianjokoma brothers' case is a suitable, though tragic, entry point for this study, which hopes to build a comprehensive and deep understanding of how people respond to police abuse in Kenya. The case highlights three crucial issues that are at the core of my analysis in this thesis. First, it illustrates a grievous case of police abuse of authority; that is, cases in which police officers severely limit people's rights (Bonner, et al, 2018). It is worth noting here that I use the more expansive concept of police abuse of authority (hereafter shortened to 'police abuse') for this study as proposed by Michelle Bonner and her colleagues (2018). This contrasts with other more constrained terms that scholars have used such as 'police deviance' (Parnaby & Leyden, 2011), 'police misconduct' (Weitzer, 2002; Porter, 2021) or 'police wrongdoing' (Miller, 2020). Most other concepts that scholars rely on are often anchored in the idea of the police breaking the law, limiting which kinds of police conduct deserve a response, as Bonner and her colleagues (2018) note. Moreover, adopting the legalistic definitions suggests that police abuse is a stable phenomenon that can easily be defined and identified. However, as the Kianjokoma brothers' case highlights, the designation of a policing incident as constituting police abuse is often contested. At various stages, the police officers rejected claims of culpability. Furthermore, as other scholars have showed, what counts as police abuse often depends on who is doing the categorisation. What some people see as police abuse, others may see as a normal part of the police job (World Bank, 2009; Faull, 2018). Like Bonner and her colleagues (2018), I go beyond the legalistic approach to rights, taking a more expansive approach that accounts for people's subjective views of how they should be treated by the police (ibid). I acknowledge that people's conceptualisation of rights in this sense may or may not be based on legal provisions and that people's sense of rights may or may not be collectively held (See, Englund, 2012). Hence, my argument here transcends the strict view of rights violations and instead focus on situations in which people feel that the behaviour of police officers towards them is improper or unjustified/unjustifiable, whether it is possible for them or others to demonstrate that the police officers broke the law.

Second, the Kianjokoma brothers' case shows that people's response to police abuse is a complex process that can involve multiple actors including the victims (and/or families of victims), members of the public, the media, human rights organisations, and state agencies. This is not just true in a case such as this, which is spectacular both because of the intensity of the violence and the extent to which it entered public discourse, but of most cases of police abuse as I demonstrate throughout this thesis. These actors have varied interests and capacities, which are often brought to bear, to varying degrees, in the aftermath of a case of police abuse. Hence, people's response to police abuse involves negotiations with and between those actors. It is noteworthy, as I discuss in more detail in the next section, that most of the scholarly attention to police accountability in Kenya has been on state mechanisms of police accountability, with limited attention paid to the role of the other actors (Osse, 2006;

Wairuri, 2021). This focus on formal institutions misses the complex and varied ways in which people respond to police abuse and the crucial roles that other actors play in this process.

Third, the Kianjokoma brothers' case shows that people articulate their desired outcomes in different ways. While some people see the desired response as police accountability, others speak more generally of justice. However, much of the scholarly and policy attention on addressing police abuse has revolved around police accountability, as I discuss in more detail below. Police accountability is the application of the concept of accountability to the Police (the organisation) and police officers (individuals) to address the problem of police abuse (Jones, 2012). Accountability refers to being made to explain and justify conduct and having one's behaviour scrutinized, judged and sanctioned by audiences (Schlenker, et al, 1994: 634). At the outset, it is important to state that my focus here is not on police institutions but on police accountability at the level of the individual police officers.<sup>4</sup> Scholars have defined the accountability of individual police officers as the detection of the police officers that bend or break the rules and the imposition of the sanctions considered appropriate by the relevant state authorities (Prenzler and Ronken, 2001; Reiner, 2010). Notably, this is state-centric intervention on behalf of the victims of police abuse. In this view, police accountability is understood as an institutional act; that is, something a state institution does to police officers. In Kenya, police accountability is seen as something that IPOA – acting together with other (mainly government) agencies – does to police officers. This policy-defined approach that amounts to what Sindiso Mnisi Weeks (2015) terms as the 'ideal scenario' misses the complexities and dynamism of the aftermath of police abuse. By the ideal scenario, Weeks (2015) is referring to the processes as they are articulated in the law. She argues that in real life the resolution of disputes does not follow the ideal scenario (ibid) as demonstrated by the Kianjokoma brothers' case above. Disputes are messy. It is for this reason that this study seeks to go beyond the assumptions embedded in accounts of police accountability and instead empirically examine the perspectives and experiences of victims of police abuse at Kenya's urban margins. In doing so, the study is guided by the question: *how – and to what effect – do people at Kenya's urban margins respond to police abuse?*

This chapter lays the groundwork for the study. It does so by firstly exploring how each of the three themes I have noted above – police abuse, police accountability, and justice – have been examined by scholars more broadly but with a focus on Kenya, and then articulating the argument I make in the study. I acknowledge the valuable contributions that have already been made by scholars, but also note what has been missed by the state-centric approaches that much of the extant scholarship adopts. Hence, the chapter not only highlights the specific scholarly debates that my study wades into, but also outlines the crucial gaps that the study works to plug. It is perhaps necessary to note here that there are several threads that run across the thesis. This is mainly due to the complex intersections between the three main themes that this study engages with. I point them out below. The value in taking such an approach, rather than a narrower one, is that it highlights the complexity of the phenomena

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<sup>4</sup> At the organisational level, police accountability refers to police organisations being held to account for their overall strategy, efficiency and effectiveness by other government entities such as legislatures or government inspectorates (Stone & Ward, 2000; Jones, 2012).

that I examine in this thesis. For this reason, the purpose of the next three sections is to draw out the core threads that I will follow throughout the thesis. In the section following this one, I examine police abuse in Kenya noting its long history, the various ways in which it manifests and who it affects the most. This is followed by an examination of police accountability in Kenya, placing it within the broader police reforms. The focus of the critical engagement with the literature then shifts to how people respond to police abuse. The next section discusses the three main factors that I see as shaping people's decisions on how to respond to police abuse: their structural position, political subjectivity, and the resources they have. My approach shows people's responses to be varied, complex and dynamic, constituted as social negotiations – in contrast to 'police accountability' approaches that frame people's responses as primarily constituted by institutional acts. After that, I examine the justice outcomes that people pursue when they are responding to police abuse. This critical engagement with the literature is then followed by the presentation of my argument and a summary of the key theoretical and empirical contributions that this study makes in section six. I argue that people's responses to police abuses go beyond the pursuit of police accountability, instead constituting social negotiations between multiple actors aimed at generating justice outcomes. That is, people's response to police abuse include but also exceed police accountability. I also argue that people's success at attaining their desired justice outcomes is shaped by their structural position, their political subjectivity and the resources they hold. I will develop all these ideas in the discussions that follow. The chapter concludes with an overview of the structure of the thesis, highlighting what each chapter covers.

## **1.2 Police abuse in Kenya**

Police abuse is widely acknowledged as a problem that plagues most state police forces across the world (Dean, et al, 2010; Bonner, et al, 2018). It has been a persistent problem in Kenya since the colonial era (Ruteere, 2011; Throup, 2017; Anderson, 1991; Hills, 2009). The colonial government established two police forces: the Kenya Police and the Administration Police (Ibid).<sup>5</sup> Kenya Police was established as an instrument for the pacification of the African population and to pave the way for the completion of the railway and eventual colonisation (Ruteere, 2011). Meanwhile, the Administration Police, commonly referred to by its abbreviation AP, was set up to support the administrative functions of chiefs who were appointed by the colonial government (Killingray, 1986; Ruteere, 2011). In this respect, the AP was a feature of the indirect rule practiced by the colonial government in Kenya (Mamdani, 1996). Both police forces were used by the colonial administration to control the country's African population and to provide security for the European settler minority (Noyes 2013; Maina-Ayiera 2015; Furuzawa 2011; Anderson & Killingray, 1991). Scholars have documented the ruthlessness of the police in the colonial era in everyday policing as well as against people who were seen as posing a threat to the continuing British rule (Anderson, 2005; Elkins, 2014; Furuzawa, 2011; Killingray, 1986). Scholars have documented various forms of abuse including shootings, rape, and other forms of sexual violence against Africans (ibid). It is important to note that these actions by the police in the colonial times are understood as amounting to abuse of people's rights in the moral sense rather than in the legal sense because

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<sup>5</sup> For a concise historical account of state policing in Kenya, see CHRI & KHRC, 2006:3-8.

the law itself was brutally oppressive and designated Africans as subjects not citizens (Mamdani, 1996). In this section, I explore the scholarship on police abuse in Kenya to highlight the core insights that shape my subsequent explorations of people's experiences with and perspective on it.

The law has been central to scholarly debates about policing in colonised countries. Some scholars have argued that colonial governments established laws to oppress and regulate the people they colonized, which were enforced brutally by the police (Asha, 2018; Roy, 2008; Mukherjee, 2012; Karekwaivanane, 2019). Scholars have often cited vagrancy and pass laws, deployed to constrain the movement of Africans across the country and their ability to occupy some spaces, as part of the basis for the brutal policing of Africans (Anderson, 2005; Ciekawy, 1997; Nyabola, 2020). However, other scholars have argued that the law is sometimes just, enabling oppressed groups to pursue justice (Thompson, 1975). Yet, the potential for the law to offer justice to the marginalised can be hollowed out over time as George Karekwaivanane (2019) shows in his study of colonial Zimbabwe. These laws play an important role in shaping people's structural position in the society which affects how people are policed, whether the laws are enforced or not. For instance, in the context of colonisation, the law distinguished between the citizen and the subject (Mamdani, 1996). Where one sat in this crude dichotomy shaped the ways in which one was policed, as many scholars have noted (Anderson, 2005; Elkins, 2014; Furuzawa, 2011; Killingray, 1986). Without disregarding the fact that colonized people could sometimes use the law to fight for justice as George Karekwaivanane (2019) has demonstrated, we must not overlook the ways in which the law was more generally deployed by the colonial government and its police to curtail people's efforts to claim their rights (ibid). An illustrative case here is the brutal repression in the 1950s of the Mau Mau rebellion that sought the end of colonialism in Kenya (Elkins, 2014; Anderson, 2005).

Similar arguments can be deployed in the analysis of law and policing in post-colonial Kenya. On the one hand, there are laws in Kenya's law books that essentially criminalize certain groups of people: a notable example being the criminalisation of same-sex relations between men by the colonially inherited Penal Code (HRW, 2008:6-7; ERT, 2012). As discussed in more detail in Chapter 6, even though there have been very few prosecutions under these provisions in Kenya's history, many queer people see these laws as being at the core of the police abuse and other forms of victimisation they face (Gitari, 2019; HRW, 2008; Dubuis, 2020). This suggests that the law is deployed in ways that go beyond what the law itself and the criminal justice system envisages, as some scholars have already noted (Fassin, 2019; Faull, 2018). That is, the police often instrumentalise the law to achieve other goals, including enforcing punishment on the people who they think deserve it (ibid).

On the other hand, there are many laws that establish people's rights and offer them protection. The Constitution of Kenya, promulgated in 2010, has been celebrated for enhancing people's rights. As Ambreena Manji (2020:17) notes, it is often viewed as a 'reified legal text to be cited, evoked and deployed as a shield.' However, as she proceeds to demonstrate through her examination of land injustices in Kenya, the constitution has its limits (Manji, 2020). Nonetheless, in some cases, the constitution has proven meaningful in

protecting people's rights and constraining state power, as demonstrated by the invocation of the constitution by the High Court in striking down eight sections of a 2014 Security Amendment Bill that would have restricted people's rights under the guise of enhancing security (Muthoni & Thuku, 2015). Yet, as the ruling of the High Court in the constitutional petition that sought to decriminalise same sex relations in Kenya shows, not everyone's rights are seen as protected by the constitution – at least not in the way that many queer people envisaged in this case. Therefore, in this thesis, I see the law as important both in terms of the subjectivities it generate as well as how the police deploy it against people belonging to marginalised groups, paying attention to what laws they deploy and how they deploy them. I also examine how the people who are victimised by the police understand the law and deploy it in their responses to police abuse.

The continuity between the colonial and post-colonial regimes in Kenya is not to be found in the law but also state policing. Scholars have noted that the post-colonial regimes inherited and retained, with minimal changes, the two police forces established in the colonial period (Hills, 2008). It is unsurprising that there is resonance between the brutality of the colonial and post-colonial regimes. With regard to everyday policing, the brutal approach is illustrated by Patrick David Shaw, a British man who worked as a police reservist in Nairobi in the 1970s and 1980s (Gumbihi, 2013; Smith, 2013; Wairuri, 2022). Shaw is a legendary figure who is reputed to have executed people whom he suspected to be criminals, and who failed to heed his warnings to desist from crime or leave the city (*ibid*). Some police officers in the present day have sought to emulate his tactics (Gumbihi, 2013; Wairuri, 2022). Another illustrative case is the spectacular hunt of a three-man gang – Wacucu (Anthony Ngugi Kanagi), Rasta (Bernard Matheri Thuo), and Wanugu (Gerald Wambugu Munyeria) – that captured the country's attention in the 1990s (NaiNotepad, 2017). Eventually, the police gunned down the three (*ibid*). As to the policing of dissent, the illegal detention and torture of people who challenged the government persisted in post-colonial Kenya (Adar & Munyae, 2001; Gimode, 2001). In other words, while colonial rule ended when Kenya gained flag independence in 1963, 'coloniality' (Torres, 2007; wa Thiong'o, 1992) persisted – and with it, police abuse.

Historically, Kenyans have resisted police abuse and oppressive regimes. This is as true of the colonial period as it has been in the post-colonial period. The Mau Mau rebellion noted above is illustrative. In the post-colonial period, resistance to police abuse was particularly significant during the 1990s. The campaign against state violence, including police abuse, formed a core part of pro-democracy activism in Kenya. Other scholars have examined this adequately and I therefore need not belabour it (Adar & Munyae, 2001; Gimode, 2001). However, it is important to note that one of the most crucial changes in this period was the documentation of police abuse by the emerging human rights organisations. One of the most significant contributions to this effort was by the Kenya Human Rights Commission (KHRC), a non-governmental organisation, which published what they called Quarterly Repression Reports documenting various forms of human rights abuses in Kenya. As journalists, lawyers and scholars anchored their work on these reports a wealth of

scholarship on police abuse emerged (KHRC, 2001; Adar, & Munyae, 2001; Kivoi & Mbae, 2013; Ruteere, 2011).

This literature has provided an important view into police abuse in Kenya and the form it takes. One of the most noted is the use of lethal force, often in an extra-judicial manner (Wairuri, 2021; van Stapele, 2016; Aketch, 2005; Anderson, 2002; KHRC, 2001; Hills, 2007; Alston, 2009). Analysts have also documented police abuse in the forms of arbitrary arrests and illegal detentions during which police officers are often said to also demand for bribes (CHRI & KHRC, 2006; Adar, & Munyae, 2001; Ruteere, 2008; Ruteere, et al, 2013; Ruteere & Pommerolle, 2003; Aketch, 2005). Some analysts have examined the involvement of police officers in crime, such as robbery and kidnapping, or colluding with criminals (Gimode, 2001; Wairuri, 2021; Kivoi, 2021). Scholars and human rights groups have also noted the brutal policing of dissent by the police in Kenya including violent policing of protests, harassment, detention and torture, which affected journalists, human rights activities, and opposition politicians (Opalo, 2018; Adar & Munyae, 2001; Ruteere & Mutahi, 2019). Much less attention has been paid to sexual abuse by police officers. Nonetheless, it has been documented in recent decades in relation to major security operations (CIPEV, 2008; Leftie, 2014; HRW, 2017). My study adds to this growing literature on police abuse by examining this phenomenon in relation to everyday policing. While this phenomenon has been noted in public health literature (Deering, et al, 2014; Crago, 2009; Bhattacharee, et al, 2018; Tegang, et al, 2010; NASCOP, 2017), the focus of many of those studies is on HIV/AIDS rather than on policing per se. My study therefore makes an important contribution to our understanding of this phenomenon more broadly.

Elsewhere, scholars have noted that police abuse is shaped by the broader socio-political context. This is consistent with studies elsewhere in the world with respect to everyday policing (Moskos, 2008; Fassin, 2013) as well as in the policing of dissent (Bonner, 2014; della Porta, 1998; Fernandez, 2008). Regarding everyday policing, scholars have noted that the acceptance of violence as an appropriate response to crime by senior police officers, government officials, and the public shapes how police violence is deployed and against whom (CHRI & KHRC, 2006; Wairuri, 2022; Mwahanga, 2014). As to the policing of dissent, the support of police abuse by politicians and members of the public shapes how the police behave (Agutu, 2017; Wairuri, 2022; Ruteere, 2008). Therefore, in this thesis I take seriously the socio-political context within which policing occurs, examining its effects on how and against whom the police in Kenya chose to deploy their discretionary power.

We can further ascertain this socio-political context from the justifications that the police offer in anticipation of, or following accusations of abuse. The narratives they offer reflect what they believe the authorities and the public will accept. Hence, the police deploy the label of 'dangerous criminal' against the poor young men they execute because they know, as Stuart Hall and his colleagues (1977) noted in the context of the UK, that their victims fit the society's stereotype of the criminal. The strength of this discourse is demonstrated by the fact that it has persisted despite evidence that many of the poor young men are already in custody and unarmed when they are executed (Fick, 2018; MSJC, 2015; van Stapele & Diphon, 2019; CHRI & KHRC, 2006). Moreover, scholars elsewhere have demonstrated that

police violence is inconsequential in bringing down the levels of crime in a society (Wacquant, 2003; Dixon, 200; Manning, 1978; Bayley, 1994). In this study, I pay attention to how the police label their victims.

Globally, scholars have found that police abuse disproportionately affects people belonging to marginalised groups in the society. I understand marginalisation as a condition and a process that prevents individuals and groups from full participation in social, economic, and political life (Alakhunova, et al, 2015). As Didier Fassin (2019: 548) observes in his examination of policing in France, the police see members of the marginalised groups as actual criminals, potential criminals, or accomplices of criminals and therefore as deserving to be treated harshly. Scholars have noted the disproportionate targeting and victimisation of young men (Jones, et al, 2017; Cassandra & Robertson, 2013; Belur, 2010; Waddington & Wright, 2008; Alves, 2018; Altbeker, 2005), women (Crenshaw, et al, 2015; Chatelain & Asoka, 2015; Hesselink, & Häefele, 2015; Mathangani, 1995), sex workers (Crago, 2009; Battercherjee, et al, 2018), and queer people (Lanham, et al, 2019; Russel & More, 2016), amongst others. Scholars of policing in Kenya have demonstrated similar patterns. Several analysts have noted the disproportionate targeting and victimisation by the police of poor, young men (van Stapele, 2016; Jones, et al, 2017), migrants (Varming, 2020; Balakian, 2016; Brankamp, 2019), sex workers (Bhattecharjee, et al, 2018; NASCOP, 2017), queer people (KHRC, 2011; Platt, et al, 2018) and protestors (Ruteere & Mutahi, 2019). This is not to say that police abuse does not affect the elite. It does. This is illustrated by the victimisation of lawyers, politicians, religious leaders, scholars, journalists and human rights activists who are seen as posing a threat to the prevailing political regime (Adar, & Munyae, 2001; Gimode, 2007). I draw reference to some of these cases throughout the thesis. However, as some scholars have noted, most police officers will avoid creating problems for wealthy and powerful people because they know it could cost them their jobs (Caldeira, 2000; Garmany, 2014). While the existing scholarship on police abuse in Kenya presents us with useful insights on the phenomenon and some of the factors that drive it, the scholarship is also limited in important respects. Crucially, most of it has focussed on the victimisation of people belonging to one social identity group, even where the scholarship takes seriously the fact that people belong to several social identities that are intersecting. This means that, at best, we get glimpses of police abuse, whom it affects and how. My study seeks to provide a fuller understanding of the phenomenon by examining the perspectives and experiences of people belonging to various social groups at the urban margins.

It is crucial to note that even though police abuse disproportionately impacts people belonging to marginalised groups, it does not impact all people belonging to a particular group in the same way. For example, to say that sex workers are disproportionately targeted and victimised by the police is not to say that all sex workers experience the police in the same way. The difference in how people belonging to the same social category experience policing is partly because people belong to multiple social categories at any one time, which are intersecting and inseparable (Sigle-Rushton, 2013: 3). That is to say that someone could be a sex worker, a wife, a mother, and a property owner all at the same time, as scholars have noted (White, 1990; Smith & Mac, 2018). Kimberlee Crenshaw's (1989) work helps us understand

how multiple structural positions might interact. She coined the concept of intersectionality to explain the condition of black women in the USA with respect to anti-discrimination law. Crenshaw observed the inability of black women to rely on the anti-discrimination law to fight the injustice they were facing because the law prohibited discrimination based on gender and race separately (ibid). This made it impossible for black women, Crenshaw found, to prove that they were being discriminated against because of both gender and race even though this was the empirical reality. Subsequently, many scholars have adopted this intersectional approach to their study of people's victimisation by the police. Naomi van Stapele (2016) argues that the police disproportionately target and victimise poor young men. In adopting the framing of poor young men, she acknowledges that the young men in Mathare that she studied are shaped by their age, gender and socio-economic status (ibid). Mathare is one of Nairobi's largest informal settlements whose residents, especially young men, are heavily victimised by the police, as has been noted elsewhere (van Stapele, 2016; Jones, et al, 2017; MSJC, 2017). My study takes this approach, seeing the structural positions of the victims of police abuse as intersectional. This is crucial because it helps explain why people who share a social identity, such as being queer, may be differentially exposed to police abuse based on their identify, how they present, and their socio-economic statuses as I will discuss in Chapter 6.

The reference to Mathare above points to the crucial fact that the spaces that people occupy and how people occupy space shapes how they are policed. Scholars have noted that the police may target people when they are seen as 'matter out of place' (Douglas, 1966), such as when poor young men occupy spaces that are seen to be for affluent social groups. Andrew Faull (2017: 49) observes this in his study of policing in South Africa. Scholars have also noted that spaces can acquire reputations of their own, which then shape how the people who occupy them are policed. For instance, in his work, Adam Elliot-Cooper (2018) notes that Tottenham, an area in north London, has been racialized as black. Using the concept of metonymic space – a space that comes to represent something else – he argues that this racialisation of the area as black shaped the nature of its policing and the community response to it. Some spaces, such as poor urban neighbourhoods that I refer to here as 'the urban margins' (Auyero, et al, 2014), are imagined as dangerous or risky and therefore as necessitating brutal policing (Yarwood, 2007; Humphrey, 2013; Paes-Machado & Noronha, 2002; Auyero, et al, 2014; Wacquant, 2008). Scholars of policing in Kenya have also noted this (Ruteere, et al, 2013; van Stapele, 2016; Jones, et al, 2017). In this thesis, I take the spatial dimension of police abuse seriously observing how space shapes the policing of people belonging to different social categories at the urban margins in Kenya.

To understand this phenomenon of police abuse fully, we must also pay attention to the individual police officers. Examining the actions of the individual police officers is crucial because, as Ian Loader argues (2000: 325), state power is enacted through the dedicated, uniformed bodies we have come to know as the police (see also, Neocleous, 2000). Furthermore, scholars have emphasized that one of the unique features of policing is that police officers exercise much discretion in their work and, in doing so, exercise agency (Bayley 1994, Bittner 1970; Ruteere, 2011). This suggests that it is crucial to understand the factors that

shape how the police officers do their work. In this regard, I find Andrew Faull's (2017) study, examining how police officers in South Africa see themselves and how this shapes their work, particularly pertinent. Faull argues that police officers' personal stories, ambitions and vulnerabilities shape how the work of policing is done (*ibid*). From his study, I draw four crucial insights that I consider important to my endeavour here. First, he notes that the actions of police officers are not just shaped by the law, but also by their own subjective view of social norms, as well as their religious and cultural beliefs (Faull, 2018). Indeed, other scholars have noted that police officers do not just enforce the law but also enforce their subjective moral order (Reiner, 2010; Faull, 2018; Loftus, 2009; Skolnick, 2008; Loader, 2006). Second, Faull (2018: 44, 46) finds that police officers expect to be treated with respect by those they police, especially people belonging to marginalised groups. He notes that in the situations where they feel that they are not being respected, they are more likely to respond in a brutal and violent manner (*ibid*). Third, Faull's (*ibid*) study reveals that the interactions between police officers and other members of the society are not limited to policing interactions because police officers are also members of the society; they will be parents, neighbours and church-goers and may also moonlight – take other jobs – in the community when they are off duty (See also, Garmany, 2014). As a result, instances of police abuse may emanate from interactions of police officers with other people in the society in non-policing contexts. Finally, the core theme in Faull's (2017) work is that police officers are career-driven individuals who make the choices that they do to advance their careers or to protect them from risk. He commented that police officers see the pursuit of accountability by the people they police as posing a risk to their careers, a risk that they often seek to minimise. Their efforts towards this may include threatening or negotiating with their victims in order that they do not file complaints or withdraw them when they already have. Previous studies in Kenya have found that police sometimes fabricate charges in order to cover-up malpractice in the course of duty (CHRI & KHRC, 2006:23). Police officers may also see accountability as a restraint on their powers, making it harder for them to do their job (World Bank, 2009: 38). In this thesis, I follow other scholars in lifting the veil of the institution to look at the actions of the police officers. I pay particular attention to how they respond to people's attempts to claim their rights.

While the primary focus of my thesis is on how people *respond* to police abuse, it is important to highlight the core insights that have emerged from the scholarship on police abuse in Kenya that my study will build on. The foregoing discussion highlights some of the core aspects of police abuse that I explore in this thesis. To begin with, I have pointed out that police abuse is a socio-political phenomenon that is linked to the law, but not determined by it. I commented that the law may sometimes predispose people to abuse by restricting their rights, but also that police officers may instrumentalise the law to achieve other goals. I have argued that several factors including the attitudes of the police, the public and the government on how the police should do their work shape how the police do their work. I also showed that who people are and the spaces that they occupy are also important in the interactions between them and the police. Taking this broad and comprehensive approach will enhance our understanding of police abuse in Kenya.

### **1.3 Police accountability in Kenya**

Mainly in the 2000s, police accountability was proposed by policy actors and adopted by the Kenyan government as an appropriate policy response to the problem of police abuse that I have discussed above (CHRI & KHRC, 2006; World Bank, 2009; CIPEV, 2008; Ransley Taskforce, 2009). In this section, I examine how police accountability as an idea emerged in Kenya and how it has been implemented. I note how police reform efforts gained momentum in the 2000s, leading to the implementation of various reforms including the establishment of new institutions such as IPOA. Here, I focus on the state institutions of police accountability, noting how they emerged and how scholars have assessed them. I argue that police accountability, which occurs within the state, involves multiple actors with varied capacities and interests. As such, I contend that even police accountability, which I view as just one of the ways that people may respond to police abuse, is contingent on the ways that these various actors interact. In other words, it needs to be understood as an institutional negotiation.

Scholars have sought to explain why police abuse of authority is so widespread and prevalent, across the world, in their effort to identify appropriate policy solutions. Some have argued that the problems of police abuse run so deep that the institution should be abolished as a whole (Kaba, 2020; McDowell, & Fernandez, 2018). While these ideas have gained some traction over the last few years, they have yet to be widely adopted as policy. Most other scholars see the problem of police abuse as emanating from the combination of the power that the police hold and the discretion they exercise in the deployment of that power (Goldsmith, 1990; Waddington, 1999; Miller, 2014; Lyman, 2002). As a result, many analysts see the solution to the problem as lying in reducing the power of the police, reducing their discretion, or both (Alpert, & Dunham, 2004; Ariel, et al, 2015; Walker, 2001). One of the core ideas that has emerged from this scholarship, and which has been advocated by local and international organisations and adopted by governments across the world, is police accountability (Walker, 2005; World Bank, 2009; CHRI & KHRC, 2006). As I noted above, police accountability is widely understood as the imposition of sanctions against police officers who are found, by a relevant state authority, to have broken the rules (Reiner, 2010; Prenzler & Ronken, 2001).

Governments have implemented police accountability differently. Over the last two decades scholars have discussed these accountability mechanisms and proposed various ways of categorizing them (Prenzler & Ronken, 2001; Stone & Ward, 2000). To take an example, Tim Prenzler and Carol Ronken (2001) categorized the mechanisms of police accountability into three: internal affairs, civilian review, and civilian control. The internal affairs model involves the establishment of a dedicated unit – an Internal Affairs Unit – within the police force to conduct investigations against police officers accused of abuse with affairs oversight being provided by the courts and by elected officials (ibid: 157). The civilian review model involves the establishment of an external agency, which monitors the investigations into police abuse and disciplinary actions conducted by the police themselves (ibid: 161). The civilian control model involves the establishment of an independent civilian-led police oversight agency, such as IPOA, to investigate complaints against police officers (ibid: 166). This latter one maps on to what other scholars describe as civilian oversight (e.g. Filstad and Gottschalk, 2011). The foregoing reiterates the point I made earlier, but which bears repeating, that police accountability is understood to be an institutional act.

Police accountability in Africa emerged as part of a package of police reforms programs that were, in turn, part of the broader package of the good governance agenda (Gray & Khan, 2010). Police reform was seen as the solution to the numerous problems that were said to plague state policing on the continent. African state police forces were said to be geared towards protecting the prevailing political regimes (Hills, 2000), and they were also said to be marked by incompetence, brutality, corruption, and a general lack of capacity (Akech, 2005; Anderson, 1991; Hills, 2000, 2007). Because of these problems, scholars argued that Africans were left to rely on non-state policing mechanisms for their protection such as mob justice and vigilante groups (Baker, 2004), as a result of which community vigilantism has received significant attention in African studies (Cooper-Knock & Owen, 2015).<sup>6</sup> The police reform programs that were therefore proposed to and willingly adopted by African countries were packaged as efforts to democratise policing, which would prioritise the protection of people – and their property – over the preservation of prevailing political regimes (Marenin, 1998; Hills, 2000; Bayley, 2001; Manning, 2010; Stenning, 2000). The initial police reform efforts included efforts to enhance the technical capacity of the police (Denny & Valters, 2015), the adoption of crime prevention policies (Steinberg, 2011), and the implementation of community policing programs (Ruteere & Pommerolle, 2003; Hornberger, 2013). Scholars have found many of these programs to have been counterproductive, often serving to legitimate police abuse (Steinberg, 2011; Ruteere & Pommerolle, 2003; Hornberger, 2013).

Kenyan police reform unfolded in two main waves. The first wave of reforms begun soon after the opposition won the 2002 election and the National Rainbow Coalition (NARC) government, led by President Mwai Kibaki, came into office. The government included police reform in their development agenda that was contained in a blueprint that they called the Economic Recovery Strategy (ERS) (Government of Kenya, 2003). However, despite the prevalence of police abuse, police accountability was curiously absent from the list of top reform priorities that was largely geared towards enhancing the technical capacity of the police (ibid). This is in spite of the fact that the drafters of the ERS acknowledged the prevalence of police abuse, and some of the prominent leaders in the NARC government – including Raila Odinga who was leading figure in the government – had experienced it (Throup, 2020). A taskforce on police reforms that was established later that year recommended the establishment of a community policing program and noted the need to enhance accountability and transparency of the police (Kivoi, 2021; Hills, 2008). The theme of accountability was also subsequently included in the much broader Governance, Justice, Law & Order Sector (GJLOS) program that followed (Otiso & Kaguta, 2016).<sup>7</sup> The Kenya Police Strategic Plan 2003–07 that was developed as part of the GJLOS program recommended the

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<sup>6</sup> Mob justice refers to ephemeral forms of non-state policing where rowdy crowds pursue and attack people accused of crimes. (See, Tankebe, 2009); Vigilante groups have received a significant amount of attention in African studies. Some of the most prominent groups include the *Bakassi Boys* in Nigeria (Meagher, 2007), *Sungu Sungu* in Tanzania (Heald, 2002), *Amandlozi* in South Africa (Buur, 2006) and *Mungiki*, *Kamjesh* and *Taliban* in Kenya (Rasmussen, 2010; Ruteere, 2008; Kagwanja, 2003; Katumanga, 2005).

<sup>7</sup> The GJLOS program was a big development program, which brought together reforms in thirty-three state institutions in the justice sector. It was coordinated by the Ministry of Justice and Constitutional Affairs (GJLOS, 2005).

establishment of a Police Service Commission which would, amongst other things, formulate a national policy on policing, monitor police performance, and investigate police misconduct (ibid). The government did not implement these reforms. Not only were the police reform efforts of the NARC government judged as being inadequate, analysts also argued that the regime had actively entrenched a culture of extra-judicial executions and used the police to oppress the media and opposition politicians just like the previous regimes (Amnesty International, 2013; Alston, 2009; Chege, 2008; Ruteere, 2011).

The second wave of police reforms resulted from the 2007-8 post-election violence that followed the disputed results of the 2007 presidential polls. In that violence, more than 1,133 people died, thousands were injured, and more than half a million were internally displaced (CIPEV, 2008). The violence ended following a political settlement (The National Accord) negotiated by a team of eminent African persons led by Kofi Anan, former Secretary General of the United Nations (Juma, 2009). Amongst other things, the political settlement included an agreement to conduct an official inquiry into the post-election violence which paved way for the establishment, in 2008, of the Commission of Inquiry into the Post-Election Violence (CIPEV) headed by Justice Philip Waki (hereafter, the Waki Commission). Regarding the Police, the Waki Commission found that they had not only failed to protect citizens who were under attack but that they had also played an active role in perpetrating the violence (CIPEV, 2008). The Commission estimated that the police were responsible for at least 405 (about one-third) of the deaths that occurred in that violence (ibid: 384-5).<sup>8</sup> To address these problems, the commission made recommendation for reform that included the enhancement of police accountability and also recommended the establishment of a taskforce to make further recommendations on how policing in the country could be improved (CIPEV, 2008). This led to the establishment, in 2009, of the National Taskforce on Police Reforms under the leadership of Justice Philip Ransley (hereafter, the Ransley Taskforce). At the end of its tenure, the Ransley Taskforce made over 200 recommendations on police reform that included various ways in which police accountability could be enhanced (Ransley Taskforce, 2009). In 2010, the Police Reforms Implementation Committee (PRIC) was set up to oversee the implementation of the reforms from the Ransley taskforce (Kivoi & Mbae, 2013). Many of the reforms proposed by the Ransley Taskforce were subsequently implemented through the new Constitution of Kenya, promulgated in 2010, and the subsequent enabling legislations, namely the National Police Service Act (NPS Act) of 2011; National Police Service Commission Act (NPSC Act) of 2011; and Independent Policing Oversight Authority Act (IPOA Act) of 2011. Crucially, these reforms led to the emergence of several institutions, which have an accountability mandate, including the NPS, the Internal Affairs Unit (IAU), the National Police Service Commission (NPSC) and IPOA. The IAU and the NPSC have been examined elsewhere (Kivoi, 2021) and since they are not primarily public facing, they are not central to my analysis here leaving me to focus on the NPS, especially the chain of command, and IPOA.

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<sup>8</sup> This number is the number of people who died of gunshot wounds in that violence. In the absence of evidence that these gunshots had been fired by anyone else other than police officers, the Commission concluded that the police caused these fatalities. However, this number should be taken as indicative rather than as a precise number since people who are not police officers may use firearms, and police officers may kill people without the use of firearms.

The Waki Commission observed that the persistence of Kenya's two police forces – Kenya Police and the AP – was a problem, proposing that they be merged (CIPEV, 2008: 434-46). However, the Ransley Taskforce (2009:42-3) rejected that proposal. Instead, they recommended that the two forces remain distinct but be brought under singular command. This latter position carried the day and, in the end, the new Constitution created the NPS, encapsulating the two police forces. The NPS would be under the leadership of an independent Inspector General (IG), with each of the two major units being headed by a Deputy Inspector General (DIG). Crucially, these changes cascaded to lower levels of the organisation with police officers in both the Kenya Police and the AP coming under the command of the County Police Commander at the County level and the OCS at the station level. So far, the police chain of command in Kenya has received very limited attention from scholars. Some scholars have noted the power that these senior police officers, especially the OCS, hold in community policing programs at the local level (Diphooorn & van Stapele, 2016) and their bureaucratic power to issue police documents such as permits for events (Brankamp, 2019). How they engage with the officers under their command, including with respect to enforcement of discipline and handling of complaints against the officers, has not been subjected to scholarly analysis. Even though Jospeter Mbuba (2021:35) notes that the senior police officers have the power to record complaints against police officers and impose punishment where necessary, he does not examine how they exercise this power. In this thesis, I seek to enhance our understanding of the police chain of command as a mechanism of police accountability through the experiences and perspectives of the victims of police abuse who report their abuse to senior police officers seeking their intervention.

Kenya's 2010 Constitution did not establish a police oversight body, as was proposed by the Waki Commission and the Ransley Taskforce. However, it provided for police accountability as one of the core principles of state policing in the country. This created room for the establishment of the Independent Policing Oversight Authority (IPOA) through an Act of Parliament (Stacey, 2018). IPOA is mandated to investigate police misconduct, especially cases of death or serious injury at the hands of the police. A decade after its establishment, our understanding of IPOA remains limited. The insufficient analysis of IPOA that does exist has focussed on its limited effectiveness in handling cases of police abuse that unfold in Kenya (van Stapele 2016; Osse, 2016; Furuzawa, 2011). The fact that IPOA only obtained three convictions in the first six years of its existence (2012-2018) has been noted (Rajab, 2018). Elsewhere, I have examined opposition to IPOA's efforts to hold police officers accountable for the deployment of lethal violence by people who feel that such violence is the appropriate response to crime and insecurity (Wairuri, 2022). What these studies have missed is how the victims of police abuse engage with IPOA. My study examines this.

As important as the chain of command and IPOA are to police accountability, it is crucial to acknowledge that the state architecture of police accountability extends beyond them to include investigative agencies. One of the most crucial institutions to consider is the Directorate of Criminal Investigations (DCI), a semi-autonomous unit of the NPS, which has the primary mandate of investigating crime in Kenya. There has been little scholarly examination of the DCI so far. The limited commentary on the DCI that exists has emphasized

its lack of capacity – especially lack of equipment and shortage of well-trained and experienced staff – to conduct investigations effectively (Mbaya, 2016; Sang, 2013; Kivoi, 2020). However, the DCI possesses some investigative capacity that other state agencies, including IPOA, lack. As a result, IPOA must often rely on the DCI for some investigations as I discuss in Chapter 3. Additionally, some analysts have argued that the DCI conduct shoddy investigations into cases of police abuse to frustrate efforts by victims to pursue police accountability (Odenyo, 2019). IPOA has often complained about frustrations by the DCI and the NPS more broadly in their efforts to investigate police abuse cases (Hope Sr, 2020; Mwangi, 2017). This is important because it allows us to see that, even within the state, police accountability is the product of negotiations between various actors. This is also reflected in the work of the Government Pathologist who is expected to conduct autopsies on the bodies of the deaths that occur, for instance, because of police abuse. Even though this institution has received limited scholarly attention, what scholarship exists has emphasized its lack of capacity do the work they are supposed to do or to do it well (Olumbe & Yakub, 2008; Muriuki, 2013; Olumbe, 2000). However, other scholars have pointed to other factors such as opposition of the conduct of post-mortems on the bodies of their loved ones for religious and cultural reasons (Bunei, et al, 2019; Oruko, et al, 2020). This further suggests that the pursuit of police accountability involves negotiations not just between state institutions but also with the families of the victims of police abuse. Although my study does not focus on the state, I will take state institutions and the processes and outcomes they generate into account.

#### **1.4 From institutional acts to social negotiation**

The foregoing analysis presents the architecture of police accountability in Kenya. As I noted earlier, police accountability is imagined as an institutional act. Thus, in the ideal scenario people would be expected to file their complaints of police abuse with IPOA, which will then investigate the case and make a recommendation to another government institution for the imposition of appropriate sanctions. However, as I noted above these normative ideals do not accurately reflect what happens in practice, as Sindiso Mnisi Weeks (2015:238) argues. Further, as demonstrated by the Kianjokoma brothers' cases, the process involves many other actors. This suggests the need to go beyond police accountability and consider people's responses as reflecting a social negotiation. In doing so, I conceptualise cases of police abuse and their aftermath as disputes, enabling me to draw on an insightful literature that goes beyond the ideal to examine what happens in practice.

Dispute resolution is complex, not just because it involves multiple actors or because it is subject to significant dynamics and inflections but also because it unfolds within and without the institutional arena (Weeks, 2015; Felstiner, et al, 1980-81; Merry, 1979, 1980). This means that understanding the way disputes are handled requires use to go beyond the institutional focus and consider the varied and complex ways in which people respond to victimisation. A crucial insight emerging from the dispute resolution literature is that people who are aggrieved deploy multiple strategies in their efforts to resolve disputes (Weeks, 2015, 2017; Cooper-Knock & MacDonald, 2015). The scholarship on dispute resolution has also noted the dynamism of these processes. This not only refers to the fact that people can deploy multiple strategies, concurrently or successively, to resolve one dispute, but also that, in doing

so, they may leverage different institutions in both formal and informal ways. For instance, the literature that describes “forum shopping” shows how people may change the institutions through which they seek to resolve a dispute in the pursuit of a favourable outcome elsewhere or when they think the current forum is unlikely to meet their needs (Mwangi, 2010; Chopra & Isser, 2012; Helbling, et al, 2015). In her work, Weeks (2015:233) identified five types of dispute management processes including: self-help, negotiation, mediation, arbitration, and adjudication (ibid: 233). She says that self-help refers to situation where people take it upon themselves to resolve a dispute by enduring the abuse, avoiding the perpetrator, or deploying violence. She defines negotiation as a bilateral attempt to resolve the dispute, between either the parties directly involved or their representatives (ibid). Mediation, arbitration, and adjudication all involve an authority figure, with the distinction being in the kind and source of power they hold (ibid: 234). This view of dispute resolution as a dynamic process in the context of multiple actors compels us to contextualise dispute resolution as a social negotiation – an idea that I will develop. Amongst the factors that scholars have noted as shaping how people respond to police abuse, I focus on three: structural position, political subjectivity, and resources.

People’s structural positions, amongst other things, shape their responses to victimisation (Felstiner, et al, 1980: 649). For instance, scholars have noted that people’s structural positions affect their ability to access state institutions such as the courts, with the people belonging to marginalised groups having the least access (Brems & Adekoya, 2010). This has led to the emergence of programs that are meant to make it easier for the marginalized to access justice through formal state institutions (ibid; Kameri-Mbote & Akech, 2011; Muigua & Kariuki, 2015). Underlying these ideas of enhancing access to justice in Kenya, is the question of citizenship, which often goes unstated. Traditionally, citizenship is understood as a legal status that is awarded to an individual by a state – to which they belong and whose authority they recognize – that then guarantees them certain rights (Sieder, 2001). However, as many scholars have observed, people’s access to rights is unequal (Butler, 2014; Chigudu, 2019). Some people experience a citizenship gap as their claims to citizenship may be dismissed or criminalised, as with the experience of queer people in a country like Kenya where same-sex relations are criminalised (Bonner, et al, 2018: 14; Richardson, 2000, 2017). This means that we need to take people’s structural positions seriously rather than presuming that they can exercise their rights because of being members of a particular polity. The foregoing also points to the importance of the law in shaping people’s structural positions, a point that other scholars have noted, especially with regard to the categories that the law creates (Camminga, 2019; Butler, 1990; Van Klinken, 2019; Gitari, 2019). In this thesis, I take people’s structural positions seriously and explore how it shapes people’s responses to police abuse at Kenya’s urban margins.

Scholars have also argued that how people respond to victimisation is also shaped by their perceptions, both of who they are and how state processes work (Felstiner, et al, 1980: 649). In other words, people’s political subjectivity matters. Political subjectivity refers to the ways that people under the authority of another (subjects) feel, respond and experience (Lurhman, 2006; Holland & Leander, 2004; Krause & Schramm, 2011). A crucial contribution

to this scholarship is if the work of Sally Engel Merry (2003) in which she examines the responses of women in Hawaii who are subjected to domestic violence. In particular, she seeks to understand what shapes their decisions on whether to report their victimisation or not, and where they report, whether they sustain the effort. She argues that whether people report – and sustain – complaints in the criminal justice system depends on whether they see themselves as rights-bearing citizens. She further argues that this political subjectivity of victims as rights-bearing citizens depends on its reaffirmation by state institutions. In other words, where state institutions treat people as rights-bearing citizens and take their cases seriously, they are more likely to report subsequent instances of abuse and vice versa. People's political subjectivity also shapes what they expect from the formal processes. As scholars have noted, people belonging to marginalised groups make strategic decisions when they are caught up in formal state processes based on their sense of how the processes works for people like them. Thus, people may often seek to avoid complications and expenses of formal legal procedures by offering police officers bribes following arrest (Onyango, 2022; FIDA-Kenya, 2008). If that fails, and someone is taken to court, they may plead guilty, even when they believe themselves to be innocent, to gain quick release (FIDA-Kenya, 2008). This is primarily because, as Michael Feely (1979) found in his study of the criminal justice system in the USA, people see the process as constituting the punishment. People may also abandon process they have initiated within state institutions if they think the processes and their outcomes may cause more problems (such as retaliation by their aggressors) than they solve (Merry, 2003; Geetanjali, et al, 2020). In this thesis, I explore the extent to which people at the urban margins see themselves as rights-bearing citizens and how this shapes their decisions on how to respond to police abuse.

How people respond to victimisation or engage in disputes is also shaped by the resources they have access to and are able to deploy. In some cases, this citizenship gap emerges from socio-economic factors, such as poverty, which place barriers on people's ability to access rights that they are entitled to. Indeed, scholars have noted that people belonging to marginalised groups deploy various strategies relying on various resources that are available to them. In some cases, they negotiate with state agents informally to avoid a harsh implementation of state regulations (Berenschot, & van Klinken, 2018; Cross 1998; Brown, et al, 2010). Sometimes people may require support to access these state institutions and to negotiate with officialdom. In the policing literature, scholars have identified situations in which people call on police officers they know to help them resolve conflicts with other people or police officers, a phenomenon that has been termed contact calling (Cooper-Knock, 2014; Hornberger, 2013; Wairuri, 2015). People may also ask other people, such as family members or neighbours to intervene on their behalf (Weeks, 2017:25). Scholars have also noted that people may seek the support of professionals, such as lawyers and paralegals, who may make it possible for them to access state institutions they may not otherwise be able to access (Karekwaivanane, 2019; Diehl, 2009; Dugard & Drage, 2013). In some cases, people from the marginalised groups will rely on their solidarity organisations or human rights organisations for help in their negotiation of the aftermath of state violence (Nasong'o, 2007; KHRI, 2008; Ali, 2017). As scholars have noted (Schlosberg, 2013; Stanley, 2004) others may rely on the media which, as demonstrated by the Kianjokoma brothers' case, can raise the political

salience of a case, triggering mechanisms of police accountability such as IPOA. People may also leverage formal procedure, such as court cases, to succeed in other arenas (Cooper-Knock & MacDonald, 2020). My study explores how people acquire and deploy various kinds of resources – including ideas, money and social networks – in their response to victimisation by the police and what effect these resources have in these social negotiations.

The foregoing discussion points to some of the fundamental elements of this study. I have noted that people’s structural position, their political subjectivity and the resources available to them shape their response to police abuse. I have also underscored the dynamism of people’s response to disputes that I carry on to cases of police abuse and their aftermath. Importantly, I have noted that people may deploy multiple strategies to one dispute and may draw in various other actors to help them mitigate these processes. I refer to these dynamic processes as acts of social negotiation, arguing that such a conceptualization helps us better understand people’s responses to police abuse than do primarily institutional analyses that focus on people’s pursuits of police accountability. What do these social negotiations accomplish? To understand this, I next delineate the nature of the justice outcomes that people pursue.

### **1.5 Justice outcomes**

So far, I have challenged the analytical primacy given to police accountability in the scholarship on responses to police abuse. I have argued that we need to go beyond the institutional focus and see people’s responses to police abuse as a social negotiation. In this section, I build on this by considering the outcomes that people seek in their response to police abuse. As I mentioned above, the state police accountability mechanisms are geared towards generating career-based and legal sanctions against police officers who are found to have abused people’s rights as demonstrated in the Kianjokoma brothers’ case. So far, there has been no sustained scholarly examination of the ends that victims of police abuse in Kenya seek when they respond to their victimisation. However, the extant literature on dispute resolution suggests that the outcomes that the police accountability system is designed to generate represent only a fragment of what victims would be looking for (Weeks, 2017). This scholarship shows that people’s efforts in the resolution of disputes are geared towards the generation of a complex set of justice outcomes that may include punishment of their aggressors, remedial action, or avoidance of further harms. In this section, I draw insights from existing scholarship on what these goals could be and what shapes the ability of the victims to pursue them.

Scholars have discussed the question of what constitutes justice for centuries, without being settled (Materni, 2013). As a result, scholars operationalise the concept in different ways to better deploy it in their work. In Just as scholars created sub-types of democracy – which David Collier and Steven Levitsky (1997) describe as democracy with adjectives – scholars have often added adjectives to the concept of justice in order to apprehend it. Hence, people talk about procedural justice (Thibaut and Walker, 1975; Tankebe, 2009; Sunshine & Tyler, 2003), substantive justice (Karekwaivanane, 2019:2), social justice (Harvey, 2010; Mutunga, 2015) and other types of justice. Scholars have found that people articulate their ideas of justice

in different ways (Brunnegger, 2019: 2). For instance, in a study on the perspectives of black and minority ethnic (BME) women who have been subjected to sexual and gender-based violence (SGBV), Geetanjali Gangoli and her colleagues (2020: 3125) found that people spoke about justice variously. They identified justice as including legal protection by the police and the courts, recognition of their victimisation by the community, protection of their human rights, and exercise of personal freedoms (*ibid*). It is these varied kinds of outcomes that people pursue, whether within or without state institutions, that are of interest to me here. Rather than collapsing these outcomes pursue under singular concepts such as human security (Weeks, 2017) or everyday justice (Brunnegger, 2019; Kyed, 2021), I prefer to rely on the more generic and agnostic concept of justice outcomes. By justice outcomes I mean both the ends that people seek, and the ones generated by the institutions utilized by people who are victimised. Nonetheless, I draw upon the extant literature, especially from victimology and transitional justice to identify justice outcomes as falling into four different categories: retributive, restorative, reparative, and transformative (Materni, 2013; Kinyanjui, 2009; Moffet, 2012; Garcia-Gordos, 2016). In the paragraphs that follow, I examine the existing scholarship on each of these categories of justice outcomes to draw out the key insights on the kinds of justice outcomes that people pursue when they are responding to victimisation.

The punishment of offenders, described as retribution or retributive justice, is the primary justice outcome that is offered by many criminal justice systems around the world (Materni, 2013). Retributive justice is sometimes also dispensed by non-state mechanisms such as vigilante groups (Buur, 2003). As I have already noted, the state-centered police accountability processes are geared towards the imposition of career-based and legal sanctions against police officers who abuse people's rights (Hope Sr, 2020). Since its establishment, IPOA has investigated several cases of police abuse, recommended the prosecution of some police officers, and obtained several convictions (*Ibid*; Awino, 2018; Wairuri, 2022). That is to say that some people consider the punishment of police officers who abuse their rights or those of their loved ones, that is understood here as police accountability, to be a desirable and meaningful response to police abuse. It is therefore important for me to state outright that I am not arguing that police accountability, which in this case amounts to retributive justice against the police officers, does not matter. It does. People file complaints at IPOA against police officers looking for action to be taken against them and, in some cases, it has worked in the ways that victims and some of the other actors have hoped (*ibid*). It is important to understand how these processes unfold, a phenomenon that has not received much attention in the literature. Most of the existing scholarship has emphasized the ineffectiveness of IPOA in addressing the problem of police abuse due to the low numbers of police officers that they have taken to court and the convictions that they have obtained (Osse, 2016; van Stapele, 2016; Rajab, 2018). Beyond that, we also need to ask what happens through and despite the failures of these formal cases. I do so in this thesis by examining some of the cases in which people have sought police accountability through IPOA.

A more substantive critique of the outcomes that the police accountability system generates encapsulates the criminal justice system. In the ideal scenario, as highlighted above, cases of police abuse should end up in the courts. However, the courts themselves are widely

seen as inaccessible, corrupt and ineffective (Muigua & Kariuki, 2014; Mutua, 2001; Otieno, 2005; Van Staple, 2016). In any case, scholars have noted that even where the criminal justice systems generate sanctions against the perpetrators of a crime, they often fail to satisfy the victims for different reasons such as the feeling that the punishment is too lenient (Englebrecht, et al, 2014; Moffet, 2012). Similarly, across the globe, scholars have noted that verdicts against police officers who are convicted of police abuse are often lenient (Fassin, 2019:541; Bonner, et al, 2018). Writing in the context of the USA, Andrew Dilts (2017: 185) argues that the form of justice that the criminal justice system can generate is often not what people want but, in the absence of viable alternatives, it becomes 'one of those things that we cannot not want' (ibid: 185). This underscores the fact that people may pursue justice through the formal state institutions even when they know that the kind of justice outcomes it generates, if it works, is likely to be insufficient. I examine this throughout this thesis.

Scholars who have examined dispute resolution across Africa have noted that sometimes victims are more interested in restorative justice than in the punishment of their offenders (Buur, 2006, 2007; Super, 2016; Heald, 2006; Sen & Pratten, 2007). Restorative justice is understood as a process that brings together the parties involved in an incident of wrongdoing to collectively decide how to deal with the aftermath (Roche, 2004). This approach emphasizes healing and the reintegration of both victims and perpetrators into their communities (Menkel-Meadow, 2007; Tutu, 1999). The restorative justice approach has been critiqued by some scholars for taking punishment of the offenders, which some victims may want, off the table (Acorn, 2004). Others have argued that these processes could be manipulated or corrupted in ways that end up further oppressing the victims (Levant, et al, 1999). Whatever the case, analysts have noted that it is often applied in resolving disputes and conflicts at a local level (Menkel-Meadow, 2007). In this thesis, I examine how this approach is applied to disputes between police officers and those they police, especially by senior police officers, which is often missed by the scholarship that has focused on IPOA. This approach was popularised by South Africa's Truth and Reconciliation Commission and finding the truth about people's victimisation was core to that process (Menkel-Meadow, 2007; Tutu, 1999). To be clear, establishing the truth is not just a feature of restorative justice; truth can also emerge in important ways from the other processes, as I demonstrate in my discussion on legal truth (Summers, 1999) in Chapter 4. People often pursue the truth about what happened to them or to their loved ones when that information is not available, is contested, or when their victimisation has been outrightly denied by the authorities (Stanley, 2005; Summers 1999). This often proceeds through public inquiries – including judicial inquests, parliamentary inquiries, and commissions of inquiry – such as the Waki Commission (2008). Some notable examples where victims have pursued state sanctioned truth of their victimisation include the Julie Ward case (Musila, 2015) and the Wagalla Massacre of 1984 (Anderson, 2014). So far, truth-telling has been acknowledged as an important part of the literature on public commissions such as the Waki Commission, the TJRC, and the Commission of Inquiry into Illegal and Irregular Allocation of Land that is commonly known as the Ndung'u Commission after its chairperson Paul Ndung'u (Brown & Sriram, 2012; Bowry, 2010; Manji, 2020). However, it has not yet been considered in depth in the responses of individuals to police abuse. My thesis will address this gap.

Scholars have also noted that the justice outcomes that victims pursue may include reparations for the harms that they have suffered (Moffet, 2012; Robin, 2011; Mueller-Hirth, 2021; Lynch, 2018; Agozino, 2021; Pemberton, 2020). In Kenya, analysts have examined the pursuit of reparations by victims of state violence because they want resources that will help them address the multiple challenges, including health issues that result from their victimisation (Robin, 2011; Mueller-Hirth, 2021; Lynch, 2018). In recent times, the pursuit of reparations by victims in Kenya has been facilitated by the Victims Protection Act of 2014. However, as Natascha Mueller-Hirth (2021) observes, and as I discuss in more detail later, accessing these funds remains difficult for victims. Here, I am building on Mueller-Hirth's (ibid) work in looking at the role that the search for reparations plays in people's responses to abuse.

Scholars have observed that, in responding to victimisation, people may also pursue changing their structural conditions, referring to the intersecting power relationships and structures of exclusion that predispose them to abuse (Gready & Robins, 2014: 340). This is what analysts call transformative justice (*ibid*). In other words, one of the ends that people may seek in responding to police abuse is to avoid further harm by addressing what they see as the root cause of the abuse they suffer. Amongst the most notable examples of the pursuit of transformative justice globally is the ongoing campaigns by scholars and activists in the USA to address disproportionate victimisation of black people by the police, through reform in policing policies (Carter, 2016) or abolition of state policing (Ward, 2018). A crucial aspect of the structural conditions of injustice is the law, which, as I said earlier plays a crucial role in shaping which people the police target and victimise. As a result, legal reform may be the target of people seeking transformative justice. A notable historical example here is the concerted efforts by pro-democracy groups in Kenya, including sustained street protests, for the repeal of Section 2 (a) of Kenya's previous constitution that had made Kenya into a one-party state. People understood that legal provision as being at the root of the abuse that many pro-democracy activists suffered (Gimode, 2007; Adar & Munyae, 2001; wa Githinji & Holmquist, 2012). In this case, transformation was sought through widespread dissent and advocacy (*ibid*). In other cases, people seek transformative justice through the courts. The ongoing legal effort by Kenya's LGBTQ+ movement seeking the decriminalisation of same-sex relations is a case in point (Gitari, 2019; van Klinken, 2019). People's ability to pursue transformative justice depends on their structural position and the resources available to them. People's attempts to pursue transformational justice is often shaped by significant changes, rapid or gradual, to either of these dimensions. For instance, the consideration of Kenya's LGBTQ+ movement of the decriminalization of same-sex relations as a feasible options has as much to do with the promulgation of a new constitution as with an expanded Bill of Rights. They saw this as protecting their rights and opening up avenues for challenging the Penal Code. It is also shaped by international advances in queer people's rights, judicial reform and the emergence and strengthening of their own solidarity organisations that have shored up the capabilities of Kenya's LGBTQ+ movement to claim their rights from the state (NGLHRC, 2017; Ocholla, 2011). A focus on responses to abuse that move us beyond the state and help us to think about the ends people pursue, the relations they forge and the resources

they draw upon to do so, helps us to grasp the degree to which responses to abuse attempt to challenge a person's place in society more broadly.

## 1.6 The Argument and summary of contributions

The foregoing analysis has pointed out that police abuse has been a persistent problem in Kenya, which, like elsewhere in the world, disproportionately affects people belonging to marginalised groups. I have noted that over the years, there have been calls for this problem to be addressed, which led to significant efforts to reform to the police in the 2000s that were, amongst other things, geared towards enhancing police accountability in the country. They culminated in changes to the state policing architecture through creation of new laws and new institutions such as the NPS and IPOA. As I have discussed, scholars have debated the relative successes and failures of police accountability in Kenya in addressing the problem of police abuse in Kenya, with a significant focus on IPOA. However, scholars have neglected the examination of other state mechanisms of police accountability such as the chain of command, which is an important avenue through which people seek to resolve disputes with police officers or seek redress when they felt that they have been violated by police officers. Beyond that, I have also demonstrated that, to fully understand how people respond to police abuse, we need to broaden our analytical lens and move beyond state-centric ideas of police accountability. This is the reason why this study does not examine the more restrictive question of how people pursue police accountability and instead engages with the broader question: *how – and to what effect – do people at Kenya's urban respond to police abuse?*

In this thesis, I argue that we need to understand people's responses to police abuse as a social negotiation that is heavily shaped by their structural position in the society, their political subjectivity and the resources that they are able to deploy. These factors shape the mechanisms that are accessible to them and the justice outcomes that are feasible for them, at any point in time. I contend that by tracing the responses of victims, we see that seeking accountability through the state is just one of several ways in which people respond to police abuse. Even within the state, victims may value multiple forms of state action that stretch beyond police accountability – the prosecution or imposition of career-based sanctions against police officers – to include protection from further harms, restoration of something that has been taken or destroyed by police officers, or compensation for harm suffered. To be clear, even though such pursuits do not exceed the state's capacity, they are not typically understood as constituting police accountability when it conceptualised as an institutional act. Moreover, I show that people respond to victimization by the police in varied and complex ways that go beyond the pursuit of police accountability. They may deploy individual and collective coping strategies, seek the intervention of non-state actors such as the media and human rights organisations, and engage state institutions with the hope of resolving disputes with police officers informally. Many of these vital responses to police abuse are missed in state-centric accounts that focus on the success or failure of police accountability mechanisms. The complex responses of victims to police abuse demonstrates that the strategies that people use and the ends that they seek are dynamic. These shifts over time are mainly due to people gaining access to additional information or the responses of other actors. Thus, I argue that people make strategic decisions on how to respond to their victimisation by the police, at any

point in time, based on their structural position, their political subjectivity and the resources they have access to.

By moving away from state-centric analyses and focusing on the perspectives and experiences of the victims of police abuse on the urban margins, my work here makes an important theoretical contribution to the study on this topic. As noted above, most of the scholarship on police accountability takes a state-centric approach and focuses on the state institutions of police accountability (van Stapele 2016; Osse, 2016; Furuzawa, 2011). While some analysts have considered the role of the non-state actors such as human rights organisations and the media in the pursuit of police accountability (Stanley, 2005; Bonner, 2009), their focus is often on how these organisations interact with the state mechanisms of police accountability. This state-centric approach is also evident in scholarship on Kenya (Osse, 2006; van Stapele, 2016). While the insights generated by these studies are important, I argue that this approach misses the complex ways in which people respond to police abuse. Thus, my study makes an important and original contribution to the study of police accountability by challenging this analytical primacy that is accorded to state institutions of police accountability, such as IPOA and, instead, examines how people respond to police abuse empirically. Practically, this is important because it provides us with an important opportunity to identify the alternatives to police accountability that we can build on in the efforts to address this problem. I find that, alongside the recourse to state institutions, seeking both formal and informal processes, sits a range of strategies that victims employ to limit or resist police abuse. These include individual and collective self-help strategies or the recruitment of intermediaries to help them counter power imbalances, navigate officialdom, and avoid further harms. I also challenge the distinction between state and non-state mechanisms by showing that as people pursue justice outcomes, formal and informal processes blur. I borrow from the work of scholars such as Weeks (2015, 2017) and Merry (1980, 2003) on dispute resolution to apprehend the dynamism of these processes, noting that people may shift forums, abandon processes, or pursue multiple goals. This challenges the focus on police accountability, conceived as an institutional act that is geared towards the sanctioning of police officers who break the rules, at the expense of the varied ways in which people respond to police abuse.

This study also makes an empirical contribution to the study of state policing in Africa. My study contributes to two main threads in this scholarship. The first is on police abuse. Most of the current scholarship on police abuse has taken a narrow thematic focus, for example the policing of protests (Ruteere & Mutahi, 2019), or focussed on one group of victims, especially poor young men (e.g. van Stapele, 2016) meaning that, at best, we get glimpses into this issue. This study advances this scholarship by providing a more comprehensive account of everyday police abuse, examining the perspectives and experiences of people belonging to various marginalised groups – including poor, young men, women sex workers, queer people, and political protestors – at Kenya's urban margins. This allows me to explore various forms of police abuse, what anchors them and how the people who are victimized understand and respond to this abuse of authority by police officers. Secondly, this study contributes to the literature on police reforms in Africa. In particular, my study

contributes to the scholarship showing that police reforms in Africa have missed the point by failing to pay proper attention to the socio-political contexts in which they have been implemented (Steinberg, 2011; Ruteere & Pommerolle, 2003; Hornberger, 2013; Wairuri, 2022). This has been demonstrated with respect to crime prevention approaches (Steinberg, 2011), community policing (Ruteere & Pommerolle, 2003; Hornberger, 2013) and police accountability (Wairuri, 2022). What this study adds to this scholarship is that rather than centring the reform, it centres the people who experience police abuse. That is, I am taking the point on the need for police reform to be embedded in the society to its logical conclusion by looking at how police accountability is socially embedded. As a result, rather than providing an assessment of the successes and failures of specific reforms, such as the instigation of IPOA (Osse, 2006; van Staple, 2016), my study situates the apparatus of police accountability within its broader context. I show that by focusing on state institutions, we have missed much of the varied and complex ways in which people respond to police abuse in Kenya. To my mind, this indicates that solving the problem of police abuse requires us to pay attention to its complexity as it manifests at the grassroots and take seriously and build upon the approaches that the people who frequently experience police abuse have developed.

### **1.7 Structure of the Thesis**

I have divided this thesis into eight chapters. This introductory chapter has laid the foundation of the thesis by presenting the research question, engaging critically with the current scholarship, articulating the main argument of the thesis and highlighting the core contributions of the study to the academy. The second chapter presents the methodology I adopted for the study. The five chapters that comprise the empirical core of the thesis then follow with Chapter 8 concluding the thesis.

Chapter 3 opens the empirical core of the thesis with an examination of the case of Kwekwe Mwandaza, a 14-year-old girl, who was shot and killed by two police officers in Maweni village in rural Kwale County. This is one of the few cases in which IPOA has been able to obtain the conviction of police officers and therefore presents an opportunity to examine a situation in which the police accountability, at a first glance, worked as it ought to. However, in my examination of the case, I show that the process of pursuing accountability was marked by conflict and co-operation amongst the multiple actors involved including the police officers, Kwekwe's family, the media, human rights organisations, and state agencies. I note that even the pursuit of police accountability is a social negotiation that is dynamic and fraught. I demonstrate that the case was distinguished by the fact that Kwekwe was seen as an ideal victim, a socio-political construct used by analysts to refer to people who are easily assigned the full status of a victim (Christie, 1986). I examine the complexities of the investigation and trial processes, showing that negotiation between various actors was crucial to how the case proceeded. I note that the outcome that the process generated – sanction of the police officers – was seen by the family as representing a fragment of the justice they wanted and has subsequently proved to have been intermediate; they are now in the process of pursuing reparations from the state.

Chapter 4 examines the brutal policing of dissent in Kenya with a specific focus on Kisumu City. The chapter is anchored in the case of Baby Pendo, a six-month old infant who died due to injuries she sustained from being hit in the head with a club in Kisumu in the aftermath of the 2017 general election. This case enables me to examine police abuse in the context of the policing of dissent through the lens of a good case, the concept developed by Sally Engel Merry (1990) to describe legal disputes where there is an innocent and respectable victim and an offense that is easily classifiable as a crime. This is a good case because the victim was an infant, hence an ideal victim, meaning that the police could not easily justify their deployment of violent as they often do when they deploy it against young men. In contrast, the circumstances of this attack raised many questions that the police could not answer. For this reason, the case allows us to examine the deeper realities of the policing of dissent in ways that the examination of the deployment of police violence against protesters often does not allow. While they were interested in multiple outcomes, I note that the decision by Baby Pendo's parents to pursue police accountability was triggered by the need for a legal truth about what happened to their daughter to counter the alternative narratives that had emerged claiming that they were responsible for their daughter's death. Due to the ambiguities surrounding the case, a judicial inquest was called upon to establish the truth about what happened to Baby Pendo. I argue that the inquest not only generated a legal truth that Baby Pendo was killed by the Police, which her parents sought, it also sanctioned 'the truth that the brutal policing of dissent is a technology of governance in Kenya in which impunity is embedded. The lack of cooperation by the police, whether by design or default, meant that the inquest was unable to generate the kinds of outcomes that other people had hoped for, such as identifying the police officers responsible for Pendo's death and having them sanctioned.

Chapter 5 examines the experience of young men at Kenya's urban margins with police abuse, paying particular attention to the use of lethal force. I examine how their discursive construction as a security threat not only predisposes them to police abuse but also constrains their ability to pursue police accountability following victimisation, including by straining community solidarity. As a result, I show that many young men rely on individual coping mechanisms, such as running away in response to police abuse. In the cases where such strategies were not possible or effective, some young men attempted to access the state mechanisms of police accountability to avoid the escalation of the abuse they were facing. However, I show that their access to these institutions often required the intervention of intermediaries.

Chapter 6 examines the experiences of queer people at the urban margins with police abuse. I pay particular attention to blackmail and extortion. I show how the police instrumentalise the criminalisation of same-sex relations (the law) and homophobia in the society to extort queer people. I note that many queer people do not consider pursuing police accountability through the state institutions following police abuse because of the threat of outing: the act of revealing the sexual orientation and/or gender identity of another person who would prefer to keep such information a secret. In a context marked by high levels of homophobia, outing can have serious effects on one's life, including physical violence and

eviction. As a result, queer people often deploy individual and collective coping strategies to respond to police abuse including paying bribes quickly to avoid escalation or relying on contact calling (Cooper-Knock, 2014). I also examine the collective efforts by Kenya's LGBTQ+ movement to address the victimisation of queer people by the police through direct engagement with the police as well as the ongoing legal effort pursuing the decriminalisation of same-sex relations in Kenya.

Chapter 7 ends the empirical core of the thesis with an examination of the experiences of women sex workers with police abuse, paying particular attention to sexual coercion. I show that the victimisation of the sex workers by the police is partly rooted in the ambiguous criminalisation of sex work and the social stigma it engenders in the society. I examine how the decisions of sex workers on how to respond to police abuse are based on their considerations about their ability to earn a livelihood and to fulfil their other obligations, such as taking care of children. I show how their considerations about the time and financial costs of such a response not only makes it difficult for them to pursue accountability following victimisation by the police but also compels them to sometimes give in to the demands by police officers so that they can get out of trouble or avoid the further escalation of abuse. I also note that some of them have established solidarity mechanisms that they often rely on for support in responding to police abuse but note that these options are not available to all of them and may not always be effective.

Chapter 8 concludes my discussions by drawing out the key insights that emerge from my analysis. I begin by summarizing my findings on police abuse in Kenya. I then demonstrate the benefits of moving beyond a state-centric focus on police accountability that presents a narrow view of how people respond to police abuse. I also highlight what we gain in considering the victimisation of people belonging to the different social groups together. I then revisit the strategies that people deploy in their response to police abuse including individual and collective coping mechanisms, their reliance on state institutions to generate justice outcomes informally, as well as the pursuit of police accountability through the formal state institutions of police accountability. I also draw out the key insights on the justice outcomes that people pursue, and note how they respond to the outcomes that the processes actually generate. The chapter ends with a return to the core argument of the thesis and its broader implications to scholarship and practice.

## Chapter Two

### Methodology & Ethics

#### 2.1 Research Design

The research question that this study seeks to answer has methodological implications. As I discussed in the preceding chapter, this study is guided by the question: *how – and to what effect – do people at Kenya’s urban margins respond to police abuse?* This question has two important methodological implications. The first, as noted above, is that the study fits into the category of sensitive research (Lee & Renzetti, 1990). A topic of study is understood to be sensitive if it delves into some deeply personal experience, is concerned with deviance and social controls, or impinges on the exercise of coercion or domination (Lee & Renzetti, 1990:3). My study qualifies as a sensitive research on all three counts. The second is that the study is situated at Kenya’s urban margins. This chapter sets out the methodological approach that I adopted for this study, the methods used for carrying out the research and subsequent analysis, as well as the ethical considerations that guided the study. The considerations I made were guided by the fact that this study dealt with subject matters that are sensitive in nature.

This study adopts an interpretivist approach which is the most suitable to the study of sensitive topics (Lee & Renzetti, 1990) and vague and contested concepts – such as ‘police abuse’ and ‘police accountability’ (Brockington & Sullivan, 2011). The interpretive research process is geared towards discovering ‘the motives, the reasons and the goals which lead people to act in the ways they do’ (Benson & Hughes, 1983:42). It allows for the meaning that people ascribe to these concepts to emerge (Brockington & Sullivan, 2011). As such, it requires that a researcher takes seriously the subjective meaning of social action (Bryman, 2012:12). This includes acknowledging the fact that truth and reality are contested, and therefore does not attempt to move towards the identification of an ‘objective truth.’ The exploration of vague and contested concepts – such as ‘police abuse and ‘police accountability’ – privileges unstructured inquiry to allow for the meanings that people ascribe to these concepts to emerge (Brockington & Sullivan, 2011). This means giving people the opportunity, time and space to share their experiences and to reflect on them. For this reason, the interpretive approach aligns to qualitative research methods, which allows people the time and spaces to share their experiences in their own words.

For this reason, the study adopted a qualitative approach with primary data being collected mainly through interviews and focus group discussions. The main focus of the study was the victims of police abuse, but the study also included interviews with other stakeholders. I spoke to a total of 259 people through interviews and focus group discussions. I conducted 24 focus group discussions and 52 individual interviews split between civil society officials (24), state agencies (7), police officers (5) and individual victims of police abuse (16). Following the initial data collection between November 2018 and May 2019, I conducted several follow up telephone interviews with some of the respondents. With the exceptions of a few interviews where the respondents did not offer consent, most of the interviews and focus group discussions were recorded and later transcribed for analysis. The interviews were

augmented by a review of documentary sources, and observation of some community activities as well as a judicial process.

In the rest of this chapter, I discuss choices I made with respect to the study. Following this introduction, I present an overview of the study sites. This is followed by a discussion on access and data collection methods with victims of police abuse and government officials. After that I then present a brief account of the additional methods of observation and secondary sources that complemented the interview data. I then discuss how I analysed the data that I collected for the study. A reflexive account on how my subjectivity and structural position shaped the study follows.

## 2.2 Study sites

As noted above, this study is intentionally located at the ‘urban margins’. I follow Javier Auyero and his colleagues (2014) in seeing the urban margins as the zones of urban relegation where multiple forms of deprivation aggregate (see also, Wacquant, 2008). These are the urban spaces that are marked by deprivation of infrastructure for drainage and sanitation, and lack of access roads, water and other services such as electricity and poor quality of and congested housing, which are commonly referred to as slums, ghettos or informal settlements (Mitulla, 2003; van Staple, 2016; Taylor & Goodfellow, 2009; Butler, 2020). I prefer the concept of urban margin because it allows me to go beyond the imaginary of these places merely as geographical space and capture the reality of socio-political and economic marginalisation that manifests in them. To be clear, the *urban margin* is conceptually distinct from the *urban periphery*, that is used to refer to areas at the edges of a city marked by the conversion of agricultural hinterland into urban real estate (Coelho *et al.* 2020), auto-construction (Caldeira, 2017) or sites of formal low-income housing projects (Williams, *et al.*, 2021). The areas of the city that I conceptualise here as the urban margins may be found at the centre of the city or at their peripheries, with the distinguishing characteristic being the political reality of their marginalisation despite being close to the centre and being central to life in the city and the state project (Das & Poole, 2004b). The urban margins are associated with poverty. Many of the residents of the urban margins are poor people (Mitulla, 2003; Ayiera, 2017). Most are engaged in precarious and informal economic activities in the city (Ayiera, 2017). The residents of these urban margins are said to be disproportionately victimized by crime, especially muggings, burglary and sexual violence (Taylor & Goodfellow, 2009; UNHSP, 2007).

Scholars have argued that the urban margins offer privileged sites for the study of interaction between “present-day state-making” and routines of local life (Beall, Goodfellow, & Rogers, 2011; Tilly, 1996). Notably, despite the reality of the precarity that marks the urban margins (Butler, 2020), they are often seen as crucial ‘vote baskets’ for politicians due to their populous nature. For my purposes here, the urban margins are an appropriate place for me to situate my study because previous studies in Kenya and across the world have showed that people who occupy – live and work – in these places are disproportionately affected by police abuse (e.g. Auyero, *et al.*, 2014; van Staple, 2016). However, this is not to say that police abuse does not affect people in other places, including rural areas (See, for instance, Ruteere, 2008; Willis & Chome, 2014), but rather that the urban margins is the place where police abuse

is most frequent. For this reason, the urban margins offer a useful lens through which we can understand the dynamics of police abuse and people's response to it. The one crucial exception in my examination of the topic here is the case of Kwekwe Mwandaza, a 14 year old girl who was killed by police officers in Kwale, whose case I examine in the next chapter. As I note below, the case helps to trouble the conceptual distinctions we sometimes draw between rural and urban areas, and which often blur in reality (Tacoli, 1998). Most of the processes that marked the aftermath of Kwekwe's case took place in Mombasa.

Having settled on the urban margins as the primary sites of the study I decided to situate the study in Kenya's three cities of Nairobi, Mombasa and Kisumu. Many of the studies on police abuse, especially on the use of excessive force, are situated in a single neighbourhood of Nairobi, especially Mathare (Jones, et al, 2017; van Stapele, 2016) and Kibera (Osborn, 2012). Other areas of Nairobi and urban margins in other cities have received limited attention. I considered the expansion of the geographical scope of the study beyond one neighbourhood and city because cities have different socio-political dynamics that shape interactions between their residents and the police. As I show in Chapter 4 below, police abuse in Kisumu is associated with the policing of dissent rather than everyday policing in ways that are distinct from what we see elsewhere in the country. That being said, each of these cities have many neighbourhoods that can be categorised as urban margins. It was therefore necessary to narrow down to neighbourhoods to avoid stretching the study too thin. However, the geographical scope within the cities later expanded as I spoke to people belonging to specific categories, such as women sex workers, who were drawn from the various neighbourhoods in the three cities.

### *Nairobi*

Nairobi is Kenya's capital city and largest city with a population of nearly 4.4 million people as per the 2019 national census (KNBS, 2019: 241). Though the source of the number is not entirely clear, it is often estimated that 60-70% of the residents of Nairobi live in informal settlements that I conceptualise here as urban margins (APHRC, 2014). A recent mapping exercise identified 158 informal settlements in Nairobi (Muungano wa Wanavijiji, 2016). In the initial stages, I situated my study primarily in two locations: Kawangware and Kiambiyu. Kawangware is a multi-ethnic low-income neighbourhood to the west of Nairobi City, approximately 10 kilometres from the city centre, with an estimated population of over 291,000 people (KNBS, 2019: 236; Ayiera, 2017). Details of the history of the area are scant but the settlement is said to have emerged in the 1960s. Its name is said to have emerged from the Kikuyu name *kwa wa ngware* (literally: the place of the person of guinea fowls) presumably after a man who used to trap *ngware* (Kikuyu for guinea fowl). Similar to other urban margins in Kenya, over 50% of the adult population have no permanent job, have limited access to education, and are poor (McDermott, *et al.* 2021). The Kenya Police Service (KPS), one of the core arms of the NPS, have designated some parts of Kawangware as crime hotspots (KPS, 2021). The history of the neighbourhood is marked by many cases of alleged police abuse that have strained the relationship of the community with the police. For instance, Kawangware was the site of the dramatic killing of seven taxi drivers on 10<sup>th</sup> March 2010 by Administration Police officers from Kawangware Chief's Post (RoK v Ahmed Omar & 6 others, 2010).

Kawangware has also experienced political violence during election periods that have also been policed brutally (See, for instance, Mwere & Ashihundu, 2017). Kiambiyu is the most recently established of all the informal settlements in Nairobi located to the East of Nairobi city, nestled between the Moi Airbase (Eastleigh Airport) and the banks of Nairobi River. It is estimated to host nearly 46,000 people (KNBS, 2019: 237). Kiambiyu has received very limited attention in scholarship and scarcely features in the reports of human rights organisation. It therefore offered me an opportunity to hear from people whose experiences and perspectives may not have emerged in the pre-existing scholarship.

While the initial interviews were conducted in Kiambiyu and Kawangware, the geographical scope of the study in Nairobi expanded when I began to interview women sex workers and queer people. In Nairobi, I worked with the Bar Hostess Empowerment and Support Programme (BHESP), a sex worker-led organisation, to arrange interviews and focus group discussions with women sex workers in the city. The organisation is based in Kasarani, to the north of Nairobi. As a result, many of the participants in these groups were drawn from the neighbouring areas including Lucky Summer, Kariobangi and Githurai, all of which can be described as urban margins. For interviews with queer people, I worked with Health Options for Young Men on HIV/AIDS/STI (HOYMAS), based in Pangani, to the north of the city, for interviews with queer people in Nairobi. Again, most of the participants were drawn from various neighbourhoods across the city that fit the category of the urban margins. I also worked with the Social Justice Working Group (SJWG), also known as the Uhai Wetu Coalition, who brought together people working in the social justice centres across all the regions of the city. Hence, my analysis of how people respond to victimisation by the police is shaped by the experiences and perspectives of people from across the city of Nairobi.

### *Mombasa*

By geographical size, Mombasa is Kenya's smallest county but it is also Kenya's second city with a population of about 1.2 million people (KNBS, 2019: 241). Thus, even though 65% of the population is estimated to live in informal settlements, they are in close proximity to each other. As a result, the people I spoke to in Mombasa were drawn from various poor neighbourhoods across the city and gathered in central locations for the focus groups. Though I examined varied aspects of police abuse, in Mombasa I was particularly interested in the experiences and perspectives of women sex workers and queer people. This is because it is the city where the solidarity organisations of people belonging to these social categories first emerged in Kenya. I primarily worked with the PEMA-Kenya, an organisation by and for queer people, and Nkoko-Iju Africa, an organisation of women sex workers. They arranged interviews with some of their members who were drawn from various areas in the city.

Mombasa was also the starting point of my examination of the Kwekwe Mwandaza case. Even though Kwekwe lived and died in Kwale County, largely a rural county which neighbours Mombasa, most of the actors in the case are located in Mombasa. This includes Muslims for Human Rights (MUHURI), a human rights organisation that was at the centre of the case. The matter was also handled in the Mombasa Law Courts. Even though the case did

not fit strictly into the urban margins that were the primary focus of my research, it is crucial to my analysis here as one of only two cases that had been investigated conclusively by IPOA, leading to the prosecution and imprisonment of the police officers involved. I have already examined the other case, relating to the killing of Kenneth Kimani by Police Constable Titus Musili in Githurai, one of Nairobi's poorer suburbs, in detail elsewhere (Wairuri, 2022a). Thus, Kwekwe's case presented a crucial lens through which to examine the cases in which the pursuit of police accountability, formally through the state mechanisms, had 'worked'.

### *Kisumu*

Kisumu is Kenya's third largest city, and the main city in the western region of the Kenya, with an estimated population of nearly 400,000 people as per the Kenyan 2019 census (KNBS, 2019: 241). The city, which is on the banks of Lake Victoria, serves as the headquarters of Kisumu County. In Kisumu the study was situated in the two neighbouring areas of Obunga and Kondele, which are the poorest and most densely populated neighbourhoods in the city (Simiyu. 2015). Residents of these area have experienced multiple forms of police abuse, especially related to the policing of dissent. The victimisation of the residents of Kisumu by the Police, particularly due to political dissent, has been traced back to the colonial period (Odinga, 1967). The victimisation extended to the post-colonial period with the Kisumu Massacre of 1969, which I discuss in more detail in Chapter 4, being emblematic. Since then, the policing of electoral periods in the city has been widely documented by human rights groups, who characterise police abuse as the use of excessive force and sexual coercion (CIPEV, 2008; HRW, 2017; KNCHR, 2018). It is in a similar context, the policing of the 2017 election and its aftermath, that Baby Samantha Pendo died, as I discuss in more detail in Chapter 4. I also worked with the Kisumu Sex Workers Alliance (KISWA), who recruited women sex workers for me to interview, and the Nyanza, Western and Rift Valley Kenya (NYARWEK) who recruited queer people for focus groups in the city.

## **2.4 Victims of Police Abuse at the Urban Margins**

This study is centred on the experiences and perspectives of victims of police abuse, especially those situated at the urban margins. The negotiation of access in field research receives a lot of attention in much of the social science discussions about methodology, with scholars noting that it is a complex process that often requires repeated negotiations (Bryman, 2012; Baird & Mitchel, 2014). However, as Raymond Lee (1993:21) argues, gaining access is situationally specific. In my case, I was able to gain access fairly easily to most of the victims of police abuse who participated in the study. In many cases, access was facilitated by intermediaries, many of them people who I have known from many years of working in politics and in the security and justice sector in Kenya. As such, I reached out to officials from human rights organisations that I had worked with before – Usalama Forum in Nairobi (both Kawangware and Kiambiyu), the CSO-Network in Kisumu, and MUHURI in Mombasa – who helped me identify potential respondents and arrange interviews. It helped that these organisations and their officials are well known in the communities as well. Although I had not worked with women sex workers and LGBTQ+ organisations before, my contacts within the broader human rights sector in Kenya were also helpful in accessing the solidarity

organisations. I posted a request for introductions to people working with these groups in a Whatsapp group that I belong to with other analysts working on security and justice matters in Kenya. This appeal generated several useful contacts, the most crucial of which was an officer at a donor agency in Nairobi that funds various organisations of sex workers and queer people across the country, who then introduced me to officials from local LGBTQ+ organisations (PEMA-Kenya in Mombasa, Nyarwek in Kisumu, and HOYMAS in Nairobi) and organisations for women sex workers (KISWA in Kisumu and BHESP in Nairobi) that I worked with. In some cases, officials from these organisations helped me reach other organisations that I was also able to interview. For instance, PEMA-Kenya officials helped me arrange interviews with officials at HAPA-Kenya, another LGBTQ+ organisation in Mombasa and with Nkoko-Iju Africa, an organisation of women sex workers in Mombasa.

In most cases, I began with a meeting with the officials of these organisations, in which I explained my research project. In some cases, these initial meetings themselves transformed into interviews in which the officials gave me an overview of the work they do with the victims. In other cases, we arranged a separate interview. Some of them who have worked on the topic or related issues for a long period of time were also able to offer me a historical perspective. As we worked to develop a list of potential respondents, many of them described cases of police abuse that they were aware of. This was the case, for instance, with MUHURI and the CSO-Network. The officials mainly recruited individuals that they knew had been victimised by the police or had worked with victims of police abuse. In the cases of the LGBTQ+ and women sex workers organisations, police abuse was understood to be so widespread that there was really no need to narrow down to specific individuals. What became important was to identify other ways of separating people into different groups through attributes such as gender, sexuality or age. Undoubtedly, there were power dynamics at play in the recruitment of the participants. People may have responded to the invitation because they were called by an organisation that was important to them in the negotiation of the aftermath of police abuse, or to their survival more broadly.

I collected most of the data from the victims of police abuse at Kenya's urban margins through focus group discussions and semi-structured individual interviews. I structured the focus groups mainly on social categories that I had included in my research design or as I was advised by my interlocutors on the ground. In some cases, this did not work well as people belonging to different social categories ended up in the same focus group, which sometimes made conversations difficult. One notable case was in Mombasa where a focus group with victims of police abuse included parents who had lost their sons to police abuse and young men who had been harassed and assaulted by the police. Even though both fit into that broad category, there were important differences that sometimes affected the flow of the discussion. I will return to this below. Though I am not certain that I could have anticipated that, it became clear that I needed to narrow down further on the categories of interest. In the design phase of the study, I was worried that people may not want to share experiences of their victimisation in the presence of other people. However, in practice, most of the participants were comfortable sharing their experiences with their peers who had also gone through similar experiences. The focus group discussions also helped me identify people that I wanted

to conduct follow up one-on-one interviews with for more in-depth understanding of their experiences. I also employed semi-structured interviews with some of the victims of police abuse. As noted above, I recruited some of them through the focus group discussions. However, others were recruited directly for interviews through the help of officials at these organisations that I worked with. Qualitative interviews are widely understood as helping the researcher gain rich and in-depth insights into the phenomenon of interest (Honey, 1987; Wengraf, 2004). The interview is a dynamic process in which the answers given by the participant may induce further questions that enhance our understanding of the phenomenon.

Before starting any interview or focus group discussion, I sought the informed consent of the respondents. In most cases I presented the respondents with a one-pager information sheet, and a consent form. We read the one-page together, point by point, to ensure that everything was understood. The one-pager included information about the study, myself, and my commitment towards treating their data confidentially. I assured them that I would protect their identities, including nicknames, through anonymization. I considered this to be particularly important for the people belonging to criminalized groups, such as sex workers and queer people, for whom 'invisibility' and 'illegibility' is a critical survival strategy. I told the participants that they did not have to write their real names or nicknames in the consent form. However, some of the participants, especially those with whom I conducted in-depth interviews, requested to be named in the study. Nonetheless, this desire for some to be named in the study must also be balanced by the interests of those who prefer to not be identified, and as a result I decided to pseudonymise all the participants in the study. The only exceptions relate to cases that are in the public domain where the respondents have also been named, especially where there has been a court case in which the details of people involved have been published. An important consideration here is that while confidentiality is easy to ensure in the case of individual interviews, it may be trickier with focus group discussions since other people hear what someone says and there is no way of ensuring that people will not talk about the proceedings afterwards. However, at the beginning of the focus group discussions, and as recommended by Mickey Smith (1995:483), I asked them to not share with people outside what was said in the group. I also informed the respondents that their participation in the process was entirely voluntary; they could decide to not participate or leave the discussions or interviews at any point in the discussion. I sought their consent to record the interviews, explaining that it would not only because it would help with the analytical process but would also, in the present moment, allow me to focus on the conversation rather than capturing what was being said. In all but a few cases people agreed for me to record the interviews. In the few cases where people did not agree to be tape recorded, I took notes. However, even in the conversations that were recorded, I also took some notes during the interviews. In some cases, the recording failed – which is to say that, sometimes, I forgot to switch on the recorder before the interview. In such cases, I often recorded myself voicing the highlights of the conversation soon thereafter, or I wrote down in my field notebook some of the key points that I took away from the interviews (referenced here as 'Field Notes').

This study explores people's perceptions and experiences with regard to police abuse that they or their loved ones have faced. Hence, it explores things that happened in the past. However, drawing on personal experiences of individuals often means that one has to rely on recollections of the victims of police abuse; and dependence on people's memory can be problematic. People may forget things or have distorted memories of events, making some of the things they say unreliable (Loftus, 2003). However, this is only a problem if a study is seeking verifiable facts, to the extent that such facts are possible to gather. This was not the case here. My study is interested in people's perspectives on police abuse, making both what they remember and how they remember it important for this study (Gorden, 2003). In some cases, people's memories failed them. In others they were reminded by others about what had happened, especially during focus groups. In some instances, I used the secondary sources that existed on a case to prompt the memories of the respondents.

There were three other ethical considerations that are important for me to highlight here. The first relates to the compensation of the participants of the study. Giving research participants money or gifts has been much debated in scholarship (see, Molyneux, et al, 2012). My view is that the decisions of the researcher need to be based on the prevailing local circumstances and their own considerations about what it costs people to participate in the study. In my case, I decided to compensate people for participating in the study. For one thing, this is a widely accepted practice in Kenya (Lairumbi, et al, 2012). Furthermore, participating in research has direct and indirect costs for people. As I discuss throughout this thesis, most of the research participants were not people of means, and many of them were self-employed or working in casual roles. Thus, even where people did not spend money to travel to the study site, they would have incurred indirect expenses such as loss of income for the time that we were together. As such, I considered it necessary to compensate them for their participation in the study. I consulted with the officials at the organisations that I worked with on the appropriate amounts to offer to the respondents. In all cases, participants were also provided with refreshments.

The second consideration relates to the risk of trauma from participating in the study. research on whether the participation of victims of trauma in studies is therapeutic or harmful is inconclusive. On the one hand, some researchers argue that research interviews have the potential to make participants relive visual or auditory reminders of traumatic events, and in so doing, re-traumatize them (e.g. Levy, 1988). On the other hand, some more recent studies have found that victims of traumatic events do not find participating in research interviews distressing but rather as valuable and relieving. For instance, a study by Michael Griffin and his colleagues (2003) found that many survivors of trauma found the process of talking about their experiences and sharing stories of trauma to have been therapeutic. In an overview of the trauma-focused studies, Soraya Seedat and her colleagues (2004) found that there were essentially three types of participant reactions in trauma-focused studies: (1) participants who are positive about the experience, (2) those who feel that participation is effortful or time-consuming, and (3) those who are negative and find it intrusive or cumbersome. They did not find the argument of re-traumatization to be a significant issue (ibid). Nonetheless, my preference is to err on the side of caution with such matters. I always asked the people in the

organisations I was working with about the possibilities of mental health support for the participants in the study. For my study, I found that many of the people that were invited to participate in the study were happy to share the details of their experiences. However, in some instances, in all cases during focus groups, some of the respondents became distressed. In those cases, I found that their peers were adept at comforting them. The discussion often paused for a bit, allowing them time. In some cases, the distressed opted to allow someone else to continue talking, while in other cases they held on to the space. Often, the other participants respected that and waited. However, in the focus group in Mombasa that I mentioned above, one young man attempted to speak over the mother of a boy who had been allegedly shot by the police, and she became distressed and then took long pauses. He was sternly asked by one of the older participants '*muache amalize [let her finish]*' (Field Notes, 2019). Many of the focus group discussions with victims of police abuse included conversations about mental health issues. People often raised the topic of their own volition, as they shared their own experiences. They also advised others on where to get help. As a minimum standard, research ethics require that people requiring help are offered assistance to available sources of care and support (WHO, 2001). In many cases, the human rights organisations that I was working with were already offering mental health support for the victims. Amongst the sex workers and queer people, most of the health support was provided by peer-counsellors who had been trained by their solidarity organisations.

The third consideration was the physical safety of the participants and myself. This study examines the sensitive topic of police abuse that could also raise serious security concerns. For this reason I conducted the interviews and focus group discussions at the places where people felt most comfortable. In many cases, it helped that I was working with local organisations that people were already familiar with. The organisations' offices were a safe spaces for me to conduct interviews and focus groups. The respondents were often familiar with these places and believed them to be safe for them. This was particularly important for the women sex workers and LGBTQ+ persons for whom, as I noted, 'invisibility' and 'illegibility' are often essential for survival. For the poor young men who were under threat of further police attacks, it was important to conduct the interviews, especially the individual interviews, in places where they were not known. Indeed, when I asked many of them where they would want the interviews conducted, they opted to do it away from their neighbourhoods because they felt safer away from the prying eyes and ears of their neighbours. As I note in Chapter 5, some of them suspected their neighbours to be part of the source of the trouble that they were experiencing with the police. Even so, it was evident that often they did not entirely trust that I was who is said I was. Thus, two of them insisted on being accompanied by someone so that they felt safe. I also decided not to examine cases of police abuse that were presently in court. Getting involved in ongoing disputes could complicate matters for those involved and possibly raise security threats for myself and the respondents.

### ***2.5 Government officials***

Accessing government officials for interviews was slightly more complicated. Even though some analysts argue that there is a 'hierarchy of consent' in which it is presumed that

superiors have the right to permit their subordinates to be studied (Dingwall, 1980), my experience was mixed. In some cases, officials insisted that I had to go through the official channels, while others, sometimes within the same organisation, agreed to participate in the study without formal permission from their superiors. This was particularly evident among police officers. In Mombasa, officials at PEMA-Kenya helped me arrange interviews with several police officers, most of whom they had worked with before, who were happy to participate in the study. However, one of the officers I spoke to, the most senior, refused to participate in the study without direct permission from his superiors. By contrast, in Nairobi I spoke to police officers from the ranks of corporal to an OCS who I was introduced to by officials from Usalama Forum, without having to seek formal approval. These varied responses were replicated in the attempts to interview officials at other government agencies including KNCHR, IPOA, NPSC and IAU. Overall, many of those I was introduced to were happy to participate in the study. Nonetheless, many of them asked me to keep their participation confidential to avoid trouble with their superiors. In other words, they were happy to participate in the study in their individual capacity as long as it did not threaten their place within the organisations they worked for. I considered this appropriate as I was not necessarily looking for the institutionally sanctioned views – and I also trusted their capacity to judge whether it was appropriate for them to participate in the study.

Gaining access to the senior officials of key organisations required a different approach. For both the NPS and IPOA, which are central to my study, I needed to seek official permission to conduct the interviews. I wrote letters to both the Inspector-General (IG) of the National Police Service (NPS) and the Chief Executive Officer (CEO) of IPOA, asking to interview them and also asking for their approval to interview other officers within their organisations. The letters needed to be accompanied by a research permit issued by the National Council for Science and Technology (NACOSTI), which is a requirement for conducting any research projects in Kenya, and which I had obtained. I did not hear back from either of them for a while and then decided to follow up, albeit in different ways.

In the case of the IG of the NPS, I asked a mutual friend to help me secure an appointment with him and he did. He accompanied me to the meeting. As we were waiting to see him, I spoke to the officers at his reception to check if they had received my letter. After perusing their mail register, one of them was able to track it. Reading from the register, she told me that the IG had seen the letter and had asked them to hold on to it. When I introduced myself to the IG, I was surprised that he remembered seeing the letter. ‘You’re the one who’d written a letter?’ he asked (Field Notes, 2019). He told me that he had instructed the team to hold on to it, awaiting the return of the Director of Police Reforms Directorate, who was on an international trip at the time. He thought that this was the right person for me to talk to. While I spoke to the IG briefly about my research and got some of his perspectives, he was adamant that I needed to wait to speak to the Director of the Police Reforms Directorate. This was not to be. I remained in limbo for a while. The IG’s term ended as I awaited a formal response. Gaining access does not always mean that one will be able to collect data.

The IPOA case was slightly different. I took the advice of my contacts within the agency, some of whom I had already interviewed, to call the office to follow up on the letter.

The CEO's secretary told me that they had seen my letter but had been unable to respond to me because I had not provided a contact number on the letter. This had been an oversight on my part. After consulting the CEO, she got back to me with a confirmation of an appointment with the CEO at 7 o'clock the following morning. When I met him, he told me that he was happy to approve my conducting the study but that I needed to provide them with my questionnaire in advance so that they can see if the questions were appropriate for the staff. He had called all the senior managers to join the meeting. I explained that my study was based on semi-structured interviews, and also that, on this occasion, I only needed to interview him and the senior managers who were already in the room. He agreed and I then proceeded to interview him and the senior managers on the same morning. Later, I was able to interview other IPOA officials who were introduced to me by some of my contacts within the human rights sector.

## **2.6 Observation & Secondary sources**

Though the study was not designed as an ethnography, it included some elements of observation. For instance, I took several walking tours around Kondele in Kisumu and Kiambiyu in Nairobi with some of the respondents so that I could better appreciate their lived experiences. I also attended several public meetings that took place during the time of my fieldwork, including the Human Rights Day in Mombasa at Mama Ngina Drive in Mombasa where I was introduced to several key people in the human rights sector in the city, such as MUHURI officials, who I interviewed and later worked with (Field Notes, 2019). I was also present in court for the ruling of the Baby Pendo Inquest in Kisumu. I also 'hung out' with a number of the people I interviewed. For instance, I spent one Sunday afternoon with some young men in Kiambiyu at their '*baze*', the emic term they use to describe the spaces where they hang out with their friends engaging in leisure activities. I watched them playing several games, such a Ludo on a locally-made board, and they also explained to me how they did sports betting on their mobile phones, something that was the subject of much of the pre- and post-interview discussions amongst the young men I interviewed. One day, I also observed protests against police brutality in Kawangware, with the participants of a focus group whose friend had allegedly been killed by police officers.

I have supplemented interview data with a combination of secondary academic literature, local news reports, government documents and historical materials. Sometimes, these documents emerged from the interviews and observations. For instance, CSOs had many pamphlets that they presented during the Human Rights Day, which I collected to review later. Some of them proved more useful than others in helping me understand the broader context of my study. Additionally, I also sought and analysed court documents, especially the rulings and judgments in some of the pertinent cases that I analyse in this thesis. Most of these are available in an online portal (<http://kenyalaw.org/>) that is operated by the National Council for Law Reporting (NCLR), commonly known as Kenya Law. However, in Kwekwe's case, where I needed to examine the details of the case beyond its outcomes, I sought the court file that included the testimonies of the witnesses and other court proceedings. Technically, one can get this easily from the Court Registry upon paying the required amount of money to photocopy the contents of a file. However, this proved challenging on several attempts due to multiple reasons ranging from 'the proceedings

haven't been typed out yet' to 'the photocopier is not working.' In the end, it turned out that MUHURI officials had a scanned copy of the file with the High Court proceedings because they had needed it in order to file the appeal.

## **2.7 Data Analysis**

As noted above, with the exceptions of a few interviews where the respondents did not offer consent, most of the interviews and focus group discussions were tape recorded. These recordings were later transcribed for analysis. I had also taken notes during many of the interviews and focus groups. I analysed the data that I collected for this study through thematic analysis, which refers to the process of identifying, analysing and reporting patterns within qualitative data (Lyons & Coyle, 2008; Braun & Clarke, 2006). However, for the data to be available for thematic coding, it needs to be processed. This meant transcribing the interview recordings, so I uploaded all the transcripts from my interviews into NVivo qualitative data analysis software, which I found incredibly useful for the thematic coding of the data I had collected. Since I had not used this software before this project, I took several online tutorials until I was comfortable to use it for this process. I started with a sketch of what I thought would be the key themes from the data and created nodes (themes) and sub-nodes (sub-themes) accordingly. However, as I went along, I realised that some of the things my interlocutors were saying did not fit into the nodes I had created or that, in some cases, they fitted into several nodes and sub-nodes. I kept shifting the data around, creating new nodes and collapsing old ones, until I was satisfied with how I had organised the data. Although this was time consuming, I felt that it gave me a better view of the data that I had collected during the fieldwork. Since NVivo allowed me to also code documentary sources, it saved me time in the end because I had in the same place most of the analytical material I needed for my writing. Once I had completed coding the data into N-Vivo, I took the coded data in a particular node and deposited it in a word processing software file and began writing. Naturally, my ideas about the research changed as I analysed subsequent data, but the versatility of the software meant that when the structure of the thesis crystallised, I could move the nodes and sub-nodes around with ease to suit the new structure.

## **2.8 Positionality**

It has been noted that in qualitative research, the researcher is not hidden but visible (Seidman, 2012: 16) and is therefore a core part of the evolving research process. Thus, the researcher's subjectivity and structural position constitutes a core part of the knowledge construction that occurs during the research process. This raises the need for the researcher to be reflexive about their work, and consider how their beliefs and the power they exercise over the process shapes the outcomes of a study. Reflexivity refers to the 'self-critical, sympathetic introspection and the self-conscious analytical scrutiny of the self as a researcher' (England, 1994: 82). In this section, I reflect on my positionality and how it shaped this research project. Undoubtedly, what follows is a limited assessment as space does not allow a more detailed exploration of these issues.

Every research is shaped by a series of choices, which are, in turn, influenced by the researcher's subjectivity. One of the more crucial ways in which a researcher's subjectivity shapes the study is in the choice of research topic. Even though I may not have acknowledged it as such at the beginning, this research project is the culmination of a personal curiosity to understand things that have happened to me and to others around me with respect to interactions with the police. I have many childhood memories and adult experiences that I could share, but that could be an entire project on its own. As such, I will share a few reflections that I think have more fundamentally shaped my perspectives on these issues. Even though I did not understand the broader political dynamics then, one of the most memorable experiences of my childhood was the deployment of police violence during the 1990 Saba Saba protests in which Kenyans were demanding for a return to multi-party democracy. I discuss this in more detail later in the thesis. For now, suffice it to say that this was my first notable encounter with the police. I was born and raised in Mukuyu, a small market town in Kiharu Constituency in what was then Murang'a District (now County). It matters that this was the home and constituency of Kenneth Matiba, the formidable national politician who in 1992 ran for the presidency against the incumbent President Daniel arap Moi, finishing second in an election that was marked by serious irregularities. Unsurprisingly, Murang'a was one of the locations where the protests took place. As the sound of gunshots filled the air, my mother, just like most other parents, shut down her business, rushed to pick me up at the nursery school and take me home. Eventually, the police came to our compound and I watched as my mother was manhandled by a policeman who tried to enter our one-roomed house to see if we were hiding any men in there. I then watched the police assault several builders who were working on a site opposite our house and who had been caught unawares. The men had not participated in the protest that had taken place earlier in the day; they had been working while my friends and I played outside. The images of those men jumping over fences to escape the police are deeply etched in my memory. As children, the General Service Unit (GSU), the para-military unit of the Kenya Police responsible for public order, loomed large in our imagination of the state and its violent potential. We continued to tell the tales of GSU violence against people and how they looted businesses in our small market town over the three days that they policed it.

To this early encounter, and others, I have added layers of personal experiences with the police, as well as those of friends and family members. In my childhood, I was shocked by stories that my sister's husband and his friends discussed on their encounters with the police. I remember saying to my sister's husband once that I did not expect to experience such things because I had always tried to be a good boy. Despite what I had already seen, I still seemed to believe that people only got into trouble with the police when they did 'bad' things. I vividly recall his response to me: *'mwanaume lazima apitie hizi vitu* (a man has to go through such things).' In other words, as van Stapele (2016) notes in her study of youth and masculinity in Mathare, experiences of police brutality are a rite of passage, especially for young men from deprived backgrounds. Since then, I have been chased by the police, arrested and extorted several times, having — if you can believe it — done nothing to deserve it. I have also watched my interactions with the police shift as my structural position in the society has changed, including, on some occasions, being offered police security. All this while people I know who have also experienced or witnessed many similar instances have argued, especially in

instances of police killings that 'the police usually know what they are doing 'or' the people they kill are usually criminals. This disconnect between my personal experience and other people's analysis of the situation has always intrigued me and is therefore part of the background of this study.

Even though, as any good researcher, I did not believe everything that people told me about their encounters with the police, I also did not treat their stories with cynicism. I knew that, for the most part, most of the stories they told were real experiences of injustice, even in the cases where some of the facts may have been forgotten, blocked out or exaggerated and even in the cases where some truths were difficult to tell except in jest. None of this, in my view, takes away from the weight of their stories. Mine was not the pursuit of some objective truth but rather an attempt to understand how people navigate the aftermath of police abuse. I also saw the hope that people placed in judicial process and the fear they carried of the anticipated outcomes. For instance, I watched, during the fieldwork period, as the hopes of many queer people were dashed by the failure of the courts to decriminalise same sex relations, with the judgment of the courts triggering physical attacks on queer people at the urban margins on the same day. These things matter to people's lives.

All social relations and interactions are imbued with power dynamics. It is therefore important for me to also reflect on how power manifested during the process of conducting this research. It has been noted that the researcher's characteristics - including education, background, gender, age, and socioeconomic status - affect the interactions of the researcher with their respondents and the outcome of the process (May & Pattillo-McCoy, 2000). It is often assumed - and rightfully so - that the interviewer has more power than the respondents (Burgess 1984:101). However, this is not always the case, as reflected by the situations where researchers interview senior government officials - as in the case of interviewing the IG of the NPS or the CEO of IPOA - as I have discussed above. Still, for the most part in this study the power imbalance tilted in my favour due to the structural position that I hold in the society, vis-a-vis a majority of the respondents and the resources - economic, social and political capital - that are available to me. While some analysts have proposed that researchers attempt to eliminate the power imbalance in the interviews (Punch 1998: 179), I am not convinced that this is possible without being disingenuous. Based on some prior ideas about how to 'fit in' with the respondents, I tried several changes to my appearance - such as dressing down or removing my wedding band - but, as far as I could tell, none of these made any change to how the respondents perceived me.

Rather than attempting to 'fit in', I found people more appreciative when I responded to their questions about myself and why I wanted to know about their lives. This reflected the argument made by Kim England (1994: 249) that 'fieldwork is personal,' meaning that as researchers it is not possible for us to hide behind the veil of being professional. As we expect other people to answer our questions, we must also be prepared to answer theirs. Interestingly, as Judith Okely (1992) argues, attempts to protect oneself from scrutiny by the respondents' smacks of arrogance because it suggests that one thinks of their presence and interaction with other people as being unproblematic. That being said, the level of disclosure that a researcher offers must also be voluntary and respect the researcher's own subjectivity

– including considerations of safety – because as Shulamit Reinharz (1992) argues, the self-disclosure on the part of the researcher can also result in their vulnerability. As a result, in my case, there were some questions from the participants that I did not feel able or willing to answer. However, the crucial lesson for me through the process was to move from being silent and avoiding the questions to stating clearly that I was not able to answer some of the questions being asked: this only happened in a few cases. My structural position was the subject of discussion in several of the focus groups that I held with the respondents for this study. For instance, in some cases, some of the sex workers that I talked to for this study, talked about me being a potential client or a *sponsor* (I discuss this in Chapter 7 below). Playing along in these conversations was largely received well, creating humour for the group and serving as ice breakers, and then people proceeded to ask me questions about myself. Sometimes it was the leader of an organisation who kicked off the banter. For instance, in one focus group discussion in Mombasa, the leader of the organisation ended their introduction of me with a disclaimer to me *'and do not give them your number even if they ask. Some people here are looking for a sponsor.'* The quick rejoinder to his remark was *'leave that one alone, they just want to keep you to themselves'* (Field Notes, 2019). This was followed by laughter and we proceeded to have a very meaningful conversation. Of course, it was also important to be cautious of the boundaries of the interactions to ensure that the environment remained safe for us all. On this, I largely relied on the cues from the officials of the organisations and often other participants in the focus groups to keep the conversations within the bounds. From many of these encounters, it became clear to me that it was much better for me to reflect truthfully on my structural advantage and show up to these spaces as my authentic self.

As a researcher based in a rich and respected university in the developed world, I am in a structural position that empowers me to make claims about the lives of other people such as the participants in this study (Wendt & Zannettino, 2015). This is partly reflected in the power I exercise in the analytical process, determining the interpretation of the data that people provide us with and the choices we make about what to include and what not to. In an interpretivist study, where people present us with their interpretation of the world, our work reflects our own interpretation of those interpretations (Doucet & Mauthner 2002). This reflects power. Many people asked me what this research was for and how it would help them. I explained that this was going to lead (hopefully) to me earning a doctorate and the value that this has to my personal career. The question of how it would benefit them was harder to tackle because often there is no immediate benefit to the respondents. However, I explained that, sometimes, documenting issues and analysing them, such as the struggles they face, was important because when opportunities for reform arose, people may be armed with some of the knowledge and ideas they require to be able to negotiate with others. In this sense, I understood myself to occupy the position of a translator, deploying the intellectual and institutional capital I have to policy audiences and advocate for change. For this reason, I understand my role as a researcher to not be merely about producing an academic document but also of contributing to the pursuit of justice in whatever way possible. It is my hope that by rigorously documenting the experiences of many victims of police abuse here and highlighting the structural dimensions of the challenge, this study contributes to strengthening ongoing efforts to address some of the root causes of police abuse and its attendant impunity.

## 2.8 Conclusion

In this chapter, I have discussed the methods that I used to collect and analyse data for this study, along with the methodological and ethical considerations that guided the study. I have noted that the study adopted an interpretivist approach, which is well suited for the study of sensitive topics such as victimisation by the police, which this study examines. The crucial point here is that the study understands social action as subjective and is therefore geared towards understanding how people interpret their experiences rather than aiming at generating some form of an imagined 'objective truth.' I further noted that qualitative research methods, focus group discussions and semi-structured interviews, were well suited for gathering the data that was required for the study. This generated rich data that I then analysed, with the help of NVivo, to identify the core themes that emerged from the study. I also highlighted how I gained access to the respondents and ensured that the study met the ethical standards required. The next five chapters will present the findings of the study showing how people's experiences demonstrate that their response to police abuse amounts to a social negotiation that is shaped by their structural position, their political subjectivity and the resources available to them.

## Chapter Three

### Hollow victory: The Kwekwe Mwandaza case and the inadequacy of legal sanctions

#### 3.1 Introduction

This thesis examines the negotiated aftermath of police abuse, of which the pursuit of police accountability is a crucial part. Police accountability, as I noted earlier, is understood as the state's detection and punishment, as appropriate, of police officers who break the rules (Prenzler and Ronken, 2001; Reiner, 2010). In Kenya, the roles of detection and punishment are split between different government agencies, and the processes to follow are defined by the law and institutional policies. These constitute the ideal – how the cases of police abuse ought to be handled. However, as Sindiso Mnisi Weeks (2015, 2017) shows in her work, dispute resolution is messy; it does not always match up to the ideal. Still, this statist imaginary of how things ought to work remains important. As I have already indicated, most of the scholarship on police accountability in Kenya has focussed on the state institutions of police accountability such as IPOA (van Staple, 2016; Osse, 2016). They have highlighted its limited success (*ibid*). Even so, it is important to look at the cases where IPOA has succeeded in obtaining conviction of police officers, and examine how it happens in practice. In this chapter, I examine such a case, to show that even where people's response to police abuse is the pursuit of police accountability through the state, the processes draw in multiple actors with varied capacities and interests and who may act in concert with or against each other at different stages. Hence, as I will discuss below, police accountability is the product of negotiations between various actors, both within and without the state apparatus.

As the civilian agency that is primarily mandated with handling people's complaints against the police, IPOA receives complaints from people who have been victimised by the police, directly or through intermediaries such as human rights organisations and the media. Once a case of police abuse is received at IPOA, it is considered by a Case Intake Committee – an internal committee made up of IPOA employees – which determines whether the matter at hand is one that IPOA should handle. The complaints that are seen as not constituting instances of police abuse are dismissed outright. Some complaints are transferred to other government agencies that are seen as being better placed to handle them. For instance, complaints that are related to corruption are often transferred to the Ethics and Anti-Corruption Commission (EACC), which is legally mandated to deal with such matters. The cases that are seen as relating to police discipline, and therefore as internal to the police, are often transferred to the National Police Service Commission (NPSC) or the Internal Affairs Unit (IAU) for action, sometimes under the supervision of IPOA. IPOA is then left to deal with the remainder of the cases – those they see as falling squarely within their mandate.

Expectedly, IPOA prioritises the cases that they see as most serious, that is those relating to death or grievous bodily harm.<sup>9</sup> Arguably, it is also much easier for IPOA to demonstrate their work to the public by placing more emphasis on such cases because, as police criminality cases, they have to be handled in court and are therefore more likely to gain

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<sup>9</sup> Interview, IPOA Official, IPOA Offices, Nairobi, 14 March 2019

public awareness than other cases. This can help bolster the legitimacy of the organisation. However, as I show elsewhere, it may be resisted by others (Wairuri, 2022). Once a case has been accepted for further action, IPOA should then proceed to investigate the complaint. IPOA designates a team of investigators to the case and dispatches them to the scene to gather evidence. In cases where they find that police officers are culpable, they make a recommendation to the DPP to prosecute the officers in court. If the DPP concurs with IPOA's findings, they institute court proceedings against the officers. The courts then determine, on the basis of the evidence provided, whether the police officers are guilty and, if so, impose the sanctions they consider appropriate. So far, there has been no sustained scholarly exploration of how this process actually works in practice. This chapter seeks to plug that gap. The limited scholarship on how the IPOA process unfolds may partly be explained by the fact that the institution has had limited success securing convictions of police officers in practice (van Stapele, 2016; Osse, 2016; Wairuri, 2022). Certainly, this gives us relatively few possible cases to explore. Analysing these cases, however, can give us crucial insights into processes of state accountability.

In the preceding chapter, I noted my decision not to investigate any cases of police abuse that were ongoing in court during my fieldwork. This left me with a choice between the only two cases that IPOA obtained conviction during its first six years (2012-2018). The first case is that of the killing of Kenneth Kimani, a young man from Githurai, by a police officer popularly referred to as Katitu (*Republic v Titus Ngamau Musila Katitu*, 2018). This case met the methodological requirement for this study because it is situated in an area that fits into the category of urban margins. However, since I have already examined this case in detail elsewhere (Wairuri, 2015, 2022), I felt that it would not be productive to re-examine it here. The second case was the killing of Kwekwe Mwandaza, a 14-year-old girl, by two police officers – Inspector of Police (IP) Veronica Gitahi and Police Constable (PC) Issa Mzee – in Maweni Village, Kwale County in the early hours of Friday, 22<sup>nd</sup> August 2014 (*Republic v Gitahi & Mzee*, 2016). While this case is situated in a rural area and thus fell outside the urban margins, I still considered it appropriate for examination here for several reasons. To begin with, the case drew in many actors who are situated in urban areas. This serves as a reminder that the conceptual dichotomies that we construct between rural and urban areas are blurred in practice (Tacoli, 1998). Exploring these entanglements is a useful addition to my other case studies that fall more solidly within the urban margins. Secondly, this case allows me to go beyond the predominant focus of scholarship on the use of lethal force by the police against young men, both in the urban and rural areas, to examine the victimisation of a young girl (van Stapele, 2016; Ruteere, 2008; Willis, & Gona, 2013; Willis & Chome, 2014). Additionally, this case presents an opportunity to examine police abuse against children, which has received limited attention in Kenya. The limited scholarship on police abuse of children in Kenya has focused on street children, especially in Nairobi (Thonden & Nowrojee, 1997; Droz, 2006; Kilbride, et al, 2000). While this chapter does not frame the discussion strictly in this sense, it provides empirical material that can enhance our understanding of this phenomenon.

In this thesis, I argue that when people respond to police abuse, they must engage with multiple actors who hold varied interests and capacities. These actors may be working

in concert or against one another. They will be driven by individual and institutional preferences but they will also be operating within structural constraints. Therefore, the processes of response and redress are best framed as a social negotiation. I am arguing that we need to explore these negotiations in ways that expands the parameters of current work, which has a narrower focus on state processes of police accountability. In this chapter, however, I show that even police accountability needs to be understood as more than an institutional act but also by the state. It needs to be seen as a complex process that is marked by negotiation – cooperation and conflict – between various actors that it draws in. In this thesis, I am also arguing that people’s response is shaped by their structural position, their political subjectivity and the resources that they have access to. Conscious of the access barriers that needed to be overcome before they could pursue police accountability, Kwekwe’s family recruited intermediaries – the media and human rights organisations – who facilitated the process. Still, I show that it matters that Kwekwe fit the category of an ideal victim, a socio-political construct that is used by analysts to refer to the people who are most readily given the complete and legitimate status of being a victim when they have been victimised (Christie, 1986: 18). It also matters that the various actors who were drawn into the process complimented each other, plugging different capacity gaps and thereby enabling the accountability process to proceed. In the end, the two police officers who shot and killed Kwekwe were sanctioned for their actions. All the parties to the case were dissatisfied with the outcome leading to further legal processes. The appeals against the High Court judgment failed. Subsequently, IPOA and the human rights groups involved in the case celebrate Kwekwe’s case as one of the major successes of police accountability in Kenya. However, the family found the victory hollow, and are now involved in a long and complex legal effort in pursuit of compensation from the state, which has generated new frustrations and conflicts.

Broadly speaking, I discuss the various aspects of this case chronologically. First, I examine the various factors that made the pursuit of accountability possible in this case including the view of Kwekwe as an ideal victim, and the involvement of the media and human rights organisations in the process. Second, I explore police attempts to escape accountability by manipulating official procedures and capitalising on family divisions, leading to Kwekwe’s hurried burial followed by an exploration of how these attempts were thwarted by investigations into the case. I show that human rights organisations played a crucial role in the investigation by plugging capacity limitations of the investigative state agencies. I then examine the trial and its outcome. Adopting Nils Christie’s (1977) conceptualisation of conflict as property, I show that the court process transforms the dispute to one between experts and state institutions with limited participation of the victims. Third, I show that justice outcomes generated by the process represented a fragment of the justice that Kwekwe’s family wanted, leading to further legal processes.

### **3.2 Kwekwe**

Before her death, Kwekwe lived with members of her extended maternal family in Maweni Village in the savannah grasslands of Kwale County in Kenya’s Coastal region (Republic v Gitahi & Mzee, 2016). Unless otherwise stated, the details of the case as narrated here are constructed from the case file, including witness statements and documents

presented in court (Republic v Gitahi & Mzee, 2016). Kwekwe's parents Umazi Zani (mother) and Mwandaza Yawa (father) had long separated and Kwekwe, their only child together and Umazi's only child, was left under the care of her mother. Umazi had left Kwekwe under the care of her brother Ndurya Zani and his wife Zipporah as she went to Kikambala to find work. Kwekwe's Uncle George Zani's family lived on their own compound a short distance away. On Thursday, 21st August 2014, George Zani's wife (Kwekwe's aunt) had asked Kwekwe to stay at their house and help take care of their two children (Kwekwe's cousins), as she was traveling to Mombasa to see her husband.

That night, as they slept, thirteen police officers came to their village to conduct a 'stealth operation.' They wanted to arrest several men who were suspected to have engaged in a recent wave of crimes in the village. Even though George Zani, Kwekwe's uncle, had been working and living away from the village at the time, he was one of the suspects. The police officers were drawn from the Directorate of Criminal Investigations (DCI) and the Administration Police (AP) – both arms of the National Police Service (NPS). The officers were divided into six groups and assigned suspects to arrest. IP Veronica Gitahi from the DCI, who was the most senior officer and was therefore commanding the operation, and PC Issa Mzee from the AP, were assigned to George's house. After the officers dispersed in their teams, one team reached their target house and succeeded in arresting the person that they were after. However, the operation was soon thwarted by the sound of gunshots. Within minutes of the two police officers arriving at George Zani's house, Kwekwe had been shot and killed. It is difficult to establish exactly what happened because, as I demonstrate in this chapter, the police officers offered different narratives, which conflicted with the account offered by Kwekwe's younger cousins who were the only other surviving eyewitnesses to the shooting.

At daybreak that Friday morning (22 August 2014), the two children went to their aunt Zipporah's house to report what had transpired in the night. They told her that police officers had killed Kwekwe and taken her body away. They came carrying some of Kwekwe's bloodstained clothes. Zipporah was aware that there had been police officers in the village the previous night. She had heard the sound of gunshots, but she had not dared get out of her house. She decided to walk with the children back to George's house to see the scene for herself before she called Umazi to tell her what had happened. When she got there, she saw the blood, bullets and some pieces of flesh that were said to be from Kwekwe's body. Kwekwe was not there. When she made the call to Umazi, she found that Umazi had already been informed by one of her brothers. The family began to search for Kwekwe in various hospitals and mortuaries in the nearby towns. Eventually, they found her body at the Kinango Hospital Mortuary later that Friday afternoon. Umazi, accompanied by Zipporah, immediately headed there to identify Kwekwe's body. When they got there, they found two women in the room whom they did not recognise.<sup>10</sup> They said that the women took pictures of Kwekwe's body and then asked them to go downstairs to meet a man who had been unable

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<sup>10</sup> Interview, Umazi Zani, Maweni Village, Kwale, 14 January 2021; Interview Zipporah, Maweni Village, Kwale, 14 January 2021

to climb upstairs to the mortuary because he had injured his leg. They learnt that he was the local representative of MUHURI.

Unfortunately, I was not able to interview all the key actors involved in the process, with the most significant being Kwekwe's Uncle Hussein Zani and Ngumbao Kithi, a local media correspondent. This was mainly due to pre-existing tensions between Hussein and the officials at the two main human rights organizations involved in the case, Muslims for Human Rights (MUHURI) and IMLU, who were my interlocutors. Although, we spoke three times, the conversations were heated, short and largely unproductive. Sadly, Ngumbao Kithi had passed away by the time I was conducting fieldwork for this study. Nonetheless, my attempt to reconstruct the sequence of events – from the court records, media reports and interviews I conducted – suggest that Hussein called Ngumbao to tell him about what had happened to his niece Kwekwe, thus validating the family's claim. In his turn, Ngumbao called several people to inform them about the case. Crucially, for my purposes here this included Francis Auma, the Rapid Response Officer at MUHURI, and Ferdinand Omondi, the journalist. The two then acted concurrently but independently of each other. Francis mobilised the MUHURI team in the area to go to the mortuary where Umazi and Zipporah found them when they came to identify the body. Ferdinand visited the site early the next week and conducted interviews. His report was broadcast on KTN, Kenya's longest established private television channel (Obuya, 2021), followed by a front page article in the *The Standard*, Kenya's second largest newspaper by circulation and a sister company to KTN, by-lined by Ngumbao Kithi (Kithi, 2014). By this time, however, Kwekwe had already been buried. I shall return to this later.

To my mind, the actions of Hussein and Ngumbao reflect their recognition of the limits they were operating within. Hussein knew that the family needed the intervention of other actors, especially powerful social institutions, to navigate the aftermath of Kwekwe's death. He reached out to Ngumbao who had links to a national media house and human rights organisations that could raise the profile of the case. However, even though Ngumbao represented a big media house, he seems to have acknowledged that, as a local correspondent, he had less power over the editorial process than a senior journalist like Ferdinand Omondi. He therefore reached out to him to tell him about the story and ask him to cover it. Gaining media coverage for a case is the product of institutional negotiations that are shaped by one's position with the organisation. It also matters that Ferdinand was stationed in Mombasa at the time, meaning that he was able to get to the scene more easily than if he were stationed in Nairobi which is much further away. It is important to account for contingencies as well as the bigger structural picture. For instance, it matters that Ferdinand was not already busy with other stories, perhaps on account of being stationed in a second city. This meant that he could spare the time to travel to Maweni to see if there was a story worth reporting. Possibly underlying the decisions by both Hussein and Ngumbao to recruit others to respond to Kwekwe's killing by police officers, was the idea that this case, unlike many other cases of police abuse, was likely to be taken seriously because the police had killed a child. She could fit into the category of ideal victim (Christie, 1986). I turn to this next.

### *'Ideal victim'*

For a long time now, scholars have noted that victims of crime are not seen and treated in the same way by the various actors that are involved in the aftermath of the victimisation – some victims receive more attention and sympathy than others (Walkate, et al, 2018). Nils Christie (1986: 18) developed the concept of the ideal victim to describe the people who are most readily given the complete and legitimate status of being a victim – and therefore as deserving sympathy and assistance – when they have been affected by crime. It is important to point out that the concept of ideal victim is a socio-political construct that merely helps us to understand the differentiated ways in which the victims of crime are seen and treated, rather than a distinct social category to which people belong. Thus, as Christie (ibid) also noted, the construction of the ideal victim is culturally specific meaning that being seen as such depends on the ideas that a society has about victims and aggressors. For instance, in a society such as the USA where the figure of the white woman is seen as the archetypal victim and the black man as the archetypal aggressor, white women who are victimised by black men are likely to more easily fit that category of ideal victims (Curry, 2017). To demonstrate the key attributes of an ideal victim, Christie (1986: 19) relies on an example of a ‘little old lady who is hit on the head by a big, bad man who grabs her bag (and uses the money for liquor or drugs while she is on her way home in the middle of the day after having cared for her sick sister’. From this example, Christie (ibid) and his followers,, have drawn several attributes of the ideal victim (Schwöbel-Patel, 2018, Eriksson, 2009). In the paragraphs that follow, I draw out three key attributes of the ideal victims emerging from this example and explore the extent to which Kwekwe met them.

Firstly, the victim is expected to be weak, vulnerable and helpless like the little old lady (Schwöbel-Patel, 2018: 710; Eriksson, 2009). In her work, Maria Eriksson (2009) notes that the characteristics of the ideal victims tend to map on to the social construction of women and children who are seen as weak and vulnerable in many societies and therefore as needing the protection of others when they are victimised. This, as some scholars have observed, is the reason why discourse on victimisation, especially with respect to atrocities, tends to emphasize the victimisation of women and children (Schwöbel-Patel, 2018). Hence, most of the time (some exceptions below), children are more likely to be assigned this status of ideal victim than adults (Walkate, et al, 2018: 2017; Eriksson, 2009: 440). Thus, Kwekwe, being a child, could be easily seen as an ideal victim. However, being assigned this status of ideal victim is not uncontested. In this case, the police officers contested the categorisation of Kwekwe as a child. They claimed that she had a large gait and therefore attempted to define her as a woman rather than as a child. However, their attempt failed because their claims could not override the legal definition of a child in Kenya as anyone below the age of 18. Justice Muya, who adjudicated the case at the High Court, described this argument as ‘not very attractive’ (Republic v Veronica Gitahi & another, 2016: 5).’ The ideal victim is often contrasted to their aggressor who as Christie’s (1986) example suggests is ‘big and bad.’ In contrast to the ideal victim who is seen as vulnerable and helpless, the aggressor is seen as dominant and violent, attributes that map on to ideas of adulthood and masculinity (Eriksson, 2009). Kwekwe’s aggressors were two adult police officers who were trained and armed. As a result, Justice Muya argued that they were expected to have exercised the necessary precautions to avoid shooting a child.

A second attribute of the ideal victim emerging from Christie's (1986) example is that the victim should not bear any blame for their victimisation. Like the little, old lady they need to be at the right place at the right time and carrying out a respectable project. Where people are victimised in places where it is thought they should not have been, such as in areas that are said to be dangerous, they may not be assigned the status of the ideal victim. Moreover, in cases where people are taking part in something that is seen as illegal or against the prevailing socio-political norms, they may not be able to obtain this status of ideal victims. Thus, even in cases where children are victimised, they may be denied the status of an ideal victim if they were engaged in an activity that is illegal or seen as morally unacceptable. In her work examining how state officials dealt with minors who had been trafficked for exploitation in criminal activities in the Netherlands, Brenda Breuil (2021) shows that the children were not seen as victims, in some cases being seen as 'little rascals.' Kwekwe avoided this denigration not only because she was not involved in any criminal activity, but she was sleeping at home, and taking care of her younger cousins when the police officers attacked.

Third, like the little old lady in Christie's (1986) example, the victim is also expected to respond in the ways that are accepted as socially appropriate. In many cases, the victim is expected to be passive and not respond to the aggressor and wait on other people to rescue them (Eriksson, 2009; Schwöbel-Patel, 2018). However, in some cases, scholars have shown that the victims are expected to respond actively to their aggressor. For instance, Melanie Randall (2010) shows that women victims of sexual assault are expected to demonstrate that they resisted the assault by vigorously fighting back, into be seen as an ideal victim. The police officers in this case claimed that Kwekwe had attacked them with a *panga*, a large machete-like knife (Wanambisi, 2014). However, the two children, the only eyewitness to Kwekwe's shooting, disputed this claim. This claim by the police officers failed to convince many people because, as Ferdinand Omondi argued, 'it was very difficult for people to believe that two adult police officers who were armed could be threatened by a 14-year old girl armed with a panga.'<sup>11</sup>

From the foregoing, we can see that Kwekwe fit the status of an ideal victim because she was a child who was attacked by armed police officers while she was sleeping and caring for her younger cousins. Furthermore, she could not be shown to have posed a threat to her aggressors. Being seen as an ideal victim has important implications for how a case is handled. Scholars have noted that the victimisation of people who are more easily assigned the status of an ideal victim receives more social attention, and the victims are treated with more sympathy (Walkate, et al, 2018). It follows, as McEvoy and McConnachie (2012) argue, that this idea of an ideal victim generates a hierarchy of victimhood leading to the marginalisation of victims who are not seen as fitting into this category). In Kenya, scholars have noted that many deaths of poor, young men as a result of police action do not receive media coverage. Moreover, where they are covered, the coverage is neither sympathetic nor sustained, as I discuss in Chapter 5 (See also Smith, 2019; van Stapele, 2016). The view of Kwekwe as an ideal victim, especially by the media, human rights organisations, and the state agencies like IPOA, under-girded the attention that the case received. However, as I have noted, this status is not

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<sup>11</sup> Interview, Ferdinand Omondi, Skype, 12 Nov 2020

uncontested and should therefore be seen as a socially negotiated outcome. That being said, Kwekwe being assigned this status of ideal victim does not fully explain why the case received the attention it did. We also need to pay attention to the negotiations within and between these organizations – especially the media and human rights organisations.

### *The media and human rights organizations in Kenya*

Globally, positive accounts of the media as a social institution that facilitates accountability of state actors, including police officers, by exposing and shaming those who abuse their power and triggering formal accountability mechanisms persist (Schlosberg, 2013; Stanley, 2004; Bonner, 2009). However, in Kenya, the role of the media with respect to accountability is best seen as ambivalent. On some occasions, the media serves the interests of state operatives rather than facilitating accountability by not only failing to question official narratives but by also suppressing, some stories on contentious topics that may have helped to facilitate accountability if they had been aired (Galava, 2020). On other occasions, the media has helped to advance accountability by exposing abuse, corruption and impunity within the state (ibid). To explain this ambivalence, media scholars have advanced various explanations. This includes the concentration of media ownership amongst people who are affiliated to current and previous political regimes; commercial interests; political interference; the affiliations of individual journalists; and corruption in the media, amongst others (Obuya, 2021; Onguny, 2021; Galava, 2020; Mbeke, et al, 2010). My interest here is to explore how some of these internal factors shape what stories the media covers and how. Here, I will examine the broader dynamics of how the media and human rights organisations work together to facilitate accountability.

Though Kenya's traditional media landscape is diverse (ibid), I take the example of The Standard Group, that owns KTN and The Standard, which were central to Kwekwe's case, as illustrative. Established in 1902, The Standard Group is the oldest media house in Kenya, and is said to be affiliated to the family of former President Moi and their business affiliates (Onguny, 2021: 67). After President Moi left office in 2002 and the NARC government came into power, The Standard Group ventured into investigative reporting (ibid). This came at a cost, as the media house was attacked by the government. One notable case was the raid on The Standard Group on 2 March 2006 by balaclava-clad men, presumed to have been police officers. These men vandalised the KTN tv station, putting it off-air for several hours, and burning thousands of copies of the newspapers (Mudhai, 2007: 537; Onyango, 2018). It is important to reiterate here that my focus on the Standard Groups is merely illustrative as there is a long history of raids on media houses in Kenya (Ogenga, 2010; Maina, 2015). Despite these intimidation attempts, The Standard Group continued to engage in investigative journalism. Of note is the Jicho Pevu<sup>12</sup> series by investigative journalists Mohammed Ali and John Allan Namu that broadcast a series of reports examining police abuse, corruption and drug trafficking, which attracted wide viewership and shaped national discourse on governance (Kanyinga, 2014; Odidi-Okidi & Odote, 2017). The two journalists were subjected to constant threats and harassment (Onguny, 2021: 62). Eventually the series disappeared and both

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<sup>12</sup> Swahili for a keen eye. The English Broadcast was Branded 'The Inside Story.'

Mohammed Ali and John Allan Namu left the media house (Kanyinga, 2014). It matters that at the time that Kwekwe was killed, 'KTN has styled itself as a hub for investigative journalism in the country' as Ferdinand put it.<sup>13</sup> This made it easier for him to get editorial approval to cover the case.

Journalists often rely on the support of other people to be able to make their reports. For a case like this, Ferdinand explained to me, the involvement of human rights organizations helps a journalist a great deal.<sup>14</sup> NGO staff who are well versed with a case helps a journalist verify claims that are made by people they interview and also put the case in its broader context for the general audience. This includes offering a view of what to expect as the case progresses.<sup>15</sup> In other words, they explain how the system works (or ought to work) and therefore set expectations for the public on how to judge whether justice has been served. Human rights organisations understand that media coverage is crucial to their success. These were lessons that were well learnt by the nascent human rights sector in 1990s Kenya, during the clamour for political reforms in the 1990s. They learnt that when issues gained media attention, they were more likely to lead to state action.<sup>16</sup> Hence, obtaining media coverage for their activities became central to their work. Some organizations, such as MUHURI, have become particularly media savvy. MUHURI has developed deep connections with journalists, especially in Kenya's Coastal region where they operate, even offering working space to some of them in their office.<sup>17</sup> This helps to ensure that many of the cases that they work on receive media attention. Conversely, Kenya's human rights movement also learnt that the cases that failed to gain media coverage were often ignored.<sup>18</sup> For instance, MUHURI officials showed me numerous letters they had written to IPOA to follow up on the status of many cases that they had reported to them that appeared to have stalled.<sup>19</sup> Thus, when they had a case that involved an ideal victim, MUHURI officials knew to engage the media. They called a press conference to draw media attention to the case in order to raise the stakes, scupper by the police to cover-up attempts the case, and trigger the response of state institutions, such as IPOA and the ODPP.

It is not surprising that MUHURI and IMLU were the human rights organisation at the centre of this case. MUHURI is a human rights organisation based in Mombasa that is well known amongst Muslims and the people of Kenya's coastal region, where it has amassed a track record of succeeding in claims against the government on the abuse of human rights (Chome, 2019). In recent years, they had successfully fought government attempts to de-register them for discrediting the government's counter-terrorism measures - including targeted assassinations - that violated human rights in cases that were highly publicized in the media (ibid). As a result, they have built credibility amongst the people of Kenya's coastal region as a champion of their rights against successive regimes which they see as having

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<sup>13</sup> Interview, Ferdinand Omondi, Skype, 12 Nov 2020

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Interview, Mutuma, Nairobi, 15 October 2018

<sup>17</sup> Interview, MUHURI officials, MUHURI offices, Mombasa, 15 January 2021

<sup>18</sup> Interview, Mutuma, Nairobi, 15 October 2018

<sup>19</sup> Interview, MUHURI officials, MUHURI offices, Mombasa, 15 January 2021

marginalised them and violated their rights since independence. It is also not surprising that MUHURI officials were able to attend to the case so quickly. MUHURI is deeply embedded in the communities they serve. Over the years, they have built a strong network of human rights defenders based in the communities they serve, who are often the first responders to any reports of human rights violations. This explains why Francis was able to dispatch people to the Kinango Hospital Mortuary quickly when he learnt about the case. They got there even family.

In its turn, IMLU is a human rights organisation based in Nairobi that focuses on investigation issues of torture – including police abuse. They gained recognition through their publication of the statistics of police killings in Kenya that have received national and international media coverage (for example, Pflanz, 2014; Ombati, 2015). IMLU has recruited a network of doctors and lawyers across the country, working as volunteers or on a consultancy basis, who help to conduct medico-legal investigations into cases of alleged torture (Christiansen, et al, 2019). One of their core focus areas is the conduct of medical examinations on the victims of torture, including autopsies in homicide cases. They also help the victims to pursue accountability where that is possible and where the victims or their families want to do so, as in Kwekwe’s case.

It is important to note that, even though the organisations are based in different cities, the officials within them know each other and have worked together. They often rely on each other for capacities that they do not possess internally. For instance, IMLU often relies on MUHURI for on-the-ground work in the areas where they operate while MUHURI has often depended on IMLU for the conduct of medico-legal investigations that are crucial, especially when cases they are handling may end up in court. The cooperation between these organisations was crucial in Kwekwe’s case.

The foregoing discussion shows that the attention that Kwekwe’s case received from the media and human rights organisations was largely shaped by the fact that she could be assigned the status of ideal victim. This made it easier for actors to draw in other players into the case. However, I have showed that the status of ideal victim is not adequate to explain the attention that the case received. We need to also pay attention to the ways in which the media and the human rights organisations cooperated in responding to the case. This increased the feasibility of the pursuit of accountability. However, as I have showed, human rights organisations also have mixed motives, including the need to sustain themselves, which shapes how they engage with cases of police abuse. Undoubtedly conscious of the possibility that the family could pursue accountability for Kwekwe’s death, a cover-up attempt by the police begun. The co-operation of these actors and the state agencies was to also prove necessary to thwarting these efforts. I turn to this next.

### **3.3 The Investigation**

The facts of a case may be disputed. People may forget things and, sometimes, the accused may attempt to distort the facts of the case or bury the evidence.\* This is what makes investigations into claims of abuse necessary – in the hope that they can generate the truth about what happened and to whom – in order to then deliver the appropriate justice

outcomes. As a result, Michael Ignatieff (1996:113) argues that the purpose of the criminal justice system is to narrow the range of permissible lies on both sides of a dispute. The initial part of this process is the conduct of investigations into a matter. As I noted in the introduction, the state has established several investigative agencies, including IPOA, the DCI and the Government Pathologist. The conduct of investigations into cases of homicide is also guided by the law. Internationally, the Minnesota Protocol on the Investigation of Potentially Unlawful Death established by the United Nations (UN), stated that all deaths that are potentially unlawful should be investigated and provides guidelines on how this ought to be done (OHCHR, 2017). Even though analysts have noted that Kenya's legal requirements are not fully in line with the Minnesota Protocol (Probert, et al, 2020), Kenya's Criminal Procedure Code (CPC) (2012) requires that deaths that occur in uncertain circumstances, and where death does not result from natural causes, be investigated. The investigations are expected to determine the cause of death and the circumstances in which the death occurred. In this section, I examine how the process of gathering and examining the evidence unfolded in Kwekwe's case, showing how it was shaped by the interactions between various actors – both state institutions and non-state actors – that included both cooperation and conflict with the intervention of the courts. Knowing that there was going to be an investigation, the police attempted to scuttle the process.

### *Tying loose ends*

Following Kwekwe's death, the two police officers took the body to the mortuary. When they got there, they told the mortuary attendant that they had collected the body on the streets. However, the mortuary attendant, who was suspicious, refused to collect it without the name of the next-of-kin. He insisted that they had to follow the requirements; leading to the registration of IP Gitahi, as the person delivering the body until the rightful next-of-kin was identified. Hence, Kwekwe's death entered the state records with Veronica's name attached to it. When the family found Kwekwe's body, Umazi was asked to formally identify her and she was then recorded as the rightful next-of-kin. She informed the mortuary attendant that they – the family – would collect Kwekwe's body on Monday, 25th August 2014 for burial. From the sequence of events that followed, it seems that the police officers understood that this was likely to cause challenges for them if the family decided to pursue accountability. At the very least, if they were to stick to their earlier narrative, they would have to explain where they got the body. What followed appears to have been an elaborate attempt by the police officers to tighten the loose ends. Most crucially, the paperwork needed to be streamlined.

To begin with, the police officers needed to meet the legal requirement that the death be investigated. In the very early stages, the DCI, the unit of the NPS that Veronica was from and the primary investigative agency in the country, recommended that a judicial inquest be opened into the case to establish what happened (Kithi, 2014). However, as I discuss in more detail in the next chapter, inquests are often used by the police as an opportunity to cover-up evidence and shut down efforts to pursue accountability. This attempt was scuttled by the efforts of the family and human rights organisations who launched alternative investigation processes as I demonstrate below.

Another crucial step that the police officers seem to have taken is to have an autopsy conducted on Kwekwe's body. The human rights officials I spoke to for this study believed that the officers compelled one of the doctors at the Kinango Hospital to conduct a postmortem examination on Kwekwe's body that Friday morning. This was just hours after Kwekwe had died.<sup>20</sup> Even though the doctor noted the existence of gunshot wounds, he recorded the cause of death as 'cardiac arrest.' This was important to the cover-up attempt because it provided an official cause of death that would not be attributed to the actions of the police officers. The conduct of an autopsy on Kwekwe's body is particularly important to this case. In Kenya, autopsies are not conducted in many cases where they ought to be conducted. Much of the analysis on this issue points to the lack of capacity to conduct all the autopsies that are required (Olumbe & Yakub, 2008; Muriuki, 2013; Olumbe, 2000). Some have noted that, even in the cases where autopsies are conducted, many of them are executed by doctors who are not properly trained as pathologists (ibid). Therefore, it is not unusual that the initial post-mortem examination was conducted by a doctor at the Kinango Hospital who was not a pathologist. The analysts who focus on the question of capacity propose that autopsies should be conducted by pathologists who are well-trained and experienced (Davis, 2005:6). At its root, the argument about enhancing capacity to solve the challenges plaguing the conduct of autopsies in Kenya is the view of an autopsy as merely a technical and scientific process that is aimed at generating the 'objective facts' relating to a death (Crossland, 2009). Many scholars have challenged this view (Crossland, 2009; Kruse, 2013; Hlavka & Mulla, 2021; Daemmrich, 1998). Without taking away from the real capacity constraints that exist, the idea that expertise can lead to objectivity is reductive. For instance, in this case, my interlocutors believed that the doctor had been instructed what to write on his report.<sup>21</sup> This suggests that the ability of an autopsy to identify the cause of death, and for these findings to be meaningfully applied to the judicial processes, is not only shaped by institutions but also by the actions of the people within them. Such an issue would not be addressed by having better trained pathologists.

The next step in the attempts to cover-up the case was for Kwekwe to be buried. Pre-existing conflict in the family seemed to have made this easier for the police officers. As noted earlier, Kwekwe's parents were separated and she lived with her maternal family. However, culturally, her burial was the responsibility of her paternal family and she was to be buried on her father's land. From what Umazi and MUHURI officials said to me, it seems that Kwekwe's father was not interested in pursuing police accountability.<sup>22</sup> They suggested that he may have been coerced or co-opted by the police officers in that regard. Whatever the case, for one to conduct a burial, they must obtain a Burial Permit from the government. Usually this document is issued by the Chief. The Chief is an official of the national government who represents the Office of the President at the local level. As it turned out Chief Solomon, the Chief of the area, was himself a member of Kwekwe's extended paternal family. The MUHURI officials who followed this case that I spoke to believed that the Chief was bribed by the police officers to issue the burial permit quickly in a view to frustrate any attempt to pursue

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Interview, MUHURI officials, MUHURI offices, Mombasa, 15 January 2021; Interview, Umazi Zani, Maweni Village, Kwale, 14 January 2021;

accountability for Kwekwe's death.<sup>23</sup> After he had issued the Burial Permit, in his official capacity, Chief Solomon then proceeded to the mortuary to pick up Kwekwe's body, in his capacity as a family member. According to court proceedings, he told the Mortuary attendants that he had been designated by the family to do so. However, having already received instructions from Umazi who was now recorded as the next-of-kin, the mortuary attendants refused to release the body to the Chief without Umazi's consent. The Chief then sought the intervention of the OCPD of Kinango, the most senior police officer in the district, who then accompanied him to the mortuary and instructed the attendants to release the body to Chief Solomon. They obliged. Kwekwe was buried on that Saturday night on her father's land. One of the witnesses said in court that they could barely see as they buried her; they relied on spotlights from their mobile phones for light. Umazi, and her relatives, learnt of the impending burial when the body had already been collected, and they rushed to Kwekwe's father's land in order to witness the funeral. Commenting on how the saga had unfolded, Zipporah told me '*walitaka haraka kusiwe na ushahidi mwingi* [they wanted everything done quickly so that there would not be too much evidence].'<sup>24</sup> However, while the police officers seem to have hoped that this would put the matter to rest, it backfired. The attempt to cover up the case invited even more scrutiny. It had also complicated the investigation process.

On Monday, following the hurried Saturday night burial, Umazi and her brother traveled to Mombasa to meet with the MUHURI team. They brought with them some two bullets and one bullet casing that they had collected at the scene. MUHURI officials called a press conference at which they first reported the case to the media. They then reported the case to IPOA for further investigations and handed over the bullets and bullet casings to IPOA officials in Mombasa. MUHURI also contacted IMLU seeking their involvement in the case, especially with the conduct of the investigations. The investigations would include: the conduct of a second autopsy, ballistics examinations and gathering witness statements. My examinations of these aspects demonstrate that even though the generation of evidence is shaped by institutional and broader socio-political dynamics, evidence emerges from negotiations between actors. I examine these in turn below.

### *A second autopsy*

MUHURI and IMLU officials recognized that the conduct of a second autopsy to establish the actual cause of Kwekwe's death was a major and urgent challenge for them if the pursuit of police accountability was to have any chance of success. It bears pointing out here that, as obvious as it may sound, for an autopsy to be conducted there has to be a body. This is important to highlight because in some cases where people know or suspect that someone has been killed by the police, they are unable to find the body. Human rights organisations have documented hundreds of enforced disappearances in the country (Missing Voices, 2020). In some cases, the bodies are subsequently discovered. For example, the bodies of two former Cabinet Ministers JM Kariuki (killed 2 March 1975) and Robert Ouko (killed in February 1990), widely suspected to have been killed by the police, were found in the Ngong and Koru Forests

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<sup>23</sup> Interview, MUHURI officials, MUHURI offices, Mombasa, 15 January 2021

<sup>24</sup> Interview Zipporah, Maweni Village, Kwale, 14 January 2021

respectively (Musila, 2015: 78). In some cases, police officers have succeeded in destroying the bodies of victims' altogether – the most notable example here is the infamous case of Mbaraka Karanja who died in police custody in Eldoret in 1987 and the police officers subsequently incinerated his body (Ngotho, 2017). In Kwekwe's case, the body was not missing but was not available for an autopsy because she had already been buried. If the police officers were to be held to account for their actions, Kwekwe's body needed to be exhumed for a second autopsy.

To exhume a body that has been interred in Kenya, one requires to obtain a Court Order (Kabira & Kibugi, 2020). Officials from MUHURI and IMLU encouraged Kwekwe's mother to seek exhumation orders in Court so that a second autopsy could be conducted. Technically, only members of the victim's family can apply to the court for the exhumation. However, in all important respects, the application was filed by IMLU. While the human rights organisations can file many different kinds of court cases on their own, for such a cases, which is also important for them, they need the families of victims in order to achieve their own objectives. Scholars have long examined the use of people's suffering for raising money by human rights groups (Schwöbel-Patel, 2016; Kennedy, 2009). It was IMLU that hired lawyer to represent Umazi at the High Court and to lodge the application. Umazi's role was to appear in the court as the applicant. Kwekwe's father opposed the exhumation in court. Again, my interlocutors from the human rights organisations suspected that he had been paid by the police officers and facilitated by them to oppose the court case.<sup>25</sup> Even if this was a plausible explanation, it is not the only one. In reality, people's actions are shaped by multiple factors and beliefs. In my view, it is important to take seriously the fact that Kwekwe's father opposed the application for the exhumation on cultural grounds. He argued that it was against their culture to exhume bodies. Indeed, the MUHURI officials seemed to deny him the same agency they offered to other families of victims they worked with.<sup>26</sup> For instance, while they seemed to be frustrated by the refusal of many families of victims of police abuse to conduct autopsies on the bodies of their loved ones for religious reasons, they seemed to accept those arguments as valid. People's resistance to the conduct of autopsies in the bodies of their loved ones in Kenya has been noted by other scholars (Bunei, et al, 2019; Gacheri, et al, 2015). Even though there is not much social science scholarship on exhumations, it is hardly surprising that some people would be opposed to them as Kwekwe's father was.<sup>27</sup> The conduct of an autopsy should therefore be understood as going beyond the exercise of technical expertise; it is the product of the negotiations between various actors within particular constraints, including socio-cultural norms and beliefs. On some occasions, they may require adjudication by the courts.

Despite the opposition by Kwekwe's father, the High Court issued an exhumation order and instructed the Government Pathologist to conduct a secondary autopsy to determine the cause of Kwekwe's death. Subsequently, Dr Johansen Oduor, the Government Pathologist, led a team of pathologists, including two from IMLU, in conducting the second

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<sup>25</sup> Interview, MUHURI officials, MUHURI offices, Mombasa, 15 January 2021

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

autopsy. The pathologists who conducted the second autopsy concluded that the initial one was erroneous, and that Kwekwe had died of gunshot wounds. That this second autopsy generated an outcome that was understood to tell the truth about what happened, is not merely attributable to the presence of trained and well experienced pathologists as the analysts who emphasize capacity gaps may interpret it (Olumbe & Yakub, 2008; Muriuki, 2013; Olumbe, 2000). That matters. However, it also matters that as a court mandated exercise the second autopsy was government undertaking. This was not only signaled by the fact that the autopsy was led by the Government Pathologist but was also protected by a heavy contingent of police officers, mainly drawn from the General Service Unit (GSU), the public order police unit that is notorious for its brutal approach to policing.<sup>28</sup> Alongside the attention that the case had gained from the media, human rights organisations and the public, the possibility of tampering with the process had been severely constrained. The outcome of the second autopsy suggested that the two police officers were potentially culpable for Kwekwe's murder.

### *Ballistics examinations*

Having established that Kwekwe died of gunshot wounds, there was need for further investigations to establish the firearms that had been used to shoot Kwekwe and whether they had been used by the suspected police officers. This required the investigation of the firearms and the projectiles (bullets) – an exercise referred to as ballistics examinations – as well as the examination of police records. The Minnesota Protocol calls for the examination of the firearms, the projectiles (bullets) and the gathering of ballistic information including the pattern and movement of the projectiles from a firearm after discharge (OHCHR, 2017: 25). The main purposes of these investigations are to confirm that the object they have been provided with is a firearm, that it was discharged, and then to match the firearm with the bullet (the projectile) or the cartridge casing (Lunn, 2017:115). These investigations should be conducted by a firearms examiner who is trained to conduct ballistics examinations. Like in the case of the pathologists above, capacity constraints – especially the shortage of equipment and well-trained investigation officers – have been cited as a major challenge to the conduct of ballistics examinations in Kenya (Mbaya, 2016; Sang, 2013). However, as I show below, the outcomes of ballistics investigations are shaped by what the institutional landscape will allow.

The DCI is the only state agency in Kenya with the capacity to conduct complete ballistics investigations. As a result, IPOA has to rely on their services whenever they need to conduct ballistics examinations. The interactions between IPOA and the DCI are not always cooperative. In fact, IPOA has often complained about lack of cooperation by the NPS, of which the DCI is a part (IPOA, 2016). The DCI – and the police more broadly – have also been accused of conducting shoddy investigations into cases of police abuse in order to frustrate the pursuit of police accountability by victims. For instance, while acquitting a police officer who was accused of killing his colleague, Justice Mary Kasango complained that she was placed in an unenviable position (Odenyo, 2019). She is quoted as saying that she felt sorry for the victims but could not convict the accused because 'the police did an extremely

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<sup>28</sup> Ibid.

shoddy investigation and failed to avail witnesses who could have assisted the court to reach a just determination' (ibid). In other cases, they have been accused of covering up evidence in order to frustrate the judicial process. For instance in the Katitu case that I have noted before the judges of the Court of Appeal complained that the police had attempted to cover-up the matter by handling the evidence in a way that made it difficult to identify the precise weapon that was used to shoot Kenneth Kimani (Katitu v Republic, 2020). The Court of Appeal termed this as emblematic of the 'blue code of silence', the centre-piece of their judgement, referring to the unwritten rule according to which police officers never provide incriminating information about their colleagues (see, Westmarland & Conway, 2020; Skolnick, 2002). This is to say that it takes more than the ability to conduct investigations for the process to generate meaningful outcomes that can facilitate the pursuit of police accountability.

Knowing this, IPOA has set up some safeguards against such manoeuvres by the DCI. The most crucial is that they have recruited ballistics examiners, mainly former police officers, who can conduct preliminary ballistics examinations before the evidential materials are handed over to the DCI.<sup>29</sup> This creates a safeguard against the materials disappearing or being switched when they get to the DCI. In this case, it matters greatly that Kwekwe's family had gathered some evidence, the bullets and bullet casings at the scene, handing them to MUHURI who then handed them to IPOA. When he went to the house where Kwekwe had died to cover the story, Ferdinand Omondi, the journalist, found other bullets and bullet casings at the scene which had not yet been recovered and they were also handed over to IPOA for the investigation purposes. IPOA conducted their preliminary examinations on them and then handed them over to the DCI for the complete ballistics examinations. In my view, the fact that the evidence had been seen and documented by many actors along the way, alongside the widespread attention that the case had received, would have made it difficult for the DCI officers to tamper with the evidence if they had been so inclined. During the trial, the defence lawyers raised objections about the chain of custody of these evidential items but they did not succeed in having the evidence thrown out. This is surprising, as the evidence that is gathered without following the proper evidence chain is usually considered inadmissible in court in Kenya (Ajema, et al, 2009). In his judgment in the case, Justice Muya did not engage with this issue, making it difficult for us to understand what informed the decision he made (Republic v Veronica Gitahi & another, 2016).

The DCI conducted the ballistics investigations and found that the bullets that killed Kwekwe had been discharged by the guns that had been issued to the two police officers. This was corroborated by the police records, especially the Arms Movement Register, which records the arms that are issued to a police officers and their return. While I shall examine the role of documents in the pursuit of accountability in more detail in the next chapter, it is crucial to note here that documents are an important element of the practice of statehood; but their production, use and storage are marked by the exercise of power and agency by various actors (Cooper-Knock & Owen, 2018). Though some attempts to alter the armoury records were noted, they were not adequate to obfuscate the role of the two police officers in Kwekwe's death. This could be read in multiple ways. For instance, it could be that the armoury officer

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<sup>29</sup> Interview, IPOA official, Nairobi, 23 Jan 2021

needed accurate records to protect his own career. However, it seems to me that it was just one piece of the puzzle that the officers had missed and by the time they got to it, it must have been just too late. That said, documents can also be destroyed. Scholars have noted how state documents have been destroyed in fires, shredded or just ‘disappeared’ in attempts to evade accountability (Mnjama, 2003; Anderson, 2015; Etyang, 2014). Why the documents were not disappeared or destroyed remains a matter of speculation. In the end, the police records showed that Veronica had been issued with a Jericho Pistol (serial number: 40305198) and Issa Mzee had been issued with an AK 47 gun (serial number: 4941030). Both of the guns had returned in good working condition – but the officers returned five rounds of ammunition less than they had been issued (Veronica less 2, Issa less 3). Testifying in court, the officer in charge of the armoury said that the guns issued to IP Gitahi and PC Mzee before the operation were the only ones to have been fired that night, and that they had discharged five bullets. This confirmed that it was the two officers who went to George’s house who had shot Kwekwe dead.

### *Witness testimonies*

Collectively, investigations that are seen as primarily scientific in nature – such as autopsies and the ballistics – are referred to as forensics. Many scholars have challenged a common perception that forensic evidence, as the outcome of scientific processes, speaks for itself (Crossland, 2009; Kruse, 2013; Hlavka & Mulla, 2021; Daemmrich, 1998). Forensic evidence must be understood within the broader socio-political contexts, which shapes the form they take and the outcomes they generate. For this reason, some analysts argue that the evidence that emerges from these forensic processes needs to be contextualized through witness statements (Lunn, 2017: 43). The Minnesota Protocol also recognizes witness testimonies as a crucial element of homicide investigations (OHCHR: 2017). This requires the identification of witnesses, interviewing them and recording their statements in order to establish the circumstances leading to the death being investigated (ibid).

Ideally, collecting witness statements should be the role of the state investigative agencies such as the DCI and IPOA that have the legal mandate to conduct investigations. However, some people complain that these agencies are too slow to get to the scenes of crime, hampering the efforts to identify witnesses and record statements following an instance of police abuse.<sup>30</sup> One investigator at IPOA noted that these delays are occasioned by their internal procedures, such as the case intake committee that I discussed above, and resource constraints.<sup>31</sup> Human rights organisations, on the other hand, are much quicker to get to the scene following reports of police abuse and to gather preliminary evidence. This is particularly true when they are as deeply embedded in the communities they serve as MUHURI. In Kwekwe’s case, MUHURI officials started to identify the potential witnesses and recording statements as soon as they learnt about the incident, days before state agencies were able to come to the scene. The work that was done by MUHURI served as the entry point for IPOA investigators when they eventually came to Maweni village to begin their investigations

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<sup>30</sup> Interview, Khelif, MUHURI offices, Mombasa, 15 January 2021

<sup>31</sup> Interview, IPOA official, Nairobi, 23 Jan 2021

into the case. It is important to note here that human rights organisations are, broadly speaking, intervening in what should really be state process. Yet they are not the state and are usually not following state procedures but their own. This creates its own tension partly because of procedural issues, the state officials have to follow their own internal procedures, many of which are set out in the law. The state procedures also provide an anchor for the officials who want to take be in control of these processes to do so.

These approaches may results in frustration for some of the witnesses as they may be required to record statements several times.<sup>32</sup> Not only is this time consuming for the witnesses, the interviews also run the risk of re-traumatising them. This was of particular concern in the case where the two eyewitnesses of the incident were minors. In some countries, such as the USA, investigators have adopted a Multi-Disciplinary Team (MDT) approach to interviews of child witnesses in order to reduce the number of interviews a child is subjected to, and thereby limiting the number of times that the child has to relive the traumatic event (Cowan, 2013). These MDTs consist of representatives from law enforcement, the prosecution, child welfare agencies, health professionals and guardians (ibid). Due to the uncoordinated nature of the investigations in this case, the children were subjected to multiple interviews. In the absence of deliberate state efforts to avoid the re-traumatisation of witnesses, the human rights organisations often have to bear the burden. In this case, IMLU supported all the witnesses, including the two children, by providing counselling services.\*<sup>33</sup> Further evidence of how the human rights organisations plug the gaps that emerge within the state processes and thereby making the pursuit of police accountability possible. However, this would become contentious during the trial, raising doubts on the credibility of the testimony presented by the children.

The foregoing discussion has explored the investigations into Kwekwe's death. While noting the centrality of state investigative agencies to the process, I have showed that they face numerous capacity constraints in the execution of their mandate. I have also showed that human rights organisations often intervene to bridge these gaps by identifying witnesses and collecting their statements, gathering and handing over crucial ballistics evidence as well as providing technical expertise to support the conduct of autopsies. However, my argument here goes beyond the question of capacity, which has been the focus of much of the extant literature, to show that the generation of evidence that facilitates accountability emerges from the negotiations between various actors, and how they exercise the power they possess. In the next section, I examine the trial and its outcome.

### **3.4 Hollow victory**

When IPOA concluded their investigations into Kwekwe's case – with the support of other state and non-state organisations – showing that the two police officers were culpable for Kwekwe's death, they forwarded the file to the ODPP with the recommendation that the two police officers be charged with murder. The DPP concurred with IPOA's

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<sup>32</sup> Interview Zipporah, Maweni Village, Kwale, 14 January 2021

<sup>33</sup> Group interview, IMLU Officials, Nairobi, 14 January 2021

conclusion and instituted murder charges at the High Court in Kwale against the two police officers in February 2016, about a year and a half year after Kwekwe's death. This culminated in the two officers being sentenced to prison. In this section, I examine the trial, the justice outcomes that they produce and their aftermath. I argue that people pursue varied justice outcomes, which emanate from various procedures. I show that even where the state judicial processes generate police accountability, the victory may be seen by the victims as hollow and may trigger subsequent processes.

As a Common Law country, Kenya's criminal justice system is adversarial (Mwalili, 1997). This means that the prosecution presents their evidence to the court, which the defense attorneys challenge (*ibid*). At the end of the trial, a judicial officer rules on the adequacy of that evidence and the arguments made in the court to prove the guilt of the accused beyond reasonable doubt (*ibid*). The parties have the option to appeal to higher courts if they are dissatisfied with the outcomes. The implication of this is that criminal proceedings can only be brought to court by the state – represented by the DPP – against the accused party(ies). This model has been noted by some African scholars, such as Daniel Nsereko (2010), as a legacy of European colonialism in Africa. One of the core effects of this approach to criminal justice, as many scholars have noted, is that the victims are marginalised in the legal processes that centre the lawyers, representing both the state and the accused (Wemmers, 2010; Zedner, 2002: 419). This reflects the argument by Nils Christie (1977) who, conceptualising conflicts as property, argued that in criminal proceedings the state and experts – especially lawyers – take away conflicts from the victims and their aggressors. Scholars have noted that victims, and their families, have often been reduced to mere spectators in the court proceedings though in some cases they may be called to serve as witnesses for the prosecution (Wemmers, 2010). Yet, even in the cases where they are invited as witnesses, their contribution is limited and, as Luke Moffet (2017: 255) argues, their participation is merely functional: supporting the prosecution in the quest for the imposition of punishment of the defendants.

The marginalisation of victims in legal processes gained scholarly attention and became the subject of advocacy in the 1950s and 1960s, in what has been termed by some scholars as the re-emergence of the victim (Karmen, 2012:38). The establishment of the American President's Task Force on the Victims of Crime by US President Ronald Reagan 1982 is significant in these developments (Cassell, 1994). The taskforce found that the criminal justice system served lawyers and defendants while treating the victims with institutionalized disinterest (*ibid*: 1379). Three years later, the United Nations General Assembly (1985) adopted the Declaration of Basic Principles of Justice for Victims of Crime and of Power that aimed aimed to give victims improved access to justice and fair treatment (Crawshaw & Holmström, 2008). These developments in the international arena served the background for reforms to the place of victims in Kenya's criminal justice system several decades later. There are a few notable changes that are important to note here. In 2003, the Criminal Procedure Code (CPC) was amended to allow victims to provide Victim Impact Statements to the courts (Criminal Law (Amendment) Act, 2003). A victim impact statement presents an opportunity for a victim to explain the impact that the crime has had on them that the judge may consider in sentencing (Sander, 2002; Cassell, 2008). The CPC was amended again in 2008 to introduce

plea bargains that could also include compensation and restitution by the perpetrators to the victims (Criminal Law (Amendment) Act, 2008). The 2010 Constitution of Kenya recognized the rights of victims in criminal trials. Section 50 (9) of the constitution provides that “Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.” To fulfil this requirement, Hon. Millie Odhiambo introduced the Victims Protection Bill in 2013; it was passed by parliament and assented to by the President in 2014 becoming the Victims Protection Act. Amongst other things, the Act provides for rights of victims to participate in trials and to seek compensation for harms they have suffered due to their victimisation.

The trial of the two police officers was heard by Justice Muya at the High Court in Mombasa. Since Kwekwe’s death occurred when the Victims Protection Act was already in place, her family applied to be admitted to the proceedings in court and also for compensation from the two police officers. In practical terms, this meant that they could appoint a lawyer to observe the proceedings on their behalf. As the family could not afford to appoint a lawyer, IMLU appointed Harun Ndubi, a renowned constitutional lawyer, to represent the family in the trial. However, the participation of the family’s lawyer in the proceedings was neither uncontroversial nor unfettered. His application for admission by the court was opposed by the defence attorneys who argued that the victims’ interests were already protected by the prosecutor. Jared Magolo, one of the defence lawyers, is recorded as saying that ‘the CPC has no room for participation of any other person other than the accused. The victims’ case is well taken by the DPP.’ This position was challenged by Harun Ndubi, for the family, who noted that the Constitution and the Victims Protections Act provided room for the victims’ participation in the trial. In his ruling on the matter, Justice Muya said that ‘section 4(2)(b) of the Victims Protection Act exhorts the court to ensure that everything possible is done to accommodate the victims’ participation.’ He granted the request for Ndubi to participate in the trial but restricted his interventions to matters of policy and to constitutional issues. This meant that he could not, for example, cross examine the witnesses. This debate has subsequently gone to the Supreme Court which expressed itself in the *Waswa v Republic* case recently (Joseph Lendrix Waswa v Republic, 2020). The Supreme Court of Kenya said that victims are not a secondary prosecutor, but they assist ‘the trial Judge to obtain a clear picture of what happened and how they suffered, which the Judge may decide to take into account’ (Ibid: 13). This validated the decision that Justice Muya had made five years earlier.

During the trial, the prosecution presented their evidence that had been gathered by IPOA, with the support of other actors, to the court. They called 23 witnesses including members of Kwekwe’s family and the experts who had conducted the investigations. In order to make it easier for the children to testify, the court held a session at the scene. This was meant to make it easier for the children to explain what they saw on the night that Kwekwe was killed. After the prosecution completed presenting their case came the critical juncture at which the court has to determine if the officers had a case to answer. Both sides made their submissions. The prosecution argued that they had presented adequate evidence to prove that the two officers had jointly murdered Kwekwe Mwandaza. In their turn, the defense attorneys urged the judge to throw out the case because, in their view, the evidence that had been

presented was circumstantial. They also argued that the children had been coached on what to say to the court as one of them, while seemingly responding to a question by Jared Magolo, is recorded as saying 'I've been counselled on what to say.' Without more detail, it is not possible to completely determine what was meant by this because the children had received psychological counselling from IMLU. In his ruling delivered on 10th November 2015, Justice Muya said that he was 'satisfied that a prima facie case has been made against the accused persons to warrant them to be placed on their defence.' As required by the law, he then proceeded to inform them of their right to make submissions to the court and to call witnesses in their defence. The defence attorneys called the two officers to defend themselves and two other witnesses, both police officers. Their defence amounted to the claim that Kwekwe had attacked them with a panga, that Maweni was a dangerous area and that they were after dangerous criminals, including George Zani, who they insisted was in the house and had threatened them saying 'nitaua mtu [I'll kill someone]'. PC Job Ouma, one of their witness, is quoted as also saying that police accountability was making it harder for them to do their job of ensuring security because, as he put it, 'it is difficult to arrest the suspects because they are saying that they are protected by IPOA and human rights groups.' Onesmus Towett, a Senior police officer, is recorded as having said that IPOA's investigations into the case had interfered with their own processes of investigating the matter.

Justice Muya delivered his verdict on 17<sup>th</sup> February 2017, just over a year since the two officers were charged at the High Court in Mombasa. While the judge found that the two officers were responsible for Kwekwe's death, he was not satisfied that the prosecution had provided adequate evidence to support that the officers had malice aforethought, the intention to kill on the part of the officers, which is crucial to prove the offence of murder. For this reason, he found the two officers guilty of the lesser crime of manslaughter and sentenced them to seven years each in jail. Additionally, Justice Muya declined to grant the request for Umazi to be compensated by the two police officers saying 'these are people of straw. In my estimation, they lack the financial wherewithal of compensating the victims'.<sup>34</sup> He advised that the family seek compensation from the state. All the parties to the dispute were dissatisfied with the outcome of the trial, albeit for different reasons. The DPP and IPOA felt that the judge had erred in reducing the crime of the two officers from murder to manslaughter because they believed that they had provided adequate evidence to prove that they had committed the offense of murder. They also argued that he should have imposed the only sentence provided in the law for manslaughter, as per Section 205 of the Penal Code, which is life imprisonment. Here, it is crucial to point out that even though the High Court Judge acknowledged the presence of the two children in the house when the police officers shot Kwekwe, he did not engage with their testimony at all in his 16-page judgment. As a result, it remains unclear what he thought about their testimony, including their claims that the officers had threatened to also kill them or that they had shot Kwekwe when she had already fallen to the ground following the first gunshot. Had he found these claims credible, it would have made a big difference to the judgement, especially on the question of whether the actions of the police amounted to murder or manslaughter. From his reduction of the

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<sup>34</sup> Sentencing, pg 5

charge from murder to manslaughter, it appears that he did not find these claims credible, but did not give any reasons why making further scrutiny of his decision difficult. Nonetheless, this may demonstrate that child witnesses suffer testimonial injustice in that they are more likely to be disbelieved by actors within the criminal justice system than adult witnesses (Baumtrog & Peach, 2019: 18). In their turn, the defence felt that having found that the officers had no intention to kill or cause harm, the judge was wrong to then find them guilty at all. Thus, both parties lodged appeals at the Court of Appeal in Mombasa (I.P. Veronica Gitahi & another v Republic, 2017).

In a judgement delivered on 17th February, 2017 the Court of Appeal rejected both appeals, upholding both the conviction and the sentence (I.P. Veronica Gitahi & another v Republic, 2017). However, there were a few differences in the findings. To begin with, the Judges engaged with the evidence provided by the two children saying that they had found it to not be credible, since one of the children 'readily admitted that he had been counseled on what to say' (ibid: 10). It is noteworthy that the Judges reviewed the record on the High Court; they did not call in the witnesses to testify again. The judges rejected the claim that George was a dangerous person. Given that he was readily available, they wondered why the police had not since arrested him 'if indeed he was the dangerous suspect that the police wanted to arrest in the dead of the night (ibid: 11).' They found the use of firearms by the police officers to have been unnecessary and that the police officers had failed to make every effort to avoid using firearms on children (ibid). They were also unsatisfied by the claim that Kwekwe had attacked them with a panga (ibid). This marked the end of the criminal case. That legal process had produced winners and losers. The DPP and IPOA had won while IP Veronica Gitahi and PC Issa Mzee had lost. Subsequently, the IPOA, MUHURI and IMLU all celebrate Kwekwe's case as a major success, a demonstration that police accountability works or can work in Kenya.

In her turn, Umazi, and her family with her, was and remains dissatisfied with the sentence the two police officers received. She thought it was too lenient.<sup>35</sup> Umazi told me 'wamepewa miaka kidogo sana [that sentence is too short]'.<sup>36</sup> As noted earlier, observers have noted that the families of victims of homicide are often dissatisfied with the outcomes of the criminal proceedings (Moffet, 2012; Englebrecht, et al, 2014). One study of the families of victims of homicide in Ohio (USA) found that many of the participants felt that the sentences reflected a devaluation of the lives of their family members who had been killed (Englebrecht, et al, 2014). Similarly, Umazi compared the sentence to Kwekwe's life, arguing that the seven-year imprisonment was too short compared to the loss of her only daughter. This is an important point to consider because, ultimately, no punishment can be proportionate to the loss of someone's life. In other words, even a longer sentence would not have been comparable to Kwekwe's life. However, in my conversation with her, she repeatedly stated that she would have been satisfied if the officers had been jailed for 20 years each.<sup>37</sup> I found this curious. As our conversation unfolded, I began to understand that her position on the appropriate

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<sup>35</sup> Interview, Umazi Zani, Maweni Village, Kwale, 14 January 2021

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

punishment of the police officers had not been always fixed. It had changed during the course of the trial. She had initially expected the officers to be jailed for life for killing Kwekwe.<sup>38</sup> While Section 204 of Kenya's Penal Code provides that people found guilty of murder should be sentenced to death, no one has been hanged in Kenya since 1987, with all death verdicts being commuted to life imprisonment (Nation Reporter, 2015). No doubt this shaped Umazi's perspective on the punishment that she expected the officers to face. Life imprisonment is also the punishment that is designated for people who are found guilty of manslaughter by Section 205 of the Penal Code. It seems that Umazi's position changed from life imprisonment to 20 years in prison for each officer after Justice Muya had reduced the charge from murder to manslaughter. In our conversation, Umazi alluded that some people – presumably the lawyers and the human rights officials – had told her that this would be a reasonable punishment for the officers.<sup>39</sup> This indicates, as I am arguing in this thesis, that the justice outcomes that people are after shift over time as the prevailing circumstances change, especially when new information becomes available. However, once the appeal was lost, the outcome was fixed. Umazi's expectations were now positioned against an outcome that was not going to change. The dissatisfaction is likely to last.

I discussed Umazi's dissatisfaction with one of the IMLU lawyers. He thought that her dissatisfaction was perhaps because no one had explained to her some of the mitigating circumstances and how they may impact the sentencing.<sup>40</sup> Yet it seems that people involved in the case had explained things to her that had led her to change her perspectives. It was never possible for anyone to accurately predict what the judge would decide since ultimately, as the Court of Appeal judges argued, sentencing is at the discretion of the Judge (IP Veronica Gitahi & another v Republic, 2017: 13). Without invalidating people's desires for harsher punishment of their aggressors, perhaps the fact that the punishment of offenders may never be enough to satisfy victims or their families is something that needs to be accepted as a reality of these processes.

Umazi was also dissatisfied by the refusal of the court to order the police officers to compensate her for the loss of her daughter. As scholars have noted, victims are often dissatisfied by the outcomes generated by the criminal justice system because they are seen to reduce the harm they suffer to crime and thus shift the focus to the punishment of offenders (Pemberton, 2020). The multiple harms that victims suffer – including mental health issues and financial distress – due to their victimisation are not often considered by the criminal justice systems (Connolly & Gordon, 2015; Chery, et al, 2005). The harms may manifest, for instance, in victims being unable to return to work (Buzzi & DeYoung, 2003). Umazi has been unable to return to work since Kwekwe died. She moved back to Maweni where she now lives in her brother's home.<sup>41</sup> By failing to grant the petition for compensation, Umazi felt that the significant harms she suffered due to the death of her daughter had not been addressed. Talking about both the sentence and the compensation, she expressed her disappointment to

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Interview, IMLU Official, Nairobi, January 2021

<sup>41</sup> Interview, Umazi Zani, Maweni Village, Kwale, 14 January 2021

me saying 'huku nikose na kule nikose [I lost on both sides].'<sup>42</sup> However, given that the Victims Protection Act enables victims to apply for compensation from the state, she could do that. In this respect, the verdict of the High Court and the Court of Appeal that found the two police officers guilty had also served a crucial function; they had designated Kwekwe as a victim of state violence. This made it possible for Umazi to claim compensation from the state.

The process of pursuing compensation was to prove complex and time consuming. Again, Umazi needed the support of IMLU to navigate these processes. A lawyer at IMLU explained to me that claiming compensation involved two separate court cases.<sup>43</sup> The first was a succession case whose purpose was to transfer Kwekwe's estate to her mother. This would then give Umazi the legal standing, *locus standi*, to claim compensation from the State for Kwekwe's death. The second was to file a new court case at the High Court, suing the state for compensation. However, these processes would cause new suspicions and conflicts to emerge on the question of money. Some of Umazi's relatives, especially Hussein who seemed to have taken a lead role in the saga, became suspicious of the human rights organisations when the process took long. There were two dimensions to this as my interlocutors at MUHURI and IMLU explained to me. To reiterate, I was not able to interview Hussein for this study. The first was that the human rights groups were benefiting from the case because it was an avenue through which they could fundraise. Hussein told me the same thing on one phone call I had with him. I remember him saying 'wewe utaandika kitabu chako, utengeze pesa alafu sisi victims unatuwacha hapa hapa [you will go and write your book, make money and leave us, the victims, as we are].'<sup>44</sup> Some of the officials at IMLU and MUHURI who I spoke to were frustrated by the difficulty of engaging with the family, including restrictions on the access to Umazi. They also seemed to have become disdainful of Hussein. One of them said to me, 'it has just become about money for them'.<sup>45</sup> While I understand their feelings, I also acknowledge that Hussein's sentiment is not baseless. As I noted above, scholars have noted that human rights organisations often use people's suffering to raise money (Schwöbel-Patel, 2016; Kennedy, 2009).

The second dimension, as my interlocutors speculated, seems to have been fear that the officials at these organisations and the lawyers they recruited to handle the case could fleece the family when the payment was eventually made. Again, these suspicions are not far-fetched. There have been many cases of lawyers failing to remit money paid to them as compensation for their clients. For instance, in November 2020, lawyer Evan Asuga was charged at the High Court in Nairobi with stealing more than Kes 5.8 million (~ USD 58,000) that he had received from National Water Conservation and Pipeline Corporation (NWCP) as compensation for his client Misheck Mokuwa Saboke (Kigundu, 2020). The longer the process took, the deeper the suspicions became. Eventually, Hussein decided to file a court case to claim compensation at the time when IMLU was handling the succession case.<sup>46</sup> He recruited

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<sup>42</sup> Ibid

<sup>43</sup> Interview, IMLU Official, Nairobi, January 2021

<sup>44</sup> Personal communication, Hussein, 14 January 2021

<sup>45</sup> Interview, IMLU Official, Nairobi, January 2021

<sup>46</sup> Ibid.

a lawyer based in Mombasa who filed a court case. However, he had found it difficult to follow up the case, as a result of which the case had been dismissed for lack of appearance.<sup>47</sup>

Still, Hussein's case was a hindrance to IMLU's effort to seek compensation for Kwekwe's death. When they finished the succession case and went to lodge the compensation case, they were told that they could not since a similar case had already been filed. That was when they learnt about Hussein's case. This created an additional obstacle for them to overcome. They needed to negotiate with Hussein to withdraw his case so that the new case could be filed. By the time I conducted the interview with Umazi in January 2021, nearly seven years since Kwekwe died, the substantive case claiming compensation had yet to be filed in court. However, the lawyer recruited by IMLU had already prepared the petition and they were waiting to file the case in court. It is likely that it will still take a long time before Umazi gets compensation from the Kenyan state for Kwekwe's death. It may be years before the case is concluded in court and, even when the case is concluded, presuming a positive outcome, it may still take more years before the government actually pays Umazi. This is well illustrated by the case of Kenneth Matiba, the politician who finished second in the Presidential election in 1992 and who had been detained and tortured by the government in the early 1990s, resulting in life long health complications. He filed a petition in 2014 seeking compensation (*Kenneth Stanley Njindo Matiba v Attorney General*, 2017). Three years later, the High Court ruled that he was entitled to compensation of about KES 1 billion (USD 10m) from the state (*ibid*). However, the family only received the first payment in 2019, after Matiba had died the previous year (Mutai, 2018). If members of the political elite struggle to obtain compensation for violations of their rights by the state, it is unlikely that the process will be easier for Umazi.

The foregoing discussion shows that even the process of adjudication of disputes by the courts constitutes a negotiation between various actors with varied motivations and capacities. I have noted that the designation of a case as a criminal case in a common law adversarial legal system takes the conflict away from the parties and centres experts, especially lawyers, and marginalises the victims. However, as I have already showed, they continue to exercise agency in the process through participating as witnesses or attempting to pursue parallel legal procedures. They may still come across barriers and officialdom that they require intermediaries to navigate. I have also showed that the various actors involved are interested in and satisfied by varied outcomes. While the imposition of legal sanctions against the police officers has been celebrated by the state and non-state actors involved, Kwekwe's family found it hollow. They found the sentence to be lenient and the refusal of the court to order the police officers to compensate them for the loss of Kwekwe as disappointing. They have also been frustrated by the long and complex legal process for pursuing compensation from the state, which has bred suspicion and animosity between some of the family members and the human rights groups that have been working with them through the process. IPOA exited the scene after the verdict of the court of appeal that confirmed the legal sanctions against the police officers. Their work was done as the police officers had been held

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<sup>47</sup> *Ibid*.

accountable for their actions. Yet, to the family and the human rights groups, the response to police abuse was far from over. In fact, it only got more complicated.

### **3.5 Conclusion**

This chapter examines a case where the family of a victim of police abuse pursued accountability and obtained the legal sanction of the police officers involved. It follows a chronological sequence of the process to highlight the way in which it deviates from the ideal. I showed how the actions of various actors, in the early stages, scuppered the efforts of the police officers to evade accountability by manipulating official procedures and having Kwekwe hurriedly buried. These findings support my argument in this thesis that in responding to police abuse, people recruit intermediaries to overcome power imbalances and negotiate officialdom. In the end, the two police officers were found guilty of manslaughter and sentenced to prison. While the human rights organisations and state agencies eventually accepted and celebrated the outcome, the family found the victory hollow. The family is now in the process of pursuing compensation from the state, a process that they have found long and complicated and has led to suspicion and disagreements with some of the human rights organisations that are involved in the matter. This reflects my argument in this thesis that people pursue varied and dynamic justice outcomes. In other words, police accountability should be understood merely as a fragment of what the victims want from the negotiated aftermath of police abuse. Overall, this chapter challenges the view of police accountability as an institutional act by demonstrating that it needs to be seen as a social negotiation between multiple actors, within and without the state, who have varied capacities and interests. Police accountability emerges as the product of negotiations between the various permutations of actors, such as state agencies and non-state agencies, the victim's family and human rights organisations, human rights organisations and the media, and so on. Moreover, I have showed that even where actors may be pursuing different, or even conflicting, goals, they may still prove to be useful to each other in the responses to police abuse.

## Chapter Four

### ‘The police killed our baby’: Baby Pendo and the brutal policing of dissent in Kenya

#### 4.1. Introduction

The brutal policing of protests is a common phenomenon that has been noted by scholars all over the world (Fernandez, 2008; della Porta, 1998; Jha, 2020; McSweeney, 2020). However, scholars have also noted that not all protests are policed brutally and that some protests are policed more brutally than others. For example, in the aftermath of the 2017 general election in Kenya, the protests staged by supporters of the opposition against the declaration of Uhuru Kenyatta as winner of the 2017 election were policed brutally (Wairuri, 2018). By contrast, the protests that were staged by supporters of the ruling Jubilee Party following the nullification of the presidential election by the Supreme Court were not (ibid). This suggests, as some scholars have noted elsewhere, that the nature of the policing protests often has to do with who is protesting and what they are protesting against (Fernandez, 2008; Bonner, 2014). That is, the policing of protests is shaped by politics. For this reason, Luis Fernandez (2008) argues that it is better to expand the analytical lens to the policing of dissent, and in so doing we can account for the differentiated policing of protests as well as examine the policing of political expression that lies beyond protests. As a result, even though the policing of protests remains central to my analysis here, I adopt the concept of the policing of dissent for my analysis.

This thesis examines how people at Kenya’s urban margins respond to police abuse. I am arguing that people respond in varied and complex ways based on their structural position, their political subjectivity and the resources they are able to mobilise and deploy in the negotiated aftermath of victimisation by the police. In this chapter, I examine these issues through an in-depth examination of the brutal policing of dissent in Kenya. I show that it is often difficult for most victims of police abuse in the context of the policing of dissent to pursue police accountability, even where they may want to. However, every so often, the brutal policing of dissent generates cases of police abuse for which the pursuit of police accountability seems feasible. One such case emerged in the aftermath of the 2017 election. Six-month old baby Samantha Pendo died after being hit in the head by a police officer with a *rungu* (Swahili for clubs that the police use while policing protests) in Nyalenda, one of the poorer neighbourhoods in Kisumu (Fick, 2017). In this thesis, I refer to her as Baby Pendo as she came to be known in the public discourse of her case. Some actors saw police accountability as feasible.<sup>48</sup> Undoubtedly, this was because the case was seen fitting the discursive category of a *good case* (Merry, 1990). Sally Engel Merry (1990) developed the concept of a *good case* to describe cases that prosecutors in the USA legal system saw as easier to prosecute because they involved an innocent and respectable victim, and an offense that could be easily classified as a crime. However, I show that the nature of the policing of dissent made it difficult for the pursuit of police accountability in Baby Pendo’s case despite it fitting that discursive category of a *good case*. The impunity of the police officers, I show here, was

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<sup>48</sup> Interview, Human rights officer, Kisumu, 03 December 2018

baked into the entire approach of the state to the policing of dissent. In other words, police abuse had been legitimated by state practices in advance including threats, mapping exercises the nature of police deployment and misinformation campaigns. However, these state efforts made obtaining a state-sanctioned truth – a *legal truth* – about what happened to Baby Pendo a crucial objective for her parents. Given the difficulty of obtaining evidence, the matter was handled by a judicial inquest, which generated the legal truth they sought; that the police killed their daughter. The involvement of state investigative agencies and human rights organisations in this case was not able to overcome the evidential gap, which would have made police accountability possible as in Kwekwe’s case that I discussed above. It also legitimated some well-known *political truths* that the policing of dissent in Kisumu – and in Kenya generally – pertains to punishment and not the maintenance of law and order as the police and the government often claim.

The chapter proceeds as follows. First, I present an overview of police abuse in the policing of dissent in Kenya, showing how the government has deployed both politicization and depoliticisation strategies to justify the brutalisation of those who oppose the prevailing political regimes (El-Enany, 2015). Second, I examine the Baby Pendo case in detail through Sally Engel Merry’s (1990) concept of a *good case* showing that the identity of their victim and the circumstances of her death made it difficult for the police to deny or justify their brutality, and raised hopes of human rights groups that they could pursue police accountability. Third, I show that even though Baby Pendo’s parents were reticent about the prospects of police accountability, they decided to proceed with the effort in order to discredit claims made against them on social media. They recruited the Kenya National Commission on Human Rights (KNCHR) to help them with that process. This is followed by an examination of the judicial inquest that was set up to investigate the matter and the justice outcomes it generated. I show that even though the inquest failed to identify the police officers responsible for Kwekwe’s death, it generated a legal truth that served the interests of the Baby Pendo’s parents – for the truth about what happened to their daughter to be known. It also legitimated the claims of human rights groups that the police were attacking people in their homes. I conclude the chapter by presenting an overview of my argument and showing how it bolsters my overall argument in the thesis.

## **4.2 The brutal policing of dissent in Kenya**

Protests are a potent political tool that ordinary people use to express their dissent (Butler, 2014; Robertson, 2009; Branch & Mampilly, 2015; Brown, 2015). In Kenya people have staged street protests for various reasons including, but not limited to, opposition high food prices (Musembi & Scott-Villiers, 2015), land grabbing and demolition of informal settlements (Klopp, 2008), rigged elections (Lafargue, & Katumanga, 2008; Murunga, 2011), and political assassinations (Throup, 1993). Because this chapter is anchored on Baby Pendo’s case it is primarily situated in Kisumu where her family lives. In addition, many of my conversations about police abuse with residents of Obunga and Kondele neighbourhoods in Kisumu where I conducted my research revolved around the policing of protests. Some of them emphasized that street protests were a key avenue for their voices to be heard in the national political

arena.<sup>49</sup> Michael, a resident of Obunga and one of the leaders of *Bunge la Mwananchi* (The people's parliament) in Kisumu who has been involved in mobilisation for several protests in Kisumu, told me that '*maandamano ndio sauti ya wanyonge* [protests are the voice of the weak]'.<sup>50</sup> Michael offered several instances where political protests had resulted in the policy change they had demanded. For instance, he cited the reform to the election laws and the reconstitution of the Independent Electoral and Boundaries Commission (IEBC) in the lead up to the 2017 election following the street protests that came to be known as #TeargasMondays between April and June 2016 in the major cities of Nairobi, Mombasa and Kisumu (Olick, 2016; Wairuri, 2018; IPOA, 2016).<sup>51</sup>

It is commonly understood that political protests in Kenya are policed brutally (Ruteere & Mutahi, 2019). The use of teargas to disperse the protestors is so common that it has come to be expected by protestors; it has even come to be seen as one of the signifiers of a successful protest.<sup>52</sup> As I have discussed elsewhere, some protestors in Kisumu have been cited demanding, perhaps in jest, to be teargassed by the police saying that '*hakuna maandamano bila teargas* [No protest without teargas] (Wairuri, 2018)'. The police have also been known to engage protestors in running battles, often assaulting those they catch up with (Amutabi, 2002; Murunga, 1999; Kimari, 2021; Amnesty International, 2017). The police in Kenya are also known to deploy lethal force against protestors. A notable case from the colonial period is the shooting dead of approximately 150 people in Nairobi in 1922 who were protesting the arrest of Harry Thuku, one of the leaders of the emerging African nationalist movement in 1922, alongside 150 other people (Mose, 2014; Brownhill & Turner, 2002). Among them was Field Marshall Muthoni Nyanjiru, a woman who led protests (ibid). The use of lethal force in the policing of protests has been noted by analysts in recent times (Okia, 2011; Wairuri, 2022b; Ruteere & Mutahi, 2019; Gimode, 2007). Justin, a young man I spoke to in Kondele (Kisumu) claimed that he had shot in the chest by the police in the aftermath of the 2017 election with live ammunition.<sup>53</sup> However, there are a few notable exceptions of protests that have not been policed brutally, even when they are against the state, such as the *Saba Saba March for Our Lives*, protests organised by the Uhai Wetu Coalition<sup>54</sup> against police brutality, which Naomi van Stapele and Tessa Diphon (2019) examined. Nonetheless, this remains very much the exception not the rule. Most protests in Kenya are police brutally.

Police brutality has also been documented in the policing of dissent beyond protests. Scholars have noted that the policing of dissent in Kenya has included the victimization of political actors such as human rights activists, politicians and journalists who oppose the

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<sup>49</sup> Interview, men leaders, Kisumu, 04 December 2018

<sup>50</sup> Ibid. Bunge la Mwananchi is a vocal grass-roots organisation, comprising mainly of people from the lower socioeconomic strata of Kenyan society, which campaigns against socio-economic and political oppression (Gachihi 2014; Kimari & Rasmussen 2010).

<sup>51</sup> Ibid. The protests came to be known as #TeargasMondays because they were staged on Mondays and they were marked by the persistent use of teargas by the police in their effort to disperse the protestors.

<sup>52</sup> Group interview, women, Kisumu, 03 Dec 2018

<sup>53</sup> Interview, Justin, Kisumu, 03 Dec 2018

<sup>54</sup> Uhai Wetu Coalition, also called the Social Justice Working Group (SJWG) brings together social justice centers that have been established across the countries to fight to justice at the local levels.

prevailing political regime through illegal detentions, torture and assassinations (Adar & Munyae, 2001; Gimode, 2007; Wairuri, 2022b; Anderson, 2004; Elkins, 2014). While I make reference to these, my focus in this thesis is on the policing of ordinary people at the urban margins. The police have also been said to attack people in their homes, claims that have been especially demonstrated by reports of sexual assault of women in their homes by the police during election periods (CIPEV, 2008; HRW, 2017; KNCHR, 2018). Some of the respondents to this study made claims of police officers sexually assaulting women in their homes in Kisumu in the aftermath of the 2017 election.<sup>55</sup> This broader context is important to note because Baby Pendo's family were attacked by police officers at night in their home.

To examine the policing of dissent, I follow Nadine El-Enany (2015) when she argues that we need to pay attention to both the law and politics. In a short commentary on the policing of protests in Ferguson, Missouri (USA) following the police shooting of Michael Brown, an unarmed young black man, Nadine El-Enany (2015) proposes that the policing of protests should be understood through frames of de-politicization and politicization. Below, I explain what El-Enany means by these terms and how they might be usefully applied to successive regimes in Kenya.

In the piece, Nadine El-Enany (2015: 3-4) argues that states have traditionally sought to depoliticise protests that seek to challenge the legitimacy of their power by labelling them as crimes through the use of public order laws. This has been evident in Kenya as some scholars, such as Nanjala Nyabola (2020) have noted. The legal dimension of the brutal policing of dissent has been traced back to the colonial era. As one of the ways to sustain itself in power, the colonial government in Kenya set up public order laws to restrict political activity of Africans most notably the Native Authority Ordinance of 1912 (later the Chief's Authority Act) and The Public Order Act of 1958. These laws limited the number of people who could assemble in any one place in order to inhibit political activity (Ciekaway, 1997; Nyabola, 2020). They also required that organisers of public gatherings obtain a police permit before organising a gathering (ibid). The laws were retained by the post-colonial governments and have been deployed against people who have challenged the prevailing political regimes. Scholars have noted the deployment of these laws in the Jomo Kenyatta regime (1963 -1978) and the Moi regime (1978 -2002) to restrict political activity amongst those that challenged the government (Otiso, & Kaguta, 2016; Adar & Munyae, 2001; Kagwanja, 2009; Anderson, 2002). Notably, during the Moi era, these laws were deployed to justify the banning and subsequent brutal policing of the *Saba Saba*<sup>56</sup> rally called by Kenneth Matiba and Charles Rubia at the Kamukunji Grounds in Nairobi on the 7th July 1990. They called their ally to demand the repeal of section 2(a) of the constitution, which had made Kenya a *de jure* one party state. (Gimode, 2007). The same laws have been sustained and deployed by the regimes of the Mwai Kibaki regime (Kagwanja, 2009) and Uhuru Kenyatta regime (Nyabola, 2020) to justify the brutal public order policing, despite enhanced people's rights following the promulgation of a new constitution in 2010. When challenged about the police violating people's constitutional

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<sup>55</sup> Group interview, women leaders, Kisumu, 04 December 2018

<sup>56</sup> The date (7/7) came to be popularly referred to as (saba is Swahili for seven) and thus the rally was called the *Saba Saba* rally.

rights to protest, Charles Owino, former spokesman of the police, has often been quoted saying 'people's constitutional rights are not absolute, they have limitations' (Africa News, 2017). He is also quoted as saying that the police deploy violence when protests are interfering with other people's rights (ibid).

In some cases, the brutal policing of dissent is often justified by state actors in outright political terms, as Nadine El-Enany (2015) observes. One of the central political justifications that underlies the brutal policing of dissent in Kenya is the *ideology of order*, a concept that was first deployed by Kenyan historian E S Atieno-Odhiambo (1987). In his work, Atieno-Odhiambo (ibid) argued that to understand how the post-colonial Kenyan state has dealt with dissent, we have to pay attention to the image that the country has attempted to portray to the outside world. He argued that the Kenyan state has traditionally been so preoccupied with the maintenance of order and projecting the image of stability, in a region that was characterised by political violence and chaos, that it was willing to do so at the expense of the life of its citizens (Atieno-Odhiambo, 1987). Building on this, other Kenyan scholars have noted that those who have been seen as threatening this sense of order have been designated as *enemies of the state* by successive regimes and therefore produced as political subjects who are deserving of brutal punishment (Aketch, 2005; CHRI & KHRC, 2006). Scholars have shown how this tag has been deployed against religious leaders, politicians, lawyers, human rights activists, scholars and journalists who have challenged the prevailing political regimes, often with grave consequences to the individuals (Adar & Munyae, *ibid*; Gimode, 2007; Mwakimako & Willis, 2016: 25). In some cases, people who have been seen as posing a threat to the prevailing political regime have been assassinated, including senior politicians such as JM Kariuki (died 2 March 1975) and religious leaders such as Bishop Alexander Muge (died 14 August 1990) (Chege, 2008; Adar & Munyae, *ibid.*).

On some occasions, this tag of the *enemy of the state* has been deployed against entire communities, paving the way for collective punishments. Scholars have noted the subjection of Agikuyu people to collective punishment by the colonial government, especially due to the Mau Mau revolt in the 1950s (Anderson, 2005; Elkins, 2014). A notable case of collective punishment in post-colonial Kenya is the Wagalla Massacre of 1984, in which an uncertain number of men of the Degodia clan,<sup>57</sup> part of the Somali ethnic community, were killed under the guise of disarming the clan following inter-clan conflicts amongst Somali clans (Anderson, 2014). More recently, the the Kenyan security forces rounded up members of the Somali ethnic group were and locked them up as the state responded to the rising threat of al-Shabaab on the country (Wairuri, 2018). These examples not only illustrate collective punishment but also point to the fact that, at different times, state authorities see different ethnic communities as *trouble makers*. And, as Didier Fassin (2009) argues, once a group of people is seen as problematic, the imposition of punishment against them is seen as justified whether or not they have done anything wrong. In the Kenyan context, this also points to the significance of ethnicity as a political cleavage, as has been noted by many scholars (Ndegwa, 1997; Holmquist & Githinji, 2009; Kanyinga, 1994; Ajulu, 2002). For my purposes here, it is

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<sup>57</sup> While the official announcements acknowledged 57 fatalities, recent efforts that have aimed at establishing the truth about the massacre have estimated fatalities between 500 to 3,000 people (Anderson, 2014).

important to pay particular attention to the policing of dissent by members of the Luo ethnic community in post-colonial Kenya.

Even though there is no systematic data on the ethnicity of the victims of police brutality in the policing of dissent, the disproportionate victimisation of members of the Luo community by the police in Kenya is well understood, as Keguro Macharia (2017) notes. This is akin to the case in Brazil where Jaime Alves (2018) observes that even though the race of victims of police abuse is not reported, there is adequate academic evidence that black people are more disproportionately victimised. My point here is not to downplay the victimisation of members of other ethnic communities. Rather, it is to show how members of an ethnic community that has been designated as *trouble makers* have been exposed to the most brutal forms of state violence for their dissent against successive Kenyan regimes, which have marginalised them politically and economically (Malik & Onguny, 2020; Maupeu, 2008). Members of the Luo political elite have been amongst those whom successive Kenyan regimes have designated as *enemies of the state* and subsequently targeted and victimised. This is illustrated by the assassinations of former cabinet ministers Tom Mboya in 1969 and Dr Robert Ouko in 1990 and academic Dr Chrispin Odhiambo Mbai, a lecturer at the University of Nairobi who was chairing the Devolution Committee during the constitutional review process (Opiyo, 2020; Oloo, 2015; TJRC, 2013; Juma & Okpaluba, 2012; Gagiano, 2016). Many members of the Luo political elite have also been subjected to harassment, illegal detention and torture with Jaramogi Oginga Odinga, Kenya's first vice-president (Ochieng', 1995:101–2), and his son Raila Odinga, who would later become Kenya's Prime Minister being potent examples (Gimode, 2007; Atieno-Odhiambo, 2002). These political events cemented the perception of marginalisation amongst members of the Luo community, leading some of them to express their dissent to the prevailing political regimes through street protests, to which the state has responded with brutal force.

The events of 1969 are particularly important to our understanding of the state response to the expression of dissent by the Luo people. Earlier in the year, as noted above, Tom Mboya was assassinated (Opiyo, 2020; Oloo, 2015). In response, Luo people staged protests that sparked fears of a civil war and were policed brutally (Opiyo, 2020). At that time, Jaramogi Oginga Odinga, the leading Luo politician who had served as Kenya's first Vice-President, had fallen out with Jomo Kenyatta. He had resigned as vice-President and as a member of the ruling party – the Kenya National African Union (KANU) – and subsequently established the Kenya People's Union (KPU). Later in 1969, in this tense political climate, President Kenyatta travelled to Kisumu to open the newly constructed Kisumu Provincial General Hospital (Karimi, 2013). The construction of the hospital had been funded by Russia and it was Jaramogi who had negotiated this funding while he was Vice-President. Thus, even though he was now in the opposition, Jaramogi attended the event, insisting that he had a right to be there (ibid). It is said that young men threw stones at the President's motorcade during that visit. The government claimed that the young men were affiliated to KPU, a claim that the party rejected (ibid). Whatever the case, the presidential bodyguards responded by firing into the crowd, injuring and killing many people while others were trampled on in the ensuing stampede (Ibid). It is not clear how many people died in what came to be known as

the Kisumu Massacre of 1969, with estimates varying from 20 (Amina, 2012) to 50 fatalities (Ochieng, 2018). What is clear is that this brutality continues to shape people's understanding of policing and statehood today: some of my interlocutors referenced them in our conversations.<sup>58</sup> Moreover, the stereotype of young Luo men as stone throwers in the midst of protests has also persisted (Sam, 2012). Stone throwing is not something that only young Luo men do; even police officers are known to throw stones during protests (Chweya, 2017). Rather, this stereotype is one element of a narrative that undergirds the brutal policing of Luo dissent. Taking these events of the 2017 electoral cycle within the longer historical context, many of my respondents in Kisumu saw their brutal policing as not being about law enforcement but rather as punishment for their ethnicity and their political choices. One human rights activist said that they were policed brutally 'just because we are Luo'<sup>59</sup>.

The brutal policing of dissent also has a spatial dimension. As I discussed in the introductory chapter to this thesis, geography matters in policing because spaces can acquire reputations of their own, shaping how they are policed (Elliot-Cooper, 2018). I noted that the urban margins are often imagined to be dangerous spaces, which serves to legitimise their brutal policing (See, for instance, Humphrey, 2013; Paes-Machado & Noronha, 2002; Auyero, et al, 2014; Wacquant, 2008). In my analysis of the policing of the urban margins in Kisumu, I find the work of Adam Elliot-Cooper (2018) particularly potent. Elliot-Cooper (ibid) examines how the racialisation of the North London area of Tottenham as black has shaped the ways in which it is policed, noting that Tottenham residents are more likely to experience police abuse than people from elsewhere in other areas of London are. He uses that concept of metonymic space to show how a space can come to stand in for something else and shape how it is governed. Similarly, the urban margins of Kisumu are not only seen as dangerous with respect to crime but also as politically dangerous. This is because they are occupied by people who are seen as being *trouble makers* in a dual dimension: ethnicity and socio-economic status. In other words, they are occupied by poor Luo people. This perception is so pervasive that it is also carried by some human rights organizations. For instance, a Human Rights Watch (2008: 27) report described the poorer neighbourhoods in Kisumu, including Manyatta, Kondele, Obunga and Nyalenda as being revolutionary and militant spaces. This is seen to be the reason why the police are often deployed there, presumably because the state views them as a threat (ibid).

In the lead up to the 2017 election, Kenyan government mapped areas that they considered hotspots for potential election related violence (Wairuri, 2022b). Unsurprisingly, these neighbourhoods were among the places that were identified as hotspots. This mapping provided a justification for the deployment of police officers to these areas, ostensibly to prevent violence from erupting, but in reality to police dissent. The government also issued many threats to discourage people from protesting and also deployed a containment strategy, barricading the urban margins in places where the opposition enjoyed support, so as to prevent would-be protestors from being able to leave their residential neighbourhoods and gather on the major roads or commercial centres where they could cause disruption (ibid;

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<sup>58</sup> Interview, Audi, Kisumu, 03 December 2018

<sup>59</sup> Interview, Human rights officer, Kisumu, 05 December 2018

(Mosoku, 2017). Despite this early deployment of police officers, street protests still followed the declaration of President Uhuru Kenyatta as the winner of the presidential election in Kisumu and elsewhere in the country where the opposition enjoyed support (ibid). That the violence during the 2017 electoral period, like in the past, was concentrated in Kisumu's poor neighbourhoods, including Nyalenda, is unsurprising (HRW, 2017). Similar patterns of police brutality were witnessed in Nairobi with the poorer neighbourhoods of Kawangware, Dandora, Mathare, Kibera and Kangemi being most affected (Ibid). Baby Pendo's family lives in the Nyalenda area – a poor neighbourhoods in Kisumu. Their attack by police officers at home needs to be situated within this broader context.

The government had identified 'rejection of election results' as the reason for the possible eruption of violence in these areas (Wairuri, 2018). Evidently, they chose a brutal policing approach to addressing dissent rather than ensuring a free and fair election whose processes and outcomes would inspire the confidence of most, if not all, Kenyans. It is notable that Raila Odinga, the leading Luo politician, had contested the presidency three times before the 2017 election (1997, 2007 and 2013). According to the official tallies by the electoral management bodies, the now defunct Electoral Commission of Kenya (ECK) for 2007 and the IEBC for 2013, Raila Odinga has finished a close second in these elections. The outcomes of the 2007 election is known to have been fraudulent but the Supreme Court declined the petition by Raila Odinga and his supporters following the 2013 election (Klopp & Kamungi, 2007; Kriegler, 2008). Given the history of irregularities and rigging, the failure of the government to engage with those issues is poignant. Even though the outcome of the election had been endorsed by election observers (Molony & Macdonald, 2019), Raila Odinga, and the National Super-Alliance (NASA) coalition that he led, rejected the results and lodged a petition at the Supreme Court (Wairuri, 2018; Kanyinga, 2019). In the end, the protesters who said that they were highlighting irregularities in the election were vindicated when the Supreme Court nullified the election result, citing massive irregularities, and ordered a repeat presidential election to be conducted within 90 days (ibid). The repeat election was held on 26 October 2017 but the NASA boycotted it. The political crisis persisted until January 2018 by which time an estimated 214 people had died, amongst them Baby Pendo (HRW, 2020). Next, I examine Baby Pendo's case in detail.

### 4.3 A 'good case'

On the night of 12<sup>th</sup> August 2017, police officers in their home in Nyalenda in Kisumu attacked the family of Joseph and Lenser Omondi. Earlier that evening, the IEBC had declared the incumbent, President Uhuru Kenyatta, as the winner of the 2017 presidential election triggering protests by supporters of his main rival Raila Odinga in parts of Nairobi and Kisumu where the latter enjoyed support (Mohammed, 2017). Neither Joseph nor Lenser had taken part in those protests.<sup>60</sup> In fact, knowing that the announcement of the results was pending and that the outcome could trigger protests, both of them had left work earlier than usual on that day to avoid getting caught up in protests.<sup>61</sup> They had made and eaten their

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<sup>60</sup> Interview, Joseph and Lenser, Kisumu, 14 February 2019

<sup>61</sup> Ibid.

dinner, watched the tallying process that was happening in Nairobi on the television and then headed to sleep at about 9pm.<sup>62</sup> Because the door to their house was faulty, they often moved their sofa to block the door before they went to bed to enhance their protection in the night. Unless otherwise stated, the information about the case that is provided in the remainder of the chapter is drawn from the reconstruction of the events by the Magistrate in the ruling of the Inquest into Baby Pendo's death on 14th February 2019 (Chief Magistrates Court Kisumu, 2019).

Lenser was woken up in the middle of the night by the screams of one of their neighbours who was being beaten.<sup>63</sup> She then woke her husband up. Soon, there was a knock on their door with an order for them to open it. Fearing for their own safety and that of their two children, Joseph and Lenser hoped that pretending that there was no one inside would spare them. It did not. The police officers tried to kick the door in but they failed because of the sofa that was behind the door. In our conversation, Lenser recalled one of the police officers outside telling his colleagues, no doubt in frustration, '*wacha nitawaonyesha* [You just wait, I will show them].'<sup>64</sup> Through the little gap they had created when attempting to kick in the door, a police officer threw a teargas canister into the one-roomed house, which caused the family to start chocking. They had to get out of the house. Joseph moved the sofa, opened the door and was the first to come out of the house. As soon as he got out, the police officers made him lie down on the ground. They then started beating him. Their elder daughter ran out of the house and sought refuge in the house of one of their relatives a short distance away. They found her the next day. As Lenser was coming out of the house carrying Baby Pendo in her left arm, she announced it to the police officers. She recalled saying '*msinipige niko na mtoto* [do not hit me I am carrying a baby].'<sup>65</sup> When she saw a police officer in front of her, she used her right hand to shield the baby's head. She did not notice that there had been a police officer standing right next to the door who was now positioned behind her. When that police officer hit her in the back with a *rungu*, she was startled and loosened her grip on the baby as she reflexively turned her head back. At that moment, the police officer in front of her swung his *rungu* at her and it landed squarely on Baby Pendo's head. The baby sustained serious head injuries that resulted in her death three days later on the 15<sup>th</sup> August 2017 (Fick, 2017).

In the broader context of the policing of dissent in Kenya, especially in the 2017 electoral cycle, Baby Pendo's case stands out because it fits the category of a *good case*. I borrow the idea of a *good case* from Sally Engel Merry (1990) who uses it to describe cases where there is an innocent and respectable victim and an offense that could be easily classified as a crime and is therefore seen by criminal justice officials as easier to prosecute. Concerning police abuse, a *good case* could be seen as one that makes the pursuit of police accountability more likely because it makes it much harder for the police to justify their conduct. As a six-month old infant, Baby Pendo could easily be assigned the status of an *ideal*

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<sup>62</sup> Ibid.

<sup>63</sup> Interview, Joseph and Lenser, Kisumu, 14 February 2019

<sup>64</sup> Ibid

<sup>65</sup> Ibid

*victim*, the socio-political construct of people who are easily seen as victims when they have been victimised as I discussed in detail in the previous chapter. Many people easily saw the attack on Joseph and Lenser's family and the eventual death of their daughter as an instance of police abuse. This was reflected in the widespread condemnation of the attack in the national and international media (Fick, 2017; Ojina, 2017). Given the circumstances of the attack on the family, it was going to be difficult for the police to justify their actions. As already noted, whenever the conduct of police officers is called into question, the police often seek to justify or excuse their conduct (Fernandez, 2008; Box & Russell, 1975; della Porta, 1997). With respect to the policing of dissent, the police rely on a set of responses, which, as I show below, could not work in Baby Pendo's case.

First, the police often attempt to justify their brutality against protesters by arguing that they are doing the work of maintaining law and order for which they are legally mandated to deploy force. Indeed, Chapter 47 (1) of the NPS's Service Standing Orders (SSOs) empower the police to use of force to protect themselves or others from the threat of death or serious bodily harm, protect property and disperse a riotous mob that poses a threat to life or property (NPS, 2015). In response to accusations of police brutality by human rights groups in the aftermath of the 2017 election, Charles Owino, then police spokesman, is quoted as justifying the police response by saying 'the protestors were engaging in criminal activities and the police have a responsibility to protect each and every person's life and property' (Africa News, 2017). However, some of my interlocutors claimed that the police were often violent towards them even when they were staging peaceful protests.<sup>66</sup> This phenomenon where the police deploy violence against peaceful protestors has been noted elsewhere and has been described by scholars as 'police riots' (Stark, 1972). It is well understood that the deployment of police violence escalates tensions and intensifies the conflict especially where it results in fatalities (Ibid; Rosie & Gorringer, 2009). The claims by the police that they deploy violence in order to enforce law and order are challenged by the fact that the police do not de-escalate their responses when the behaviour of the protestors changes. Moreover, the police are known to brutalise people who are already in their custody. This was illustrated by the assault of a Jomo Kenyatta University of Agriculture and Technology (JKUAT) student in October 2019 by four police officers who already had him in custody, which was video-recorded and shared widely on social media (Nyawira, 2019). This suggests that the point of policing here is not the maintenance of law and order but rather the imposition of punishment (Fassin, 2019). Additionally, these law and order claims fail when the police officers attack people who are not participating in protests such as when they attack people in their places of work or at home. In Baby Pendo's case, the police could not justify their attack on claims of maintaining law and order because the family had been attacked while they slept in their home.

Secondly, sometimes the police argue that they deploy violence in self-defence; that is, to defend themselves from violent protestors. Indeed, police officers are themselves often subjected to threats or violence by protestors. In a statement issued on 20th October 2017, the NPS (2017) reported that 10 police officers had been severely injured in protests across the

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<sup>66</sup> Interview, men leaders, Kisumu, 04 December 2018

country from 2nd to 16th October 2017. The young men that I spoke to in Kisumu readily admitted to the stone throwing as a response to police violence during protests. In fact, some of my interlocutors in Kisumu saw inflicting injuries on police officers as part of their victory in their street battles. Some of them celebrated the prowess of some of the young men amongst them whom they said can throw stones 'so well that they could drop a police officer's helmet'.<sup>67</sup> However, this should not be taken to downplay the significant power imbalance between the police and the young men. When responding to accusations of police brutality during the #TeargasMondays protests in 2016, Charles Owino, the police spokesman, is quoted as saying that 'protestors hurled stones at the police and the officers responded by making use of their guns' (Mugo, 2016). Even if we take this account as factually correct, the brutal asymmetry between protestors and the police suggests that there are other factors at play beyond de-escalation and/or self-defence. In her work, Donatella della Porta (1995) argues that the possibility of the police deploying violence during the policing of protests is shaped by how they expect the protestors to behave. Where police officers come to the protests expecting the protestors to be violent, they are likely to deploy violence even without provocation (della Porta, 1995). In other words, police violence against protestors is often not based on the unfolding reality but on the subjective expectations of protestor behaviour that Donatella della Porta (1995:4) refers to as *police knowledge*. By police knowledge she means the ideas and images that the police hold about their role and the people they police, including stereotypes about the protestors (Ibid). Stereotypes about poor young Luo men as violent and aggressive towards the police shape how protests in Kisumu are policed.

It is also important not to overlook the role that fear can play in police action, even if it is fed by stereotype. Some analysts have noted that police officers are often scared of the uncertainty that they face as they go into protest situations (Onyango & Otuya, 2019). In a 2019 survey of 124 police officers across Nairobi, Duncan Onyango and Petronila Otuya found that nearly 60 percent of officers reported using violence during public order control due to the risk of personal injury. This suggests a need for our view of the policing of protests to go beyond what the police do and instead see the street battles as embodied action by agentic actors who are nonetheless constrained by structural factors. That being said, it was impossible for the police to demonstrate that Baby Pendo, a six month old, posed any threat to them or to others to justify the deployment of violence against her.

Thirdly, in many cases, the police in Kenya have often sought to justify their brutality towards protestors by claiming that they were looters. In this way, they attempt to justify their brutality by arguing that they are fulfilling their legal mandate to protect property (NPS, 2015). That protests in Kenya are often marked by some looting is not in question; it has been noted by scholars and covered in the media before (van Stapele & Diphoon, 2019). For instance, on 6 October 2017, the police reported that protestors, whom they described as 'goons', had broken into Tumaini Supermarket in Kisumu where they stole and destroyed goods worth over KES 6 million (NPS, 2017). However, the identity of looters and whether police action is geared towards protecting property are both contested points. The police often refer to protestors as looters in order to justify the deployment of violence against them

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<sup>67</sup> Group interview, Men in Black, Kisumu, 03 December 2018

(ibid; HRW & Amnesty International, 2017). This discursive tactic is often aimed at delegitimising the protesters. Expectedly, protest organisers challenge this depiction and its implications. One of the leaders of the human rights activists in Kisumu argued that there is a distinction between what he said were ‘genuine protesters’ and ‘looters’.<sup>68</sup> He said that there are criminals who infiltrate their protests with the intention of looting, arguing that the police should target the looters rather than collectively punishing the protestors.<sup>69</sup> However, as multiple authors have argued, protests and looting should not be seen as distinct but rather as intertwined, complex and ambiguous socio-political phenomena that constitute strategies of dissent against prevailing political and economic regimes (Dynes & Quarantelli, 1968; Bakonyi, 2010; della Porta, 1997). Beyond that, my interlocutors claimed that police officers also looted businesses during the protests.<sup>70</sup> While the police have often rejected claims that they engage in looting, media coverage of the members of security forces looting shops at the Westgate Mall – following an Al-Shabaab attack that resulted in 67 deaths – has made these claims more believable (Robertson, et al, 2013). Despite this, the logic that police use force to protect private property remains. Again, what is crucial for my analysis here is that the police could not have relied on the protection of property argument in Baby Pendo’s case. She could not fit into the category of looters.

In the cases where it is not possible for the police to justify their conduct, the police may seek to excuse their conduct by claiming that the injuries that victims suffered were accidental or caused by other protestors. This is especially common in cases where the police have victimised children who do not fit easily into the imagined category of rowdy or looting protestors. The police sought to deploy this response in the case of Stephanie Moraa, the nine-year-old girl that I mentioned above who was shot dead in the aftermath of the 2017 election in Mathare in Nairobi (Fick, 2017). The police officers claimed that her death was the result of a *stray bullet* (van Staple & Diphooon, 2019). However, one of the witnesses has disputed this claim during the ongoing court proceedings (Kiplagat, 2020). The designation of a death as accidental or as resulting from a *stray bullet*, seeks to withdraw the agency of the police officer involved by moving the case from the category of *intentional* criminal injury to *unintentional* accident in an effort to evade accountability. For this reason, it matters greatly that Baby Pendo did not die of a gunshot wound due to a blow to her head by a police officer in close proximity . On top of everything else, this made it more difficult for the police to deploy claims of accidental death convincingly.

As such, Baby Pendo’s case qualified to fit into the category of a *good case*, as proposed by Sally Engel Merry (1990) because it involved the victimisation of someone who was easily assigned the status of an ideal victim and there was a clear act of wrongdoing that the police could not easily deny, excuse or justify. Unlike many other cases of police abuse in the broader context of policing dissent, Baby Pendo’s case opened the possibilities of pursuit of police accountability. Baby Pendo’s parents were not very keen on pursuing police

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<sup>68</sup> Interview, human rights activist, Kisumu, 03 December 2018

<sup>69</sup> Ibid.

<sup>70</sup> Group interview, women leaders, Kisumu, 04 December 2018

accountability. However, they were compelled to do so by the claims that they had hurt their own daughter, as I discuss below.

#### 4.4 Truth as a justice outcome

Due to the media attention that the Baby Pendo case garnered, Joseph and Lenser received numerous phone calls from people within civil society organisations offering to help them with the process of pursuing what they described as *haki* [justice].<sup>71</sup> Despite this, Joseph and Lenser were hesitant to embark on the process of pursuing police accountability. They debated whether to seek justice for their daughter's death. Joseph, on the one hand, was more optimistic about the process. He told me that he had seen several cases of police officers being jailed for killing people on the news.<sup>72</sup> He was somewhat hopeful that the officers who killed their daughter would be held to account. Lenser, on the other hand, was quite sceptical. In our interview, she recalled telling her husband '*hii ni Kenya, hakuna kitu itatendeka*' [This is Kenya; nothing will happen].<sup>73</sup> Undoubtedly, Lenser's scepticism, like that of many other respondents, was rooted in the history of police impunity for violence against protestors in Kisumu as I noted above. When I asked people in Kisumu what they think should be done to the police officers who victimised them, many of them responded, like Akinyi, '*wachukuliwe hatua* [action should be taken against them]<sup>74</sup>.' In the context of criminal justice in Kenya, this Swahili phrase has been popularised by *Vioja Mahakamani* (loosely translates to 'drama in the courtroom'), a popular weekly courtroom comedy that has been on air for over four decades (Barasa, 2019, 2020; Mbogo, 2015). In the show, the 'prosecutor' uttered this phrase, after witness testimonies and the called on the court to take action against the 'accused'. In my interviews, I followed up by asking people what exactly they meant when they said this. Some said that the officers should be dismissed from their jobs.<sup>75</sup> Akinyi, a woman who had been assaulted by police officers in the aftermath of the 2017 election, said that the officers should be treated like any other citizens who have broken the law, '*washike, wapelekwe kortini na wafungwe* [they should be arrested, taken to court and jailed].<sup>76</sup> Many people often cited the imposition of career-based and legal sanctions on the police officers who victimised them as the response they desired. This is crucial because it signals that some people at the urban margins see police accountability as a legitimate response to police abuse. However, as I am arguing here, pursuing police accountability is just one of the ways in which people respond to police abuse.

That being said, many of my interlocutors in Kisumu also acknowledged that it was unlikely for them to succeed in the pursuit of police accountability. Justin, the young man who was allegedly shot by the police in his chest in the aftermath of the 2017 election told me that '*ni ngumu sana kufuatana na serikali* [it's very hard to pursue the government]'.<sup>77</sup> This

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<sup>71</sup> Interview, Joseph and Lenser, Kisumu, 14 February 2019

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Group interview, women, Kisumu, 03 Dec 2018

<sup>75</sup> Interview, men leaders, Kisumu, 04 December 2018

<sup>76</sup> Group interview, women, Kisumu, 03 Dec 2018

<sup>77</sup> Interview, Justin, Kisumu, 03 Dec 2018

statement carried much weight. It demonstrated his recognition of the fact that there were structural barriers that needed to be overcome in the process of pursuing police accountability. It is reflected an appreciation of the officialdom that needed to be navigated. It also suggested that, even if one could overcome those barriers, the chances of a positive outcome would be limited. The people I spoke to cited different reasons for their sense that their attempts to pursue accountability were likely to be futile. Some said that they could not identify the police officers who victimised them. For instance, Justin told me that even though he knows that a police officer shot him; he would never been able to point out which officer shot him.<sup>78</sup> Audi Ogada, former leader of a vigilante group called Baghdad Boys and now chairman of local organisations called Kisumu Residents Voice, expressed similar sentiments. He told me that the problem is that 'the police commit these crimes when they are in a group, making it very difficult for people to identify the officer who has shot-and-killed someone'.<sup>79</sup> Some people also said that many people did not want to pursue police accountability because they feared the implications. This was particularly true for women who had been subjected to sexual coercion and feared the social stigma it would bring, as I will discuss in more detail in Chapter 6 below.<sup>80</sup> Others said that they did not bother to pursue accountability because they did not think that they would be successful in having the police officers sanctioned due to the sustained impunity of police officers, which they had witnessed over the years. Audi Ogada said that despite the long trajectory of police violence in the city, going back to the 1960s, there have been very few instances of the police being adequately held to account for their actions.<sup>81</sup> Acknowledging this reality, Joseph was inclined to agree with his wife Therefore, in the immediate period, they had no plans to pursue accountability.<sup>82</sup> As a result, they largely ignored the calls by human rights activists to lodge a formal complaint against the police.

As I am arguing in this thesis, people's choices on how to respond to police abuse are dynamic, changing with important shifts in the broader context of the case, including the emergence of new information. In this case, Joseph and Lenser's position would soon change, not because their faith in the ability of the state to deliver accountability changed but because of the how their daughter's death was canvassed in the broader political debate in which it featured prominently. One day, one of Joseph's friends showed him a post on Facebook, the social networking platform, in which someone had suggested that it was they, Joseph and Lenser, who were responsible for their daughter's death and not the police.<sup>83</sup> He recalled that the person who had made the post on Facebook had claimed that rather than being hit with a club by a police officer, Lenser had banged the baby's head against a wall.<sup>84</sup> When I spoke to a DCI officer who was involved in the investigations into the case, he said that this was one

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<sup>78</sup> Ibid.

<sup>79</sup> Interview, Audi, Kisumu, 03 December 2018

<sup>80</sup> Group interview, women leaders, Kisumu, 04 December 2018

<sup>81</sup> Interview, Audi, Kisumu, 03 December 2018

<sup>82</sup> Interview, Joseph and Lenser, Kisumu, 14 Feb 2019

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

of the theories they investigated.<sup>85</sup> This means that the claim had gained some purchase. However, these claims need to be understood in the broader context of misinformation that characterized the 2017 elections in Kenya including the role of discredited firm Cambridge Analytica, which Job Mwaura (2018a, 2018b) has examined in detail. Not only did these claims upset the grieving parents, it also made it imperative for them to launch the formal process of pursuing police accountability so that, as Joseph put it, '*ukweli ujulikane* [the truth can be known].<sup>86</sup>'

Joseph and Lenser were conscious of the structural barriers they faced in pursuing accountability. They knew that they needed intermediaries who would help them navigate these processes. This meant that they had to choose one of the many organisations that had contacted them offering them support. In the end, they settled on the KNCHR, the constitutional commission responsible for human rights monitoring in Kenya. They told me that they settled for the KNCHR because they were familiar with their local human rights monitor and they trusted her.<sup>87</sup> It also matters that the KNCHR has an office in Kisumu that they could easily access. Nonetheless, when the process begun, other interested organisations such as the Law Society of Kenya (LSK), IPOA and IMLU were also involved.

The foregoing shows, as I am arguing in this thesis, that people's response to police abuse is shaped by many factors and draws in multiple actors with varied interests and capacities. I have noted that even though Baby Pendo's case was a *good case* that attracted significant attention of the media and human rights groups, her parents were hesitant to pursue accountability because they were not sure that it would amount to anything meaningful. However, the emergence of alternative narratives that denied their victimization made establishing the truth an important goal in its own right. This, in turn, led them to seek the intervention of the KNCHR in their efforts to pursue police accountability with the state-sanctioned truth of what happened to their daughter as one of the justice outcomes they sought. In the next section, I examine the judicial inquest that became the forum in which these processes unfolded.

#### 4.5 The Judicial inquest

While some scholars argue that the purpose of the crucial justice system is to limit the range of permissible lies on a case (Ignatieff, 1996:113), others have argued that these processes establish the *truth* in cases where the facts of a matter are in dispute (Summers, 1999: 497). However, as Robert Summers (*ibid*) clarified, the *truth* that emerges from legal processes is a particular kind of truth; a formal *legal truth*, which needs to be contrasted to – and may in fact be different from – what he, calls the *substantive truth* (*Ibid*). Nonetheless, the *legal truth* that is generated by the formal legal process is crucial because it can officially designate people as victims, which, as I showed in the previous chapter, may help people with subsequent legal processes such as pursuing compensation. However, proving the truth about what happened

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<sup>85</sup> Interview, DCI Office, Kisumu, 14 Feb 2019

<sup>86</sup> Interview, Joseph and Lenser, Kisumu, 14 Feb 2019

<sup>87</sup> *Ibid*.

– determining the *facts* of a case – is difficult, if not impossible, in situations where the events are complex and their interpretations manifold, as in Baby Pendo’s case (see, Merry, 1980). Here I examine how a judicial inquest emerged as the appropriate forum for the gathering of the evidence required.

While many human rights organizations reached out to Joseph and Lenser offering to help with the process, they had to await their instruction to proceed with the case. However, the state investigative agencies, in this case both the DCI and IPOA, did not need the approval of Baby Pendo’s parents to investigate the matter. Thus, in contrast to what happened in Kwekwe’s case, the state agencies were quicker to the scene. However, this did not mean that they were able to carry out their investigations or even to acquire the kind of evidence they hoped for. The DCI officers who were assigned to investigate the case were unable to access the scene for three days because of the hostility of the residents towards the police after news of the baby’s killing spread.<sup>88</sup> As I argued in the previous chapter, investigations themselves are social negotiations; they are the product of what the socio-political context will allow. In this case, government agencies had to negotiate access to the scene with the community. Even though they found some evidence when they eventually got there – including the tear gas canister and the marks left on the door to Joseph and Lenser’s house – an investigator in the case told me that the crime scene had already been compromised.<sup>89</sup> This limited the evidence they could gather. This contrasts to Kwekwe’s case that I discussed in the previous chapter, where the people who had got to the scene faster – family members, human rights officials and a journalist – had gathered evidence that was subsequently shown in court to prove the guilt of the two police officers who shot her dead. It is instructive that the evidence in the case was accepted, even though it did not strictly follow the chain of custody procedures, and yet, in this case, there seems to have been a focus on doing things by the book. Similarly, IPOA had also found it difficult to ascertain the full details of the case; they could not identify the police officers responsible for Baby Pendo’s death (Gitonga, 2017). They noted that it was difficult for them to identify the officer(s) responsible for the assault on Baby Pendo’s family. However, they concluded that senior police officers Titus Yoma, Christopher Mutune, Benjamin Kosgei and John Thiringi, who were in-charge of the policing of the areas around Baby Pendo’s home, were negligent in their work leading to the death of Baby Pendo (ibid). As a result, IPOA recommended to the DPP that the matter be handled through a judicial inquest and the DPP concurred. Section 387 (1) of Kenya’s Criminal Procedure Code (CPC) (2018) requires that a magistrate conduct an inquest in cases where a death has occurred in unclear circumstances and that it be heard in the court that is closest to the scene of the crime.

As these investigations were proceeding, Joseph and Lenser were already engaging the KNCHR. The KNCHR official that I spoke to told me that they had also anticipated the challenge of acquiring adequate evidence to sustain a criminal case in court that would lead to the officer(s) responsible, if they could be identified, would be sanctioned. As such, they had advised Joseph and Lenser to pursue a civil suit seeking formal acknowledgment by the

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<sup>88</sup> Interview, DCI Officer, Kisumu, 14 February 2019

<sup>89</sup> Ibid.

state that the death of their daughter was caused by a police officer.<sup>90</sup> This would satisfy their goal for the production of a legal truth that would ascertain that they were victims not criminals. Furthermore, if the civil suit was successful, they could then sue the state for compensation. The DPP had also advised the family to pursue civil proceedings against the NPSC for compensation (Gitonga, 2017). However, when the KNCHR learnt about the Judicial Inquest they advised the parents that it was better to join that effort and thus shelved the intention to pursue civil remedies for the time being.

Inquests are used to gather evidence in cases where determining the facts of a case is difficult. Rather than seeking to assign blame as in a criminal case, an inquest seeks to create the best narrative explanation of the death by gathering the personal memories of the witnesses (Scraton, 2013; Baker, 2016). Inquests are useful in the pursuit of legal truth for many victims of state violence because states often refuse to acknowledge the victims of their crimes and may even condemn them in their attempts to protect their democratic credentials and the international image (Cohen, 1993). As Elizabeth Stanley notes, states use legalistic responses that seek to project the victims of its violence as a source of danger, terming them ‘looters’, ‘dissidents’, ‘subversives’, ‘the enemy within’ or ‘vermin’ in order to avoid taking responsibility (Stanley, 2005; 585). In some cases, the state officials who are engaged in state crimes are often seen by their senior as ‘good performers’ and subsequently get recognition and even promotions (Stanley, 2005). The public statements by President Kenyatta congratulating the Police for a job well-done – being firm and acting professionally in accordance with the law – in the policing of the 2017 elections – despite compelling evidence that they had violated the rights of many people and resulting in deaths of many including Baby Pendo, is illustrative (Agutu, 2017). In a message dispatched to all police officers on 30 November 2017 by Benson Kibui, the Kenya Police Director of Operations, through the police’s internal communications system, often termed as *signal*, read that the president had commended them for ‘the high degree of professionalism and dedication to duty displayed during the entire period’ (ibid). This was also the case in South Africa where Riah Phiyega, then National Police Commissioner, congratulated the police and invited them to applaud themselves after the Marikana massacre in which 34 miners were shot dead by the police (Chetty, 2016). Undoubtedly, the expectations of these kinds of responses from the state authorities shape the behaviour of the police in the policing of dissent. They also mean that establishing the *legal truth* of an event becomes a crucial goal for the victims of state violence even where it proves elusive (Stanley, 2005; Summers 1999: 497). A notable example here is the Mau Mau case where victims of torture by the colonial regime in Kenya sought an apology and compensation from the British government more than 50 years after the time when the violations occurred (Hasian Jr & Muller, 2016; Anderson & Weis, 2018).

A judicial inquest into Baby Pendo’s death was subsequently set up in Kisumu. A judicial inquest has the power to compel witnesses – including police officers – to provide evidence. The Baby Pendo inquest called 21 witnesses, including the parents, their neighbours, senior police officers, doctors, and civil society activists. Most notably, the inquest called police officers whose stations of work are outside Kisumu, including two General

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<sup>90</sup> Interview, KNCHR official, Kisumu, 15 February 2019

Service Unit (GSU) officers as well as two other officers from the Recce Company, the elite VIP protection unit based in Ruiru near Nairobi who had also been deployed in the area.

The magistrate delivered the findings of the Inquest into the death of Samantha Pendo, at the Kisumu Law Courts on 14<sup>th</sup> February 2019. I attended the session in the company of a research assistant. The courtroom was packed with many Kisumu residents, activists and media personnel showing the level of public interest that the case attracted. The Magistrate provided a detailed account of the events that occurred prior to, during and after the attack of Baby Pendo's family by the police officers including the difficulties that the family faced in accessing emergency healthcare for their daughter. She called the conduct of many actors into question and highlighted how people along the chain had failed Baby Pendo in disregard of their obligations to protect lives as per the Constitution of Kenya. She called out the police officers who failed to help the family to get to the hospital and the health facilities that refused to help the child. The magistrate also noted the limits of the evidence that was provided to the inquest; especially by the police officers who testified as I discussed above. As a result, she noted that the inquest had been unable to identify the officers who had attacked the family, let alone the individual officer who had hit the baby on the head leading to her death. In the paragraphs that follow, I explore some of the crucial outcomes of that process, showing that even though the inquest failed to generate police accountability in the way some actors hoped, it nonetheless produced some outcomes that actors found meaningful.

Even though inquests argue that they are not focused on assigning blame, establishing the 'facts' of what happened invariably indicates culpability and the presumption that accountability will follow, as Scraton (2013) argues. Indeed, some of the actors expected the inquest to bridge the evidence gap and identify the individual officer responsible for the 'fatal blow' so that criminal prosecution of the officer would follow.<sup>91</sup> Citing the inability of the inquests to identify the police officers responsible for the attack on Baby Pendo and her family, the DCI officer I spoke to argued that the inquest was hurried. This was something that he attributed to the magistrate whom he saw as young and inexperienced.<sup>92</sup> He told me that *'kesi kama hiyo inafaa kupewa a senior judge mwenye ako na experience* [a case like that should have been given to a senior judge who has experience].<sup>93</sup> I am not sure whether he was aware that inquests are legally designated as roles for magistrates not judges. However, the inability of the Baby Pendo inquest to provide a compelling narrative that can sustain a criminal prosecution is not unique. Scholars have noted that inquisitorial forums such as inquests, official inquiries and truth commissions, are often not very effective in identifying the perpetrators of state crime (Stanley, 2005; Scraton, 1999). For instance, the inquest into Julie Ward's death, which has been going on over two decades, has proven to be ineffective in resolving the case (Musila, 2008). Some analysts argue that governments and other powerful actors in the society, who may be threatened by the findings of inquests, are able to interfere with the processes and frustrate the process or alter the outcome (Tweedie & Ward, 1989). Nonetheless, inquests remain an important legal tool for examining cases of death that occur

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<sup>91</sup> Interview, human rights activist, Kisumu, 03 December 2018

<sup>92</sup> Interview, DCI Officer, Kisumu, 14 February 2019

<sup>93</sup> Ibid.

in unclear circumstances. In this case, the findings of the inquest had sanctioned some important truths about the policing of dissent in Kisumu, which served the needs of some of the parties involved, albeit partially.

Despite the inability of the inquest to identify the police officers who attacked Baby Pendo's family in their home, the magistrate, following the earlier cue from IPOA, invoked the idea of command responsibility. She indicted five senior police officer who were in charge of the operation for failing to take the necessary and reasonable measures to prevent the criminal act of killing the baby. Subsequently, the Director of Public Prosecution (DPP) indicated that he would be pursuing prosecutions against these officers for negligence (Wambui, 2019). This was an important innovation that underscored the recognition of police brutality as an institutional issue, which should not be reduced to the conduct of individual police officers. If effective, this may encourage senior police officers to ensure that the officers serving under them comply with the law. That said, given the complex historical and contemporary logics that I have highlighted above, which drive police brutality within protests, the impact of these measures would, likely, be limited. The fact that this represented an important step forward is evidenced in the responses of the human rights organisations involved. Even though they noted that this outcome did not meet their desires fully, these activists celebrated the outcome of the inquest.<sup>94</sup> It had made official the claims of human rights abuse they had made but which the state had always denied.<sup>95</sup>

The inquest\* also revealed important aspects of the nature of the deployment of police officers to Kisumu in the 2017 electoral period. It was evident, even from the list of the police officers who were called in to testify, as I have noted above, that the police officers who were deployed there were from elsewhere. In itself, this was not unusual. Police officers are often redeployed across the country during election periods. However, the nature of the deployment of the police to Kisumu reflected the designation of the city as a *hotspot* for violence. This is reflected in the fact that the police officers who were deployed to Kisumu had not been placed under the command of senior officers in Kisumu or placed in any of the Police Stations in Kisumu. Instead, they camped at the Kisumu ASK (Agricultural Society of Kenya) Showground.<sup>96</sup> It was, therefore, unsurprising that the officers who had been deployed to Kisumu did not seem to know each other. For instance, while giving her testimony to the inquest, Ms Kogei, a senior police officer who was then based in Kisumu, stated that she had never met Mr Ali, the police officer who was commanding the 17 officers who conducted raids in Nyalenda on the night that Baby Pendo's family were attacked by the police (Otieno, 2020). If we are to believe Ms Kogei, this would mean that even if an officer wanted to report or testify against another officer, they would probably not have been able to do so. In other words, the nature of the deployment had provided the police officers with an element of invisibility and anonymity that underscored their impunity.<sup>97</sup>

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<sup>94</sup> Interview, human rights activist, Kisumu, 14 February 2018; Interview, Audi, Kisumu, 14 February 2018

<sup>95</sup> Ibid.

<sup>96</sup> Interview, human rights activist, Kisumu, 03 December 2018

<sup>97</sup> While an in-depth examination of the link between anonymity and police impunity are beyond the scope of my analysis here, it is important to note that it has been discussed by scholars for long including discussions on

Moreover, the inquest demonstrated the limitations of police documents as a source of evidence that could reveal the truth about instances of police abuse. The production of state documents is sometimes seen as a means of creating transparency and accountability (Cooper-Knock & Owen, 2018:282). Indeed, in my discussion of the investigation and trial in Kwekwe's case, I noted that police documents were part of the evidence that helped to convict the two police officers. However, scholars have noted the limitations of state documents in doing so because they may often leave out crucial details (Owen, 2013). This was evident in this case, especially with regard to the kind of documentation that was kept with respect to the weapons issued to the various police officers. In Kwekwe's case, I noted that police documents indicated the weapons that had been issued to the police officers, the condition in which they were returned, and the ammunitions they fired, if at all (see Chapter Three). In Baby Pendo's case, crucial details were missing from the details that were presented to the inquest. In fact, the officer responsible for the inventory of weapons appeared to not have noticed, until when he was being questioned at the inquest, that one club was missing from the inventory. This might have been the club that had inflicted the 'fatal blow' on Pendo and could, therefore, have been of immense value to the investigations. If the officer was not being disingenuous, it shows that the ways in which weapons are issued and tracked can serve to frustrate accountability efforts. This demonstrates that police weapons are not all treated with the same level of seriousness. In other words, it matters that Kwekwe had died from gunshot wounds. Guns are understood to be lethal weapons for which elaborate records are often kept. By contrast, Baby Pendo died as result of injuries inflicted by a weapon that would fit in the category of the so-called *non-lethal* weapon (Terrill & Paoline, 2017). It is evident from this case that the weapons that are categorised as non-lethal are not treated with the same diligence and care as those designated as *lethal* weapons.

Of course, the fact that Baby Pendo died as a result of injuries inflicted by a 'non-lethal' weapon problematizes this category. It speaks to a much broader history of deaths and injuries at the hands of non-lethal technologies by those policing protest. Teargas, for example, is categorised as a non-lethal weapon but has been known to cause death, especially among children. In Turkey, for example, tear gas is reported to have resulted in the deaths of 8 and injury of 146 children between 2006 and 2014 (Atak, 2017). In some cases, children have died when the police have thrown tear-gas in residential neighbourhoods or into people's houses. For instance, baby Jayden, a two-week old boy choked and died in their home in Durban, South Africa, when a tear gas canister dispatched by the police to disperse protestors landed close to their house (Singh, 2017). This is to say that whether a weapon is lethal or not is contingent on how it is used and against whom it is used. Nonetheless, the movement of weapons that are termed as non-lethal is not recorded with as much care and diligence as the weapons that are categorised as lethal. As a result, the police documents provided could not aid in the detection of the police officers responsible for Baby Pendo's death in the way they had done in Kwekwe's case.

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how wearing of badges and body worn cameras can serve to address the issue (See, for instance, Traven, 2001; Bromberg, et al, 2018). Even where these attempts have been made, scholars have noted that they are not always effective for a variety of reason such as the difficulty of identifying individuals during riots (e.g. Kroon, et al, 1991) or the fact that police officers do not always turn on their cameras (e.g. Ray, et al, 2017; Young & Ready, 2018). In any case, these are not applicable here.

Over the years, scholars of state bureaucracy have also noted that government documents are not conclusive custodians of universally accepted claims but rather are the basis for the negotiation of claims between actors (Cooper-Knock & Owen, 2018; Hull, 2012; Das, 2004). In other words, documents are tools – sometimes powerful tools – in the hands of agentic actors attempting to negotiate their way through complicated situations. People – government officials, citizens, migrants and so on – use documents in an attempt to substantiate their claims which may or may not succeed, whether the documents are legitimate or forged (Das, 2004). This is well illustrated by the documents presented by Christopher Mutune, then Kisumu Central OCPD, to the inquest. He provided an Operation Order, which contains the names of officers involved in an operation, and a Deployment Schedule, which also lists the weapons assigned to them, as part of his evidence to the inquest. However, the authenticity of these documents was brought into question when other police officers who testified at the inquest disowned them. For instance, while Benjamin Koima, the Kisumu Central sub-county AP Commandant, confirmed that APs were among those engaging demonstrators in the streets of Kisumu, he disowned the operation order which showed that some officers under him were part of the team deployed to the Nyalenda area. Consequently, he could then not account for the whereabouts of two police officers – Erick Chirchir and Cleophas Ochieng’ – who were under his command and who are believed to have been deployed in that area. This made it difficult to establish which police officers had been deployed to Nyalenda, frustrating the attempts to single out the officers who had attacked the family. This is to say that even police documents are not a sure way of providing evidence to facilitate police accountability, and the context they contain are subjected to negotiation. However, the DCI officer I spoke to argued that this problem could have been solved by demanding that all police officers who were policing the area to be called back and made to reconstitute their contingents.<sup>98</sup> Whether this could be done and whether it would have been effective remains a matter of speculation especially because, as the foregoing analysis indicates, the evidence that the police presents will only be as good as the police systems themselves allow.

Following the delivery of the findings of the inquest, I spent much of the afternoon with Baby Pendo’s parents and their new born infant. From the court, we walked through the streets of Kisumu, in the company of two human rights activists who had been following the case, towards a restaurant to have lunch. As we walked, the activists tried to explain to Joseph and Lenser what they saw as the significance of the ruling and what the next steps would be. Even though they listened, they both seemed somewhat disinterested in the conversation. I found this curious. From their response to the conversation, it was not obvious to me whether they were happy with the outcome of the inquest or not. The conversation continued over lunch as the events of the day were rehashed and examined. After lunch, I asked the two activists to excuse us so that I could conduct an interview with Joseph and Lenser.

Joseph and Lenser tearfully narrated their account of what had occurred on the night they were attacked. It was similar to the detailed timeline that the magistrate had constructed from the evidence provided during the inquest but with more detail. I asked them why they

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<sup>98</sup> Interview, DCI Officer, Kisumu, 14 February 2019

had appeared disinterested in the earlier conversation with the two activists about the next steps. They told me that they were reticent about discussing the next steps because since their daughter died, they had heard so many promises from so many people, including human rights activists and politicians, which were never fulfilled.<sup>99</sup> They had come to believe that many people, especially politicians, were using their daughter's death to serve their own interests.<sup>100</sup> Furthermore, they noted that the frequent claims by politicians that they would help the family had also strained their relations with their friends and relatives because some of them had come to believe that '*sasa tuna pesa* [now we have money]<sup>101</sup>'. In some cases, the parents believed that friendships had faltered because people thought that they had moved to a different class, and no longer had much in common with the parents. In other cases, Joseph and Lenser had just grown tired of explaining to people that they did not have money as people expected; many of the promises for help that had been made in public had not materialised.

As we ended our conversation, I asked them what they thought of the outcome of the inquest. They both indicated that they were very happy with the outcome because it had presented the *truth* to the world that, as Joseph put it, '*polisi waliua mtoto wetu*' [the police killed our baby].<sup>102</sup> At that point, they were satisfied with the outcome of the inquest because it had served the purpose they sought which was to vindicate their account that they were victims of a state crime and not the perpetrators of a crime. As Scraton (1999) has argued, inquests, just like truth commissions, do not just report the facts of a crime, they also serve to de-legitimise the alternative arguments that are presented about what really happened. However, as I argue in this thesis, the justice outcomes that people often articulate are a reflection of what they consider feasible rather than what they would want in an ideal situation. That the pursuit of *legal truth* was only a partial goal was evident in our conversation. As we spoke, the parents expressed other outcomes that they had also hoped for. For instance, Lenser said that she still wanted to know the police officer(s) who killed her daughter. This, she argues, would help to answer the many questions that the parents still had.<sup>103</sup> At one point, Lenser and Joseph also said that they wanted the officers responsible to be punished for the death of their young daughter.<sup>104</sup> At another point, Lenser said that she also still hoped for some form of reconciliation with the police officer who killed her daughter. She said, '*ningetaka akuje tu aombe msamaha* [I'd just want him to come and ask for forgiveness].<sup>105</sup> She told me that a confession and apology from the police officer would be a good outcome for both parties because she believed that wherever the officer(s) were, they were carrying a heavy emotional load as result of their indefensible actions.<sup>106</sup> Thus, while the inquest had generated a legal truth that had served one of their goals, and which they

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<sup>99</sup> Interview, Joseph and Lenser, Kisumu, 14 February 2019

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

welcomed, it had done nothing to deliver the other justice outcomes that Lenser and Joseph would have also found meaningful. These other justice outcomes, however, were unlikely to ever be attained.

#### 4.6 Conclusion

This chapter examines the responses of the victims of police abuse in the context of the policing of dissent through the attack on Joseph and Lenser's family by police officers in their home, in the aftermath of the 2017 election, which led to the death of six-month-old Baby Pendo. As a *good case* (Merry, 1980), the Baby Pendo case was expected by many observers to lead to police accountability. However, in light of the state's adoption of police brutality as a technology of governance, imbued with impunity, gathering the requisite evidence proved difficult. This led to the establishment of a judicial inquest to attempt to bridge the evidential gap. The inquest was not able to identify the police officers who attacked the family. Unlike the Kwekwe case that I discussed in chapter three, the involvement of state investigative agencies and human rights organisations in this case was not able to overcome the evidential gap, which would have made police accountability possible. Nonetheless, it generated meaningful outcomes that served some of the interests of the actors involved in the case. In particular, it generated several state-sanctioned truths that met some of the stated needs of key actors in the process. It sanctioned political truths that the police abuse of Kisumu residents, especially during electoral periods, is systemic and deeply embedded in the logics of the state that marginalizes them. It also satisfied one of the stated objectives of Baby Pendo's parents for a legal truth that they were victims and not the aggressors. Yet, while Baby Pendo's parents said that they were satisfied with the findings of the inquest that the police had killed their baby, their satisfaction was only partial as the other justice outcomes they desired including the punishment of the police officers, or for them to apologise to them, had not been met. They understood that attaining such outcomes was unlikely. To put it simply, I have shown that just because an incident of police abuse is considered a *good case* this does not mean that it will lead to police accountability, even where that is one of the desired goals. This is to say that even when the formal processes produce justice outcomes that people welcome, we must still understand them to be fragments; a poor reflection of what they would want to happen when their rights have been violated. However, I have also shown that the inability of the formal state processes to hold police officers to account for their actions does not mean that the processes are meaningless; they can also generate other justice outcomes that actors find meaningful.

## Chapter Five

### **'If we don't kill them, they will finish you': The efforts of poor, young men at Kenya's urban margins to escape death**

#### **5.1 Introduction**

A wealth of research from around the world has demonstrated that poor, young men are disproportionately targeted and victimized by the police (Cassandra & Robertson, 2013; Belur, 2010; Waddington & Wright, 2008, Alves, 2018; Altbeker, 2005). This phenomenon has also been shown by scholars and human rights groups in Kenya (van Stapele, 2016; MSJC, 2017; Jones, et al, 2017; Wairuri, 2022). Like many of the people at Kenya's urban margins that I spoke to for this study, poor, young men said that they had been subjected to various forms of abuse including arbitrary arrests, threats, physical assault and demands for bribes (extortion). Since the urban margins index poverty, as I noted earlier, by 'poor, young men' here, I am simply referring to young men who live at the urban margins. In this chapter, I explore the various forms of police abuse that poor, young men experience with a particular focus on police killings, especially relating to the use of lethal force that disproportionately affects them.

This chapter examines the experiences and perspectives of young men at the urban margins. Building on interview data and secondary data, my analysis in this chapter supports my main argument in this thesis that people's response to victimisation by the police needs to be understood as a social negotiation between the victims and various other actors in their hope of generating various justice outcomes. In this chapter, I examine how the discursive construction of poor, young men as a security threat exposes them to police abuse. I show that this discourse is so strong that it constrains the ability of poor, young men to pursue police accountability and limiting community solidarity as a result of which young men often rely on individual coping mechanisms to respond to police abuse. However, on some occasions, they seek the intervention of state mechanisms of police accountability, especially the chain of command and IPOA to help them resolve conflicts with police officers, primarily to avoid escalation of the abuse they experience. Often, as I show here, they require the intermediation of other actors to access these state institutions. In contrast, I show that the families of poor, young men are sometimes able to pursue police accountability when young men have been killed, something that the victims would have struggled to do when they were alive.

The chapter proceeds as follows. First, I examine the policing of poor, young men in Kenya and the forms of police abuse that they are subjected to. Second, I show how poor, young men in Kenya have been discursively constructed as a security threat and therefore as deserving brutal punishment. I demonstrate how crime data has been weaponised to serve this purpose. Third, I focus on the police use of lethal force, a form of police abuse that disproportionately affects poor, young men, under the guise of crime control. I examine how the police use the spectacle of lethal violence to sustain their image as crime fighters and thereby bolster their legitimacy. This section examines the strategies that young men deploy in response to police abuse. I examine their efforts to escape from their neighbourhoods, as well as seeking the intervention of the senior police officers and IPOA, to avoid further

escalation of their conflicts with the police officers to the point where it may become fatal. I contrast the difficulty that poor, young men face with the pursuit of police accountability when they are victimised by the police with the ability of some of the families to do so after the young men have been killed by the police. The final section draws out the key insights from the chapter, linking to the overall argument in the thesis.

## 5.2 The policing of poor, young men in Kenya

Some scholars have noted that the work of managing crime in Kenya seems to target poor, young men, something about which young men and their families have often complained (Izugbara, & Egesa, 2020; van Stapele, 2016; Jones, et al, 2017). Many of the poor, young men that I spoke to for this study complained about arbitrary arrests by the police, which they said they frequently experience.<sup>107</sup> This is consistent with the findings of other scholars (ibid). People were often subjected to arbitrary arrests during regular street patrols by the police or during street swoops and raids that are commonly known as *msako*. *Msako*, a Kiswahili word that means intense search, conjures the ideas of an intense police raid in a particular area to seek out suspected criminals. In practice, it amounts to the round-up of people on the streets by the police without any justification. As other scholars have noted, the police often conduct *msako* on Friday evenings, which enables them to use the threat of one being locked up in a police cell over the weekend when the courts are closed to demand bribes from the people they arrest in exchange for freedom (CHRI & KHRC, 2006). People often refer to this as the '*Friday Collection*' (Ibid: 20). It is important to note here that these arbitrary arrests impact people at the urban margins across intersectional social categories. Amongst the market traders, sex workers, queer people, and religious leaders that I spoke to for this study, people complained about being arrested regularly by the police. However, it is well understood that the police mainly target and are very brutal towards young men during these counters (van Stapele, 2016). Sometimes, as Chimaraoke Izugbara and Carolyne Egesa (2020: 1691) note, these arrests have resulted in the young men sustaining serious injuries or dying.

People's lives at the urban margins often unfold on the margins of 'illegality' as Patrick Mutahi (2011:12) observes. This manifests in various forms including engaging in illicit economic activities to survive in the city, including illegal tapping of water and electricity and the making and selling of illicit alcohol. For this reason, the police can always justify arrests through recourse to the law. However, the nature of many of the arrests by the police at the urban margins, during *msako* or regular street patrols, are often termed as arbitrary because of what follows the arrest, especially the demand for bribes by the police. Many of the people that the police arrest during *msako* or regular street patrols are released without being taken to court. While this is something that is well understood by Kenyans, it has recently been affirmed by an audit of Kenya's criminal justice system by the National Council on the Administration of Justice (NCAJ), the ombudsman (NCAJ, 2016). In that audit, the NCAJ (ibid), found that that about 58% of the people who were arrested by the police were released without any reason being recorded.

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<sup>107</sup> Group interview, young men, Nairobi, 3 December 2018

Some of the police officers I spoke to for this study disagreed with these claims, saying that they sometimes let people go with a warning or after giving them a task to perform at the station such as cleaning the facilities or cutting grass.<sup>108</sup> One officer in Mombasa, told me '*sometimes kama ni kitu kidogo kama ulevi, hakuna haja ya kupeleka mtu kortini* [sometimes, if it is a minor issue like drunkenness, there is no need to take someone to court].<sup>109</sup> However, this validated rather than challenged the findings by the NCAJ as the commission had already accounted for those scenarios. What the report did not account for was bribery presumably for methodological reasons: they did not conduct any interviews. This suggests that, in the absence of evidence to the contrary, many of the people who constituted the 58% had been released after paying a bribe to the police. Still, it is important to note that this only relates to the people who were arrested and taken to the police station. As I demonstrate in much of the remainder of this chapter, many people pay bribes in exchange for freedom before they get to the police station. This demonstrates that the purpose of these arrests is not law enforcement but rather the imposition of punishment as Didier Fassin (2019) argues, or for the pecuniary gain of the individual police officers. I examine the issue of extortion by the police in more detail in the next chapter.

While the arbitrary arrests could affect anyone, and in fact they did,<sup>110</sup> some of the young men that I spoke to complained about being individually targeted and victimised by the police. In some cases, they complained about being subjected to sustained threats. Consider, for example, the case of Michael Wanyonyi, a 27-year-old father of one and resident of Kawangware, who rides a *boda-boda* (motorbikes used for public transportation). He said that he had been subjected to sustained harassment by police officers, including arrests and death threats, for months.<sup>111</sup> He said that the police officers accused him of owning a gun and were demanding that he produce it.<sup>112</sup> On other occasions, he said that the police claimed that he had sold his gun to get the money that he used to buy the new motorbike he was currently riding for his *boda-boda* business.<sup>113</sup> When we met, he was afraid that the harassment he was experiencing could escalate to the point of him being killed by police like some of his friends and relatives.<sup>114</sup> In other cases, young men complained about repeated assaults by the police, such as when police officers were drawn into unfolding conflicts between people in the community. This is illustrated by the case of Makori, a 31-year-old man who operates a *boda-boda* business in Kiambiu where he lives with his wife and their 5-year-old son.<sup>115</sup> Makori claimed that he had been physically assaulted by police officers thrice in his home. This, he argued, was due to a property conflict between a property owner and a caretaker that they had employed, who was attempting to lay a claim to the property. The caretaker had failed to remit the rental income for two years to the property owner and also refused to vacate the

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<sup>108</sup> Interview, Police Officer, Mombasa, 15 July 2019

<sup>109</sup> Ibid.

<sup>110</sup> Focus group, religious leaders, Kiambiyu, 15 October 2018

<sup>111</sup> Focus group, young men, Kawangware, 16 October 2018

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>115</sup> Interview, Makori, Nairobi, 1 November 2018

premises when he was ordered to do so. Makori got embroiled in this conflict because the property owner had recruited him and his friends to carry out the eviction order that had been approved by the chief. Makori said that the caretaker had then recruited some police officers who raided Makori's house three times and assaulted him. He sustained serious injuries in these attacks. I shall return to both of these cases throughout this chapter. What is important to note here, is that both of these cases relate to the work that these young men did.

From the data available on the issue, it is also evident that poor, young men are disproportionately represented amongst the victims of police killings in Kenya. This has been demonstrated extensively by scholars, the media and human rights groups. For instance, Mutuma Ruteere (2008) notes claims that the police killed over 500 young men in their attempts to wipe out Mungiki, a vigilante group that operated in Nairobi and Central Kenya.<sup>116</sup> The Nation Newsplex Deadly Force Database, run by the Nation Media Group, recorded 970 deaths resulting from police action between 2016 and 2020, of which 924 (95 per cent) are men (Newsplex, 2021). The database aggregates reports of police killings from the public, media, human rights organisations and government agencies. Even though Nation NewsPlex does not disaggregate the data by age, several human rights groups and other media indicate that the majority of the victims of police brutality in Kenya are young men, some in their teenage years and most under 30. For instance, a 2004 report noted by the Daily Nation indicated that the 40 victims of police killings they had documented were young men aged between 13 and 25 (CHRI & KHRC, *ibid*: 22). Similarly, Haki-Africa, a human rights organisation based in Mombasa, noted that the majority of the 43 victims of police killings they recorded in 2019 were young men (Otieno, 2020), as did the highly consequential 2015 report by the Mathare Social Justice Centre (MSJC), which listed over 50 victims of police violence in Mathare, who had an average age of approximately 20 (MSJC, 2015). This indicates that the use of excessive force by the police in Kenya disproportionately affects poor, young men in Kenya like elsewhere in the world (Caldeira, 2002; Altbeker, 2005).

The finding that the police disproportionately kill poor, young men is consistent with the information that my interlocutors provided. For instance, in Mombasa, I met with parents who alleged that their teenage sons – Bilali Ndaro (17 years old), Kenga Masha (19 years old) and Jumaa Kazungu (18 years old) – had been shot dead by the police in their neighbourhood of Utange on 8<sup>th</sup> September 2018.<sup>117</sup> The young men who I spoke to at Kenya's urban margins for this study told me that they knew several other young men who were allegedly killed by the police – mainly shot dead – including their friends and relatives. Patrick, a young man from Kiambiyu, told me that his friend who worked as a carpenter and with whom he 'stole

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<sup>116</sup> The classification of Mungiki as a vigilante group or militia is contested. The word 'Mungiki' emerges from the Gikuyu phrase 'Muingi Ki' which means the public; the Gikuyu public. Most analysts recognise the complex nature of the organisation but, often based on their projects, emphasise varied aspects of it. The organisation emerged in the late 1980s as a religious movement based on Kikuyu traditions, as a result of which it was initially described as a 'sect' (e.g. Wamue, 2001; Kagwanja, 2003). However, in later years, it developed into a political movement, recruiting poor and disenfranchised Kikuyu youth. Therefore, some analysts see it as a socio-political movement (Kimari, 2017; Rasmussen, 2010). In the early 2000s, Mungiki deployed gruesome violence, including beheadings that triggered a brutal response by the government. As a result, scholars came to see it as a vigilante group or militia (e.g. Anderson, 2002; Henningsen, & Jones, 2013; Katumanga, 2005).

<sup>117</sup> Focus group, families of victims, Mombasa, 24 January 2019

electricity' (connecting households in Kiambiyu illegally to the power grid) was shot dead by a police officer in the streets while he was coming from purchasing materials to use at his workshop.<sup>118</sup> In Kisumu one respondent narrated his ordeal of traveling to Nairobi in an attempt to find his elder brother who had gone missing only to find that he had allegedly been shot dead by a police officer one evening as he was heading back to his house in Kayole after work. The circumstances of his death that have remained unclear to date.<sup>119</sup>

Others reported cases of enforced disappearances, where young men had been arrested by the police were never seen again. The mother and siblings of a young man called Otis from Kiambiyu told me that he had disappeared several years before, after he was allegedly seen in the company of police officers.<sup>120</sup> Their efforts to find him have proved futile. In some cases, the bodies of people who had disappeared following arrest would be found later – often in places far from where the arrest occurred. One such case unfolded in Kawangware while I was there conducting fieldwork.<sup>121</sup> The body of a young man who had been arrested by police officers on the preceding Friday evening had been discovered by chance at the Ruiru Hospital Mortuary, nearly 30 kilometres away.<sup>122</sup> It just so happened that one of the mortuary attendants knew him and alerted his family, who were already looking for him. There was no further information on how he died or how his body ended up so far away from home.

The foregoing discussion shows that poor, young men in Kenya are disproportionately targeted and victimised by the police, as they are elsewhere in the world. I have shown that these young men are affected by the forms of police abuse that people at the urban margins generally experience, such as arbitrary arrests and extortion, but that they are often victimised more intensely than other people. Additionally, I have noted that poor, young men are more likely to be targeted and victimised by the police through the use of lethal force or enforced disappearances. This is consistent with what previous studies on this phenomenon have established (Izugbara, & Egesa, 2020; van Stapele, 2016; Jones, et al, 2017). My purpose here is to examine how poor, young men respond to victimisation by the police. To understand these responses, however, we need a clearer understanding of why this victimisation occurs. In the section below, I explore the construction of young men as a security threat, which remains pervasive (Izugbara, & Egesa, 2020; van Stapele, 2016, 2020).

### **5.3 Construction of poor, young men as a security threat**

The discursive construction of poor, young men as a security threat, has been noted by scholars elsewhere (Enria, 2016; UN-Habitat, 2007; Abbink, 2005). For instance, in her study of young men in post-war Sierra Leone, Luisa Enria has noted how policy actors have constructed poor, young men in Africa as the quintessential security threat and thereby justifying brutality towards them (Enria, 2016). In this section, I examine how poor, young men in Kenya are constructed as a security threat through the weaponisation of crime data

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<sup>118</sup> Interview, Patrick, Nairobi, 30 Nov 2018

<sup>119</sup> Ibid.

<sup>120</sup> Interview, Mama Otis, Kiambiyu (Nairobi), 6 December 2018

<sup>121</sup> Focus group, young men, Kawangware, 16 October 2018

<sup>122</sup> Ibid.

that stigmatises them and the work they do. This is then married to a broader acceptance of brutal policing as an appropriate and effective way of dealing with crime by the government, the police and members of the community. Together, these two factors legitimize police brutality against poor, young men.

### *Weaponisation of data*

One of the ways in which young men are constructed as a security threat is through the use of crime data that is said to show that young men, especially unemployed young men, are the major perpetrators of crime. A global report on urban security identified that the youthfulness of the criminals engaged in robberies, house break-ins and street muggings in Nairobi was a distinctive attribute of crime in the city (UN-Habitat, 2007). The report by UN-Habitat claimed that the largest proportion of crime in Kenya is committed by youth as they stated that 'over 50 percent of the convicted prisoners in the country are aged between 16 and 25 years' (UN-Habitat, 2007: 308). While these claims are presented in these policy documents as 'empirical facts' a close reading reveals that they are erroneous. The claim about the youthfulness of criminals in Nairobi in the UN-Habitat (2007) is picked from a wide-ranging article by Kenya historian Edwin Gimode (2001) on violent crime and insecurity in Kenya between 1985 and 1999. Though Gimode comments on the 'youthfulness' of criminals, he does not provide concrete evidence to show how he arrives at this conclusion. In fact it is only once in the paper, while describing the kidnapping of a prominent businessman, that he provides the age profile of the criminals and, even then, he only states that they were in their twenties without any indication of the source of this information (ibid: 309). This unverified claim is subsequently picked for inclusion in the UN-Habitat report where it becomes significantly de-contextualised. The other broad claims that Gimode makes and which dispute this predominant focus on the youth as the 'criminals' – such as rich people's engagement in serious, though less overt crimes (ibid: 314) or his suspicion of police criminality in many of the crimes he is documenting (ibid: 321) and which are attributed to the 'youth' – are left out. This de-contextualisation serves to construct the crime problem in Kenya as primarily a youth problem even though it is far more complicated than that – a conclusion we can arrive at even based on a more careful reading of Gimode's (2001) work.

In some cases, it is evident that the analysis of data on youth involvement in crime is not carried out with the necessary level of care, often resulting in problematic and unverified claims entering into policy discourse. For instance, in a report published in 2018, the National Crime Research Centre (NCRC), the state agency that is charged with conducting research on crime in the country to support policy decisions, claimed that 57 percent of crimes in Kenya are committed by the youth (NCRC, 2018b:11). This claim is similar but different from the one made by UN-Habitat (2007) that I noted above. However, on closer scrutiny, it becomes clear that the data presented here is not valid. In fact, that figure is plucked from a book chapter by John Mugo (2011) in which he analysed convictions rates in Kenya where he found that 57% of the people in prison for crimes were young men. The NCRC report thus conflates the rates of incarceration with the rates of crimes committed. Contrary to the claims that the NCRC makes, the data being analysed only tells us about who gets arrested, charged and convicted for crimes rather than who commits crime. This is a crucial point because studies have noted that many people in Kenya, especially the poor, are often falsely accused and are often unable

to access legal representation in court, meaning that Kenyan prisons are disproportionately populated by poor people who are serving longer sentences for petty offences (Kameri-Mbote & Akech, 2011).

Furthermore, the data that is used to anchor the claims of young men as a security threat is often presented in ambiguous terms that are difficult to scrutinise or verify. In 2013, the NCRC published a report in which they claimed that most criminal gangs in Kenya were comprised of young men (NCRC, 2013). While the report proceeded to list several of the so-called 'outlawed gangs' which it stated were mainly comprised of young men, they did not provide any data to show the size of the membership of these gangs or how their membership was split by gender in order to support their claim. The report also failed to provide a definition of what constitutes a 'criminal gang' making it impossible for analysts to understand how groups of youths come to be included or excluded from this list. This is particularly significant because as Naomi van Stapele has accurately noted, the term gang is very ambiguous in its usage in Kenya (van Stapele, 2016: 308). It has been used to refer to groups of young men ranging from 'thugs for hire', 'militias', 'robbers' or 'cartels' that control the delivery of services at the urban margins (ibid). Nonetheless, it conjures an image of violent and criminal groups of young men in the minds of many Kenyans and is therefore a powerful discursive tool when it is deployed by the police and state authorities more broadly. In fact, it is precisely this ambiguity of the term that allows the state and its operatives to instrumentalise it against groups of young men.

At the urban margins, the police often term any group of young men as a 'gang' in order to justify the deployment of violence against them as some of my interlocutors noted. Wanyonyi, a young man in Kawangware who had been repeatedly threatened by police officers, recalled that he and his friends had been targeted by some police officers after they had established a car-wash business with money they had received from a local politician, accusing them of forming a criminal gang.<sup>123</sup> Similarly, Shikuku, a youth leader in Kiambiu, recalled a case where seven police officers arrested a young man whom they accused of belonging to the banned vigilante group Mungiki, took him behind the Chief's camp and allegedly shot him dead.<sup>124</sup> The young men I spent a Sunday afternoon with in Kiambiu on a Sunday afternoon told me that the police always disrupted them at their hangout spot, which they refer to as the *baze*, accusing them of being a gang.<sup>125</sup>

The ambiguity surrounding the term 'gang' also allows police officers to claim, retroactively, that someone they have injured, often fatally, belonged to an outlawed gang. For instance, when Police Inspector Dickson Mwangi Munene shot and killed James Ng'ang'a in Westlands Nairobi – after being called by his friend Alexander Chepkonga to intervene in an altercation in a night club – he initially reported that he had killed a member of the outlawed Mungiki. Presumably, he expected that this would be adequate to avoid further scrutiny into the matter (Kadida, 2009). However, this claim failed when it later emerged that Ng'ang'a was the son of a former Member of Parliament, who had just returned to the country

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<sup>123</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>124</sup> Interview, Shikuku, Nairobi, 30 Nov 2018

<sup>125</sup> Field notes, 9 December 2018

from the UK where he had recently completed his PhD studies (ibid). To be clear, this not to say that rich and educated young men cannot join gangs but rather to point out that the tag is not likely to stick as easily as when it is used to label poor, young men. As one analyst of policing in Kenya that I spoke to for this study told me, the arrest and prosecution of the officer who shot and killed Ng'ang'a was largely due to his social status, because for any other person – especially a young man from the urban margins – the Mungiki tag would have stuck.<sup>126</sup>

### *Hustling as a proxy for crime*

States and their police, also discursively construct poor, young men as a security threat through the denigration and stigmatisation of the work they do to survive in the city. Several studies have also suggested a link between youth unemployment and crime in the city. For instance, a 2010 World Bank study on urban violence concluded that there was the 'strong perception in all of the communities studied that unemployment, especially of youth, is driving violence' (World Bank, 2010: xv). Similarly, a study of violent crime in Nakuru County that I participated in found that about 80% of respondents believed unemployment and idleness among the youth, as well as poverty, highlighted the underlying causes of crime in their neighbourhoods. (Wairuri, et al, 2018). Much earlier, in the article cited above, Gimode also attributed the violent crime in the 1980s and the 1990s that he examined to the worsening economic inequalities and growing poverty in Kenya (Gimode, 2001). Additionally, the Waki Commission that investigated Kenya's 2007/8 post-election violence saw youth unemployment as one of the root causes of the violence (CIPEV, 2008). The commission argued that it needed to be addressed in order to prevent such violence from occurring again (ibid). Even though these studies often do not suggest a direct correlation between unemployment and crime, such findings and claims are often left unquestioned. As a result, even though claims of direct links between unemployment and crime have been adequately challenged by empirical research (e.g. Moser & McIlwane, 2006), the nuances of the debate are often lost as the claims travel into the policy arena. This is illustrated by the Kenya National Youth Policy (2019) which claimed that 'idleness; is at the root of many social challenges amongst the youth including joining organized militia, crime, radicalization. onsequently, both in the policy and popular discourse, the perpetrator of crime and violence in the city came to be seen as the 'unemployed' or 'idle' youth (van Stapele, 2016: 309).

The classification of many young people who are not in education or formal employment in Kenya as 'idle and unemployed' is erroneous. In fact, it mainly signals the failure of the government to acknowledge people's engagement in what is often termed as 'informal employment' as being productive. In reality, however, many young people at the urban margins are engaged in various economic activities, which they loosely refer to as *hustling*. Hustling is an emic term that refers to participation in informal sector activities where outcomes are highly uncertain and unpredictable. The idea of hustling has been understood by some scholars as a livelihood strategy (Thieme, 2013; Smith 2019), while others see it as a way for the youth at the urban margins to conceptualize their own struggles (van Stapele,

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<sup>126</sup> Personal Communications, Policy Analyst, Nairobi, March 2015

2021).<sup>127</sup> The economic activities that are seen as part of hustling include riding *boda-boda* (motorbike offering public transportation services), making and selling food in kiosks, distributing water to homesteads in jerry cans, amongst others. The idea of hustling in Nairobi is quite different from Loic Wacquant's (1998) conceptualisation of hustling as necessarily requiring the manipulation of others and sometimes joining violence to chicanery and charm in the pursuit of immediate pecuniary gain. Here, it refers to the ability to keep multiple plates spinning at the same time (Smith, 2019) as well as the flexibility to participate in whatever activities present themselves, as Marco di Nunzio (2012) observes in his assessment of this phenomenon in Addis Ababa (Ethiopia). As a result, one's career could take multiple directions, changing rapidly over time. For instance, Wanyonyi's career since completing his secondary education included working as a casual labourer at a construction site, waiting tables at a city restaurant during a busy Christmas season, ferrying water to households in Kawangware, running a car wash business and riding *boda-boda*.<sup>128</sup> For many young men, these are not temporary activities that they engage in waiting for something better to come along; this is it. While they may be able to get a bit more income, acquire assets as time goes by and perhaps even make some changes to the work they do, many of them do not expect to ever get into formal employment. Whatever the case, many of these young men are anything but 'idle and unemployed' as they are often portrayed in some of the policy literature.

That notwithstanding, the *hustles* that many poor, young men engage in are often stigmatised as criminal and therefore deserving of brutal policing. This is particularly evident in the policing of the public transport sector, especially the *matatu* (mini buses) and the *boda-boda* (motorbike), trades that mainly employ young men. The capture and exploitation of the *matatu* industry by vigilante groups such as Mungiki, Kamjesh and Taliban, that were mainly comprised of young men entrenched the view that these were criminal enterprises (See, Mutongi, 2017; Katumanga, 2005; Anderson, 2002; Kagwanja, 2003). The stereotype that young men involved in the *matatu* industry are criminals has persisted to the present day, as evidenced by a conversation I had with a taxi driver when I was heading back to the city centre after a series of interviews in Kawangware. As my research assistant and I debriefed in the car, the taxi driver interjected. He asserted that he had his phone stolen in recent days. He pointed to some young men hanging around the bus stop and he said to us that 'those young men' – referring to the *makanga* (*matatu* conductors) and *bodaboda* riders – were dangerous people who needed to be dealt with ruthlessly by the police.<sup>129</sup>

In the present day, the discourse on criminality has shifted from the *Matatu* drivers, conductors and touts to *boda-boda* riders. This is demonstrated by the fact that the NCRC (2018a: 2) conducted a study whose aim was to 'establish the prevalence of *boda-boda* motorcycle-related crimes.' The report says that the NCRC surveyed 5,500 people in 24 counties across Kenya. The report presents what it terms as crimes committed by *boda-boda* riders – robberies (52.9%), possession and usage of dangerous drugs (49.5%), murder (38.7%),

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<sup>127</sup> This latter view partly rhymes with the adoption of the term by the political formation led by Deputy President William Ruto who has adopted the 'hustler narrative' as the campaign platform for his presidential candidacy. (Oxford Analytica, 2021).

<sup>128</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>129</sup> Field notes, 16 October 2018

kidnapping and abduction (26.2%), defilement (17.8%) and rape (17.2%), smuggling of contrabands and other goods across borders (15.9%) and illegal possession and smuggling of firearms and weapons in Kenya (9.9%) – without indicating what the numbers actually refer to. Unsurprisingly, the findings of the study matched the stereotype of *boda-boda* riders a security threat. This further justified the targeting of these young men by the police, who come to see their engagement in these trades as a proxy for their engagement in crime. Thus, Wanyonyi, the young man from Kawangware who works as a *boda-boda* rider, understood his repeated harassment by the police as partly emanating from his encounters with them when he was riding his bike, especially in the night.<sup>130</sup> Police officers often arrested him claiming that he was being hired by thieves to help them escape after robberies. However, he claimed that he often worked late into the night when there was less competition so that he could raise enough money to pay off the loan on the motorbike.<sup>131</sup> Operating within a context where they were already presumed to be criminal, everything they did could be interpreted as being (potentially) criminal.

The targeting of poor, young men by the police extends to the leisure activities in which they engage. Engaging in leisure activities is seen as a sign of idleness, which as I noted above is deemed problematic. People in authority in Kenya, ranging from classroom teachers to politicians, often cite the old adage that ‘an idle mind is the devil’s workshop.’ That this view informs policy is illustrated by the fact that leisure is often constrained by local authorities and police brutally because it is often conflated with engagement in criminal activities, resulting in the youth being denied the right to leisure (Wamuyu, 2013). This is not to say that young people do not engage in leisure activities but rather to note that whenever these activities are conducted in public spaces, they often carry the potential of being disrupted by the police. Young men were often attacked by the police in the local video halls where they went, sometimes at night, to watch matches of the English Premier League, which is very popular amongst young men in Kenya.<sup>132</sup> Thuku, a young man who owns and runs such a business in Kiambiu, complained that the police often ambushed them when they were watching matches at night, chasing away his customers and assaulting anyone they caught up with.<sup>133</sup> Other times, the police waited for young men on the streets, arresting and often assaulting those they caught as they were heading home after a match had ended.<sup>134</sup> In some cases, these attacks have proved fatal. A case in point was Carilton Maina, a former student at Leeds University in the UK who was allegedly shot by police officers in Kibera, on his way back home from watching a soccer match while he was on his holiday in December 2018 (Muriuki, 2020).

It is important to note that poor, young men may also be targeted and victimised by the police because of the spaces they occupy. Some scholars have shown that young men may be singled out and brutalised by the police when they are seen as ‘matter out of place’

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<sup>130</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>131</sup> Ibid

<sup>132</sup> Focus group, young men, Kawangware, 16 October 2018

<sup>133</sup> Focus group, Kiambiyu traders, Nairobi, 4 October 2018

<sup>134</sup> Interview, young male, Kiambiyu, 19 October 2018

(Douglas, 1966). In his work on policing in South Africa, Andrew Faull (2017: 49) noted that poor, young men are often singled out by the police when they are found walking around in affluent residential neighbourhoods or hanging around upmarket shopping malls, bars and restaurants that are seen as being for the affluent social groups. While this is plausible in Kenya, it did not emerge strongly in my research. What emerges most strongly in Kenya is the fact that some spaces are imagined as dangerous or risky, and therefore as requiring brutal policing, as other scholars have noted (Ruteere, et al, 2013; van Stapele, 2016; Jones, et al, 2017). For instance, in her work, Wangui Kimari (2017: 12) notes that Mathare, an informal settlement in Nairobi, is imagined as the place where 'the real thugs live'. These claims are often quite potent as illustrated by the judgement of the Court of Appeal in Nairobi acquitting five police officers, who had been convicted of murder by the High Court for killing seven taxi drivers in Kawangware (Ahmed Omar & 5 others v Republic of Kenya, 2014). The main thrust of the judgement was that Kawangware was a 'dangerous place', making the police officer's claims that they acted in self-defence plausible even though there was no evidence that the taxi drivers had posed any threat to them (ibid). In other words, space (especially the urban margin) may be construed by the police – and other state authorities – as a proxy for danger and the presence of young men who are themselves seen as sources of threat in these spaces as necessitating the intervention of the police, often in brutal ways, as other scholar have noted elsewhere (Steinberg, 2011; Faull, 2018).

The foregoing discussion demonstrates that the targeting and victimisation of poor, young men is shaped by their discursive construction as a security threat which is fed by their socio-economic status, the work they do, and the spaces they occupy. In the next section, I turn to how the police rely on the use of lethal force to demonstrate that they are doing the work of fighting crime.

#### **5.4 Performing crime control: Police use of lethal force**

To understand why poor young men are disproportionately impacted by the police use of lethal force, we need to pay attention to the victims (young men) and the police as well as the societal actors, including the government and the general public, who are involved in the broader social negotiations around security and safety in the country. In the preceding section, I have shown how poor, young men are discursively constructed as a security threat and therefore as deserving of brutal policing. As such, I need not to go into much detail on that here. However, it is crucial to point out that the foregoing discussion is not in any way meant to suggest that young men do not engage in criminal activities and in particular, given my focus here, violent crime. There are many young men, especially at the urban margins who are involved in violent crime as several of my interlocutors noted. For instance, Wanyonyi told me about several of his friends whom he knew to be armed robbers.<sup>135</sup> He also told me that five of his friends had been shot dead by the police in a botched robbery attempt in Kitisuru, a posh suburb in Nairobi.<sup>136</sup> In Kiambiu, the mother and siblings of Otis, the young man that disappeared after being arrested by the police indicated that he was involved in

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<sup>135</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>136</sup> Ibid.

violent robbery.<sup>137</sup> Mzito, a young man from Githurai who was one of my main respondents in a previous study also indicated that he had been involved in armed robberies in the past and he introduced me to other young men who were involved in robbery that I interviewed for that study (Wairuri, 2014). My purpose here is not to examine whether the use of lethal force by the police is justified or not but rather to explore how prevailing discourses produce them as deserving of such brutal violence from the police.

With regard to the police, scholars have showed that the police have historically been imagined as crime fighters (Reiner, 2010; Anderson & Killingray, 1991; Bittner, 1970; Bottoms & Tankebe, 2017; Waddington & Wright, 2008). However, this imaginary of the police as crime fighters has been challenged by scholars who have observed what the police actually do when they are on the beat. Scholars have noted that the police spend more time on administrative duties than they do on crime-related tasks (Bayley, 1994) and that they also avoid responding to distress calls by employing delay tactics (Altbeker, 2005) or avoiding certain areas that they are meant to be patrolling (Steinberg, 2008). Other scholars have shown that police violence is inconsequential in bringing down the levels of crime in a society (Wacquant, 2003), or that the prevailing economic situation has more significant impact in reducing crime rates than policing (Dixon, 2005). Peter Manning (1978) aptly described the reality that the police do not fight crime as the 'open secret' of policing. However, in an attempt to match up to the prevailing imaginary of their role in the society, the police manipulate appearances – performing like crime fighters – so that they do not lose political and social support and with it their budgets (Faull, 2017; Manning, 1978).

One of the ways that the police do this is through the production of crime statistics to show the number of cases they handled as Andrew Faull (2017) shows in his ethnography of the South African Police Service (SAPS). Another way in which the police attempt to manipulate appearances in order to be seen to be doing the work of 'slaying the monster of urban crime' is to use the spectacle of brutal policing (Wacquant, 2012). Julia Eckert (2005) examines this phenomenon in India noting the suspicions of the members of the public that some of these 'shoot-outs' are staged by the police. In Kenya, analysts have noted that in many cases, the young men whom the police claim to have shot because they were 'dangerous' are often unarmed (Fick, 2018; MSJC, 2015). Others have noted cases where the police have shot suspects who are already in their custody (van Stapele & Diphoon, 2019). This is not lost on the young men at the urban margins who are often the victims of this brutal policing. In Kawangware, one young man noted aptly that since the police 'are unable to deal with the challenge of crime adequately, they have resorted to harassment and killing of innocent young men so that they can be seen to be working.'<sup>138</sup>

The spectacle of violence has been a core part of everyday policing in Kenya since the colonial-era to the present day. As I noted in my earlier discussion of the policing of dissent, the colonial regime deployed brutal police violence in order to sustain the colonial rule (Maina-Ayiera 2015; Furuzawa 2011; Anderson & Killingray, 1991). David Killingray (1986)

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<sup>137</sup> Interview, Mama Otis, Kiambiu, 6 December 2018

<sup>138</sup> Focus group, young men, Kawangware, 16 October 2018

also noted that the police deployed brutal violence in their everyday policing against suspected criminals in order to keep the city of Nairobi safe for the settlers. This brutal approach to the policing of crime continued into the post-colonial period. This approach is illustrated by the spectacular hunt of a three-man gang – *Wacucu* (Anthony Ngugi Kanagi), *Rasta* (Bernard Matheri Thuo), and *Wanugu* (Gerald Wambugu Munyeria) – that was widely covered by the media in the 1990s (NaiNotepad, 2017). The three were later shot and killed by the police (ibid). In more recent times, the police have also relied on the spectacle of dramatic violence especially involving the use of firearms to create the image that they are ‘tough on crime’. In one case, police officers were caught on camera by a motorist as they shot dead three young men, whom they had arrested on Lang’ata Road to the South-West of the City of Nairobi (Smith & Siddique, 2011). In another video that was widely shared on social media, a police officer was showed shooting two young men in the streets in Nairobi’s Eastleigh area as a crowd watched (Amadala, 2020). My interlocutors cited several other cases that were similar. For instance, Shikuku, the youth leader in Kiambu, recalled a case where one of his friends was arrested by police officers who subsequently shot him dead in broad daylight as members of the community watched.<sup>139</sup> Similarly, in Mombasa, the parents of the three teenage boys that I mentioned earlier claimed that police officers arrested them, ordered them to lie on the ground before shooting them dead.<sup>140</sup>

The use of lethal force by the police as the appropriate response to crime has often been endorsed by senior police officers and government officials. For instance, in 2004, when an OCPD shot dead three robbery suspects who had been arrested and immobilised by police officers, he stated that *‘the fact that they were robbery suspects was sufficient reason for them to be shot dead’* (CHRI & KHRC, 2006: 22). Recently, a senior police officer in Nairobi suggested that killing young men who are suspected to be criminals is the appropriate way of dealing with crime. When he was confronted by members of the public about the rising cases of police killings of young men in their neighbourhoods, he is quoted as having responded that *‘if we don’t kill these people, they will kill you’* (Austin, 2020). Government ministers have also often endorsed police killings of suspected criminals (e.g. Mwachanga, 2014). For instance, John Michuki is said to have issued a shoot-to-kill order, announcing that the police would no longer arrest armed criminals (Ombati, 2007). Michuki is reported to have said *‘How do you arrest someone who has a gun and is ready to fire? Or will you arrest him when you are already dead?’* (ibid). More recently, President Uhuru Kenyatta is also reported as issuing a shoot-to-kill order against illegal gun holders, saying *‘Those who own the illegal firearms should surrender them as soon as possible. If they do not return the arms, utarudi nyumbani ukiwa kwa sanduku [you will be taken home in a coffin]’* (Letting & Bakari, 2018). Such statements indicate that the Kenyan government understands the use of lethal violence in an extra-judicial manner against suspected criminals as the appropriate way of handling crime. Philip Alston, then UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, noted that the execution of suspects by the Kenyan state police was systemic and claimed that there were several police death squads in the state police forces (Alston, 2009).

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<sup>139</sup> Interview, Shikuku, Nairobi, 30 Nov 2018

<sup>140</sup> Focus group, families of victims, Mombasa, 24 January 2019

One of the ways in which the government and the police justify their endorsement of the use of lethal force against suspected criminals is to argue that the courts are unable to hold the thieves accountable. For instance, in the same speech where he is said to have issued the shoot-to-kill orders to the police, Michuki complained that the courts were lenient on armed criminals (Ombati, 2007). He is quoted as saying *'the majority of the armed criminals are released on a 2,000 Kenyan shillings (about USD 20) bail'* (ibid). Moreover, indeed, while it is somewhat odd for these sentiments to be stated officially by a senior government officials, many Kenyans see the courts as ineffective (Kameri-Mbote & Akech, 2011; Wairuri, 2022). These sentiments are also shared by some police officers who grow cynical of the criminal justice system when they see people they perceive to be guilty being acquitted, released for lack of evidence, or set free on legal technicalities as Joyti Belur (2010) notes in her study of police brutality in India. In particular contexts, marked both by high levels of crime and/or fear of crime and under-protection by the state police, this may lead to the emergence of police vigilantes as I have discussed in detail elsewhere (Wairuri, 2022).

Police vigilantism refers to the phenomenon where police officers use their authority to generate security and justice outcomes outside the legal order (Cooper-Knock & Owen, 2014; Wairuri, 2022). Kenya has seen the emergence of several police vigilantes. The most notable of these is Patrick David Shaw, a British man who worked as a police reservist in Nairobi in the 1970s and 1980s, is emblematic of the approach to policing in both the Kenyatta and Moi regimes. Shaw is renowned for executing young men whom he suspected to be criminals and who failed to heed his warnings to desist from crime or leave the city (Smith, 2013). Since then, several police vigilantes have emerged at Kenya's urban margins and they are known to target and allegedly kill many young men in these neighbourhoods. In her study in Kibera in Nairobi, Michele Osborn (2012) reported claims that a police vigilante operating in the neighbourhood under the moniker 'Stupid' took a young man from his family home and the shot and killed him. Elsewhere, I examine the killing of two brothers in Githurai by a police vigilante called Katitu (Wairuri, 2022a). More recently, there has been increased attention on the infamous Rashid, operating in Eastleigh and Mathare, who has allegedly killed many young men, with some of the cases being caught on camera (Olewe, 2019; Izugbara & Egesa, 2020). In both Kawangware and Kiambiu, the young men I spoke to claimed that some officers had specific targets of the numbers of young men they were going to kill. In Kawangware, some of them claimed that one of the officers who terrorised them often claimed to be the 'sharpest shooter' in Kenya.<sup>141</sup> As a result, some of them suspected that there might have been a competition between police officers on who killed people. While the existence of such a competition between police officers – possibly informal – would be nearly impossible to verify, the claims of these young men bear resonance to the findings of historians that such competitions existed during the colonial times (Elkins, 2014:51). Furthermore, the fact that these police officers are not arrested, even in cases where the summary execution of young men is caught on camera, convinces many people that this approach to policing is endorsed by the leadership of the police and the government.

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<sup>141</sup> Focus group, young men, Kawangware, 16 October 2018

A crucial point to note here, as well, is that this brutal policing of poor, young men is often popularly supported. The popular support for the deployment of lethal violence by the police against suspected criminals has been examined by scholars around the world for a while now. In her study on police brutality in India, Joyti Belur (2010) notes that the use of deadly force by the police has been widely accepted by many people in Mumbai as the correct and effective response to controlling increased organized crime. Similarly in Kenya, analysts have noted the popular support for brutal policing of those whom they see as a security threat. Jacob Rasmussen (2013) and Mutuma Ruteere (2008) noted the support of the Kenyan public on the use of lethal violence against suspected members of Mungiki, a vigilante group that had terrorised people in Nairobi and the Central Kenya region with a series of beheadings. I have also examined this phenomenon in my earlier work. In one case, I examined the expression of support by many Kenyans for the brutal policing of the Somali and Muslim population in the country, through *Operation Usalama Watch*, following a wave of terrorist attacks by al-Shabaab (Wairuri, 2018). This counter-terrorism campaign was marked by many cases of police abuse including violence, sexual coercion, extortion and targeted assassinations of terror suspects (IPOA, 2014; Lind, et al, 2017; Wairuri, 2017). Police brutality is also supported by people at the urban margins whom it is said to disproportionately affect. In his study on Brazil, Ronald Ahnen (2007), found higher levels of support for police violence amongst the residents of the *favelas* than in the rest of the society. People in the *favelas* expressed support for the police to beat a suspect to obtain a confession or killing suspects after apprehending them (ibid). This indicates that people support police brutality when it is directed towards the people in the society who they see as deserving it. Usually, as Teresa Caldeira (2013) also studying Brazil, police brutality is supported when it is directed against people who fit the stereotype of criminal. Similar sentiments were recorded by Paes-Machado & Noronha (2002) in their study of policing in the Brazilian *favelas* where they found that people supported police violence based on their moral judgement against the victims. In other words, people who saw themselves as morally upright citizens supported police violence against those they saw as morally deficient. Thus, someone like Makori, a young man who complained about being repeatedly assaulted by police officers, saw police violence against other young men in Kiambu, whom they viewed as ‘criminals’ as justified.<sup>142</sup> In his view, police violence was justified against people who were found on the streets during *masaa mbaya*, which roughly translates to ‘bad hours’ or ‘wrong hours’.<sup>143</sup> The Kenyan police have popularised the idea that *masaa mbaya* is a time when only themselves (the police) and criminals – often termed as *mwizi*, *mlewi na malaya* (thieves, drunkards and prostitutes) – should be on the streets. Despite acknowledging that some people close their businesses late or get back home late from work, he believed that the police were justified in using violence against the people that he saw as deserving it; that is, those who walked around the streets at night. I have also demonstrated this in my earlier work on popular support for police violence in Githurai (Wairuri, 2014).

The prevalence of support for police violence in these communities may partly explain why young men often did not receive community support when they complained about

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<sup>142</sup> Interview, Makori, Nairobi, 1 November 2018

<sup>143</sup> Ibid.

victimisation by the police. In the opening chapter to this thesis, I discussed the case of Emmanuel and Benson, the Kianjokoma brothers, who died in police custody. I noted that the case attracted many actors, including members of the community who staged protests against the police. However, the occurrence of street protests following a case of police abuse should not be presumed. For instance, the protests against police brutality that I observed in Kawangware following the death of a young man from there, were mainly attended by his friends while most other members of the community stayed away.<sup>144</sup> Shopkeepers who had shut their shops at the peak of the protests, soon reopened and observed the protests unfold from a distance. Furthermore, in communities where the legitimacy of the police brutality is strongly contested, protests may backfire and trigger counter-protests. This has more recently been demonstrated by counter protests in the US, under the banner 'Blue Lives Matter', following the #BlackLivesMatter protests demanding that Derrick Chauvin, the officer who killed George Floyd, and his colleagues be held accountable for their actions (Hill, et al, 2020; Bogel-Burroughs & Marie Fazio, 2021). I also demonstrated this in my earlier research in Githurai on the community response to the killing of Kenneth Kimani, a young man from Githurai, by Police Constable Titus Musili, even though the protests and counter-protests took place just over a year apart (Wairuri, 2022). Following Kimani's killing on the evening of 14 April 2013, his family and friends marched to the police station to demand action against Katitu. Later, residents of Githurai staged protests when Katitu was arrested 31 August 2014, demanding his release (ibid).

Some scholars have also noted that members of the community sometimes encourage the police to deploy violence. In her work, Julia Hornberger (2013) noted how members of a local Pentecostal church supported the deployment of police violence towards people in their neighbourhood who did not subscribe to their moral code. In Kenya, scholars have also noted this support for police violence by people who believe that it will keep their neighbourhoods safe (Ruteere & Pommerolle, 2003; Wairuri, 2022). My interlocutors suspected that the people who had regular interactions with the police were the ones who told the police about them, leading to their victimisation. For instance, Omondi, a young man who narrowly escaped death when his two friends were killed in a police raid on their house in Kiambiu, said that he also suspected people who had frequent dealing with the police, such as the makers and sellers of *chang'aa* (an illicit distilled spirit drink), to be informing on him to the police.<sup>145</sup> He argued that they were the people that the police visited regularly to collect bribes and they were also likely to offer information to the police because they also wanted to remain in the good books of the police. He also suspected that members of the Community Policing and *Nyumba Kumi* committees<sup>146</sup> would inform on young men to the police in order to legitimate their own positions.<sup>147</sup> Other scholars have also noted this view of Community Policing and *Nyumba Kumi* initiatives as mechanisms of surveillance (Gjelsvik, 2020; Brankamp, 2020;

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<sup>144</sup> Field notes, 16 October 2018

<sup>145</sup> Interview, Omondi, Nairobi, 1 December 2018.

<sup>146</sup> As noted earlier, the Community policing initiative took root in Kenya under the NARC government in 2003 (Ruteere and Pommerolle (2003). The *Nyumba Kumi* (ten houses) initiative emerged afterwards, mainly imported from a Tanzanian experiment where households are clustered in 10s to address security concerns at the local level (see, Diphoorn, & van Stapele, 2021).

<sup>147</sup> Ibid.

Kioko, 2017). Wanyonyi suspected that his repeated harassment by the police emanated from reports by some people in the community who failed to understand how he was able to acquire a new motorbike.<sup>148</sup> Both Wanyonyi and Omondi, claimed that people who were jealous of anyone's achievement would often interpret it as resulting from engaging in criminal activities and then report them to the police.<sup>149</sup> From the descriptions of these young men, jealousy here seemed to serve a similar function as the occult, explaining misfortunes that were difficult for one to understand as Peter Geschiere (1998: 814-5) noted. And, as Steffen Jensen and Lars Buur (2004) noted in the examination of suspicion of witchcraft in South Africa, jealousy was seen as emanating from people who were close, especially neighbours.

In the preceding section, I examined how poor young men are discursively constructed as a source of security threats for other people in the society and thereby as deserving brutal punishment. In this section, I have shown how brutal policing comes to be accepted by many actors, including members of the society, the police and the government, as the appropriate response to crime. While other scholars have noted that members of the public support police violence because it makes them feel safer. I have noted young men's suspicion that tagging them as criminals is used by other people in the community in their everyday negotiations with the police which strains community solidarity. Meanwhile, the police and the government support deployment of violence against poor, young men because it offers them the opportunity to bolster their legitimacy by showing that they are acting 'tough on crime.' In the next section I examine how these young men respond when they have been victimised by the police.

#### **5.4 Young men's response to police brutality**

In this thesis, I am arguing that people's responses to victimisation by the police is a social negotiation shaped by their structural position, political subjectivity and the resources they can deploy. So far in this chapter, I have noted that the discursive construction of poor young men as a security threat places them in a structural position that it exposes them to police abuse. In this section, I build on this to show how their structural position and limited resources make it difficult for them to pursue police accountability following victimisation by the police which I contrast with the ability of some families of poor, young men who are killed by the police to pursue police accountability. As a result, many of them rely on individual and collective coping mechanisms such as running away from their neighbourhoods when this is necessary and feasible. However, there are situations in which the intervention of state institutions is considered necessary to resolve conflicts between young men and the police. However, to access these institutions, poor young men seek the intervention of intermediaries. Even then, I note that they often pursue informal redress rather than formal accountability.

Nearly all the young men that I spoke to at the urban margins for this study narrated unpleasant experiences with the police including being physically assaulted and extorted by the police. The vast majority of them did not attempt to pursue police accountability. Some

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<sup>148</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>149</sup> Interview, Omondi, Nairobi, 1 December 2018

victims of police abuse said that they were not aware of the existence of the agency or how to reach them. One of the young men I spoke to in Kiambiu appeared to be surprised during our interview that it was possible to pursue police accountability stating that *'if I knew, I would have reported the officers a long time ago.'*<sup>150</sup> Scholars have noted that the lack of information as a key barrier for the access to justice for by marginalised groups (Mece, 2016). Wanyonyi, the young man who had been repeatedly harassed and threatened with death by a senior police officer in Kawangware, knew about IPOA and had wanted to file a complaint. However, he told me that he had been unable to do so because he did not know where IPOA offices were.<sup>151</sup> He said that he gave up after asking around and none of the people in his social networks knew where their offices were.

Only Simiyu, a young man from Kawangware, said that he had attempted to file a complaint with IPOA.<sup>152</sup> However, he soon dropped the matter after realising what the process would involve and the potential outcome. While he had expected the IPOA officials to call the officer and warn him to stop the harassment, they told him that their procedures required them to open a file and fully investigate the matter.<sup>153</sup> He believed that this would have unnecessarily complicated the matter, taking more time and effort than he was willing to invest.<sup>154</sup> I examine how costs (both time and money) create barriers to victims' efforts to pursue accountability in more detail in Chapter 7 below. To put it simply, even when people are able to reach the accountability institutions such as IPOA, they may be looking for the matters to be resolved informally, something that institutions such as IPOA may prove unfit for, leading people to withdraw their complaints.

It is noteworthy that, while young men found it difficult to pursue police accountability, it has sometimes been possible for the families of young men who have been killed by the police to do so. There are a few notable cases that I can highlight here. One is the case of Kenneth Kimani, the young man who was shot and killed by Katitu in Githurai that I have examined in detail elsewhere (Wairuri, 2022). Kimani's family lodged a complaint with IPOA leading to Katitu's arrest and prosecution. The High Court found Katitu guilty of manslaughter and sentenced him to 15 years in prison (Republic of Kenya v Titus Ngamau Musila, 2018) and the Court of Appeal affirmed both the verdict and sentence issued by the High Court (Titus Ngamau Musila v Republic of Kenya, 2020). Another example is the case of Martin Koome Manyara, a 36-year old man who died following assault by the OCS of the Ruaraka Police Station in Nairobi while he was in custody also filed a complaint with IPOA (Republic of Kenya v Nahashon Mutua, 2018). Following investigations, IPOA recommended to the DPP that the OCS Nahashon Mutua be charged with murder. Mutua was convicted by the High Court and sentenced to death (Republic of Kenya v Nahashon Mutua, 2019). In 2020, the Court of Appeal sustained the conviction and the sentence (Nahashon Mutua v Republic of Kenya, 2020). This shows that other people may be able to pursue police accountability in

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<sup>150</sup> Interview, young male, Nairobi, 8 November 2018

<sup>151</sup> Focus group, young men, Kawangware, 16 October 2018

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

ways that the poor young men who are killed by the police may not have been able to do while they were alive, even where they fear that the victimisation they are facing may result in them being killed. Both of these cases relate to the police killing of young men who were in their custody. The Kianjokoma brother's case that I discussed in the introduction to this thesis falls into this category.

The successful court cases above, however, should not be taken to suggest that all the cases of death of young men in police custody, let alone all forms of police abuse, always end up with the police officers being held to account. In some cases, the victims' families struggle with their efforts to pursue accountability. Take, for instance, the case of Espino, a 40-year-old man who died from injuries allegedly inflicted by police officers at Mariakani Police Station in Mombasa where he had been detained after arrest (Malemba, 2020). Investigations into the case have been slow, leading some of the observers to fear that it is unlikely that any action will ever be taken against the police officers involved.<sup>155</sup> This is to say, as I showed in the discussions on the cases of Kwekwe and Baby Pendo in the preceding two chapters, that police accountability is the product of social and institutional negotiations rather than a factor of the nature of police abuse that people are subjected to.

In any case, given how frequently they were subjected to police abuse, many young men saw their victimisation by the police as something to be expected and, once experienced, to be survived. In this sense, some people viewed police abuse as just one other challenge to be faced alongside others such as lack of public schools, public health facilities and failing infrastructure. <sup>156</sup> While some felt targeted by the police, others framed police abuse as something that affected everyone, pastors and *chang'aa* sellers alike. Some of them had resigned to the reality, with one young man telling me '*tunamwachia Mungu coz sasa utafanya nini?* [We just leave the matter to God because what else can one do?].<sup>157</sup> Many others, as I discuss in more detail in Chapter 7 below, believed that offering bribes to the police quickly was the easiest way to resolve conflicts with them and to avoid escalation.<sup>158</sup> Nonetheless, it is important to note that the opportunity to pay bribes in order to get out of trouble with the police is not always available for people, especially young men, to get out of trouble. For many of the poor young men I spoke to for this study, police abuse was such a common experience that their responses to it was sometimes part of their life strategy. For instance, Geoffrey, a young man from Kimabiyu told me that he stopped working as a *matatu* conductor and began collecting garbage because his previous job required him to leave work later, exposing him to frequent encounters with the police that were often unpleasant.<sup>159</sup> Young men's engagement in leisure activities were also shaped by the possibility of police disruption. At the sight of a

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<sup>155</sup> Interview, MUHURI Official, 23 Jan 2019

<sup>156</sup> Field notes, Public Baraza, Kiambiyu

<sup>157</sup> Interview, Omondi, Nairobi, 1 December 2018

<sup>158</sup> Kiambiyu

<sup>159</sup> Group interview, young men, Nairobi, 3 December 2018

police officer young men often scattered.<sup>160</sup> Sometimes, the police still succeeded in ambushing them, leading to some arrests.<sup>161</sup>

Escape, in the sense of moving away, temporarily or permanently, from the neighbourhood was one of the ways that these young men could avoid the repeated and dangerous encounters with the police, especially when they were involved in serious conflicts with them. They could opt to leave the neighbourhood and go to another neighbourhood in the city, another city or to their rural homes. In Kawangware, the young men I spoke to suggested that they often considered these options but found them to not be viable.<sup>162</sup> To begin with, Kawangware was the place they knew – many of them had been born and raised there and others had moved from upcountry to Nairobi in search of better lives and settled in Kawangware due to pre-existing social connections. This is where their family and friends are; the people they could rely on for support when they needed it. It was also the place where they had built their own *hustles*, whether it was selling water, running a food kiosk or riding a *boda-boda*, and generated a customer base that they would lose if they were to go elsewhere. In a sense, they were rooted there. Moving away would be too disruptive.

That being said, there were some cases where running away was the only way to stay alive. Omondi, a young man who had narrowly escaped when two of his friends were allegedly shot dead by police officers in Kiambiu said that fleeing the neighbourhood was the only way he could have stayed alive.<sup>163</sup> Early the following morning, his mother gave him bus fare and told him to travel to their upcountry home in western Kenya to avoid encounters with the police. He travelled upcountry to his maternal grandmother's house and settled there doing casual labour in the village. It is noteworthy that leaving the city and going upcountry is one of the options that police vigilantes in Kenya are said to offer young men they suspect to be criminals in order to avoid being killed by them (Wairuri, 2022). This idea of sending young men who are seen as troublesome from the city to their rural homes has deeper historical echoes stretching back to the colonial times. In the colonial times, the presence of unemployed young men in the cities was seen as a problem by the colonial government leading them to institute measures to keep them away from the city. As John Lonsdale (2001) notes, movement of Africans through the city was regulated through the '*kipande*' (pass) system and residence in the city was only allowed for pass-holding migrant labourers. He further notes that the association of Nairobi with *nyumbani* ('home') was fundamentally contested and sometimes subject to forceful preventions through the demolition of settlements that native Africans had created. As a result, even in post-independence Kenya, rural-urban connections have remained crucial to notions of belonging and identity as Constance Smith (2019) notes. Till the present day, the rural areas are still imagined as the places that young men who are engaged in criminal activities should be sent so that they can both avoid the temptations of the city and also be straightened by the 'toughness' of life there. However, in Omondi's case, the move from Nairobi to upcountry was primarily meant to keep him safe, away from the reach of the police.

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<sup>160</sup> Field notes, 9 December 2018

<sup>161</sup> Ibid.

<sup>162</sup> Focus group, young men, Kawangware, 16 October 2018

<sup>163</sup> Interview, Omondi, Nairobi, 1 December 2018

Illustrating the difficulties that young men at the urban margins faced in starting life elsewhere, those who left often returned. For instance, Omondi's stay in the rural areas proved to have been temporary.<sup>164</sup> Just as he was beginning to get used to life there, some of his relatives complained that he was a burden to the household saying that he should have gone to live at his paternal grandmother's home. Soon, one of them went to the local chief and reported that Omondi had been chased away from Nairobi because he was a thief. The local chief gave him an ultimatum to leave the village or else he would refer him to the police. That is to say that moving away from the urban margins did not relieve one of the burdens of being a young man – and to be a young man, especially from the urban margins – was to live with the reality of being consistently suspected of to be a thief. Having nowhere else to go, he returned to Kiambu. Escape proved to not be a sustainable solution. Thus, unless one's life was considered to be under immediate threat, people stayed.

The young men that I spoke to for this study noted that leaving their neighbourhoods following altercations with the police also carried a reputational risk; it could be seen as a confession of guilt. Regular encounters with the police already posed a reputational risk which could only be worsened if they escaped. Indeed, one of the fears that young men had of being victimised by the police at the urban margins, especially repeatedly was that some people would begin to believe that they were, indeed, criminals. These views were partly anchored in the deep suspicion that many people at the urban margins have of their neighbours coupled with the suspicion that the police often knew who the criminals were, as I have examined elsewhere (Wairuri, 2014). Since the vast majority of people's encounters with the police are fairly straight forward, often involving a stop by police officers who often demand a bribe that is then paid following a quick negotiation and then the person is let go, repeated and violent encounters with the police was seen as something that needed explanation. Makori, who had been attacked in his home in Kiambu on three occasions, worried that the repeated attacks by the police would convince some of his neighbours that there was something else going on between him and the police officers.<sup>165</sup> Similarly, Wanyonyi complained that the frequent and sustained attention from the police would ruin his reputation in the community.<sup>166</sup> He wondered, '*nikienda kwa station kila time, watu kwa kijiji watanionaje? Si wataanza kuona mimi ni mtu mbaya* [If I keep going to the police station all the time, how will people in the community see me? Won't they see me as a criminal?]'<sup>167</sup> For this reason, many of them opted to stay and attempted to resolve the conflicts with the police officers. Unsurprisingly, they took different routes based on resources they had and the justice outcomes they were interested in, often recruiting intermediaries in these efforts.

Conscious of the barriers they faced in accessing accountability, some of the young men sought the intervention of civil society organisations in their attempts to pursue police accountability. Makori, the young man from Kiambiyu who had been subjected to repeated assaults by the police, sought the intervention of a human rights organisation in his attempt to pursue police accountability. As I discussed in Chapters 3 and 4 above, human rights

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<sup>164</sup> Ibid.

<sup>165</sup> Interview, Makori, Nairobi, 1 November 2018

<sup>166</sup> Interview, Wanyonyi, Nairobi, 19 October 2018

<sup>167</sup> Ibid.

organisations often play a crucial role in helping victims of police abuse to pursue police accountability. However, the access of victims of police abuse to human rights organisations should not be taken for granted. In some ways, the accessing human rights organisations may be marked by the same kinds of barriers that people face in accessing state institutions of justice such as the courts (Cooper-Knock & MacDonald, 2021; Brems & Adekoya, 2010). Just like the courts, for instance, some people complain that these institutions are located far away from their neighbourhoods meaning that it would require them to incur costs to reach them (Wairuri, 2014). Additionally, people also sometimes complain that these organisations are located in affluent areas in the city that can be difficult for them to be comfortable in; that is, places in which they feel like and are likely to be seen as ‘matter out of place’ (Douglas, 1966). Makori’s access to the human rights organisation was itself mediated by a local human rights defender.<sup>168</sup> Human rights defenders are people at the local level who are affiliated to human rights organisations who help to identify cases of abuse and act as intermediaries, helping the victims to reach these human rights organisations. Many of them are trained as paralegals, meaning that they have an enhanced understanding of issues of rights and justice (Diehl, 2009; Dugard & Drage, 2013).

Following the initial report by the human rights defender, the organisation dispatched a vehicle to pick them up and take them to the organisations office in Westlands area, an affluent business district in Nairobi.<sup>169</sup> He could not recall the name of the organisation. He expected that he would get a lawyer when they got there who would represent him in court and they would launch a court case immediately. However, when they got there, they found a long queue and had to wait for several hours before he could be seen by the officers, which frustrated him. Eventually, when it was his turn to be served, he saw two officers who – much to his disappointment – were not lawyers.<sup>170</sup> The officers took details of his case and advised him to return the next day for medical tests. He was unable to return the next day as he was feeling much worse from the injuries he had sustained. At a later date, the organisation sent a taxi to take him to their offices for the medical check-up. He said that at the time, he did not complain about the time that the process was taking because he was not working anyway and was depending on the generosity of his neighbours and friends to survive. Nonetheless, he was frustrated when the organisation went quiet after the medical tests. By the time of our interview, several months later, he was not aware of the outcome of the tests or whether the process would still proceed or not. Furthermore, he told me that after he got better, his focus was on returning to work so that he could earn money to feed and house his family. The accountability process was no longer a priority. He felt that following up the case was a waste of time which would be better used working to make money for his family. Thus, when the human rights defender who had supported him suggested that they try another organisation, he turned down the offer.

Sometimes, poor young men who have been victimised by the police sought redress through the police chain of command. Many of the people I spoke to for this study, seemed to

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<sup>168</sup> Interview, Makori, Nairobi, 1 November 2018

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

prefer going to see senior police officers at the police station to resolve their conflicts with police officers. I explore this in more detail in Chapter 7 below. For now, suffice it to note that many of my interlocutors argued that the senior police officers were easier – though not necessarily easy – to reach. Therefore, people often took their grievances to the police officer in charge of the closest police station, mostly the Officer Commanding Station (OCS) and, in a few cases, to the Officer Commanding Police Division (OCPD).<sup>171</sup> Take the case of Wanyonyi, the *boda-boda* rider from Kawangware, for instance. Following the repeated harassment he experienced, that I noted earlier, and afraid for his own life, Wanyonyi sought an audience with the OCPD in an attempt to resolve the conflict and avoid further escalation.<sup>172</sup> He adopted this approach because the OCS was one of the police officers who was harassing him. He wanted to meet the OCPD to prove his innocence by showing that he had acquired his new motorbike legally, through a loan that his mother had taken from the bank and which he was servicing. He hoped the OCPD would resolve the conflict. To be clear, Wanyonyi was not looking to lodge a formal complaint that would involve investigations and possibly culminate in the prosecution of the police officers but rather to resolve the conflict to prevent it from escalating any further. Thus, in this case, the role of the OCPD is akin to that of the Headman in Sindiso Msini Weeks' analysis of conflict resolution in South Africa where they are expected to resolve a matter informally though their authority to do so emanates from their institutional position (Weeks, 2015-16).

Even so, access to these senior police officers was not always easy, especially not for poor young men who are discursively constructed as posing a criminal threat to the society. While on a visit to one major police station in Nairobi during an earlier study, I observed that business owners were able to see the OCS easily, often going to the front of the queue, to make complaints against unjustified arrests of their staff.<sup>173</sup> However, for many young men from the urban margins, gaining access to the OCS or the OCPD often required intermediation. Wanyonyi was fully aware of this. As a result, he followed a long-winded route to reach the OCPD, relying on personal connection with politicians. It matters here that Wanyonyi is active in local politics and is often involved in mobilising support for local politicians. This meant that he could reach local politicians directly to ask for their support. Initially, he reached out to his local elected representative, the Member of the County Assembly (MCA), who then escalated the case to the Member of National Assembly (MP) who then asked the OCPD to see Wanyonyi and resolve the matter. Still, Wanyonyi understood that on his own, he may not have been able to see the OCPD, be listened to, or even be believed. He therefore asked his mother to accompany him to the meeting so that she could present first-hand evidence that she had taken out a loan to help him buy the motorbike that he was being accused of having acquired by selling a gun. Several other young men noted that their engagements with the senior police officers had often required the interventions of *wazee wa mtaa* (the 'village' elders).<sup>174</sup> This demonstrates, as I am arguing in this thesis, that people's response to police

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<sup>171</sup> As noted earlier, even though the official designations of these officers have changed to Ward Police Commanders and Sub-County Police Commanders, the old titles OCS and OCPD have persisted.

<sup>172</sup> Focus group, young men, Kawangware, 16 October 2018

<sup>173</sup> Field notes, March 2015

<sup>174</sup> Focus group, young men, Kawangware, 16 October 2018

abuse are a social negotiation shaped by the resources they have available to them, including personal connections, that they can deploy in their response to police abuse.

Even in the cases where young men gained access to the OCS or the OCPD, the outcomes of these processes were often uncertain. As I discuss in Chapter 7 below, while some of the victims of police brutality were satisfied by the interventions of the senior police officers, others who complained said that their complaints had either not been taken seriously or that they were frustrated by the outcomes. In Wanyonyi's case, the outcome of the process was still uncertain at the time of our interview, which he found frustrating. Going into the meeting, Wanyonyi hoped for three things to happen. First, he hoped that the OCPD would call the OCS into the meeting so that they could discuss the matter together. From our conversation, I understood that Wanyonyi was hoping to avoid the escalation of the harassment he was experiencing by demonstrating to the OCS that he had the audience of somebody more senior than him. Secondly, he had hoped that by his mother showing both the OCS and the OCPD the receipts and loan documents for the purchase of the motorbike, the officials would recognise that he had acquired his motorbike legally. Finally, he had hoped that they could ask the OCS to say where he had got the information about him owning a gun from so that they could get to the bottom of the matter and establish the truth. In the end, even though he got to see the OCPD, none of these objectives were met. After listening to Wanyonyi and his mother, the OCPD told them that he would call the OCS later to discuss the matter. However, there was no way for him to know whether the conversation happened or whether his issue had been resolved because accessing the OCPD again was very difficult. At the time of our meeting, though, he told me that he had not seen the OCS for a few weeks and so the harassment seemed to have stopped for the time being. In other words, while he had not achieved accountability or redress, his strategy may have been successful in mitigating the risk of future abuse. That said, when I last saw him, Wanyonyi could not be sure that the threat to his life, posed by the police officers who were harassing and threatening him was over, nor if it could ever be.

## **5.5 Conclusion**

This chapter has demonstrated how people's structural position can severely constrain their ability to pursue police accountability. I have showed how the discursive construction of poor, young men as a criminal threat to the society, which hangs over their heads like the proverbial sword of Damocles, not only exposes them to police abuse but also constrains their ability to pursue police accountability. I have added on to the existing literature on police abuse of poor young men (CHRI & KHRC, 2006; van Stapele, 2016; Ruteere, 2008; MSJC, 2015), by showing how data on crime and discursive terms such as 'gangs' are weaponised by the police and the government to justify the deployment of lethal violence against young men. This makes it difficult, if not impossible, for them to pursue police accountability following victimisation by the police. In this thesis, I argue that people adopt different strategies in response to police abuse, which include individual self-help mechanisms. Here, I showed that poor, young men often rely on escape to avoid further harms. However, escape is not always possible. Even where they succeed to get away from the police, escape only offers them temporary relief, and may carry a reputational risk. I am also arguing in this thesis that people

may seek the intervention of state institutions to resolve conflicts with police officers in order to avoid further harms. In this case, I have noted instances where poor, young men went to senior police officers seeking for them to resolve the conflicts in informal ways, though on the basis of the formal power they hold. To do so, however, they require the support of intermediaries, such as parents and local politicians. To say that it is difficult for poor, young men to pursue police accountability is not to say that they cannot make attempts to do so. I noted cases where some young men attempted to do so. However, they often dropped the complaints as the processes, either at IPOA or intermediaries such as human rights organisations, proved to be complex and time consuming, thereby competing with other survival activities. This reflects the fact that, as I highlight throughout this thesis, that the processes that people embark on and the justice outcomes they pursue, in response to police accountability, should always be understood as reflecting what the victims consider feasible within their prevailing circumstances.

## Chapter Six

### **‘Human Rights don’t work on the streets’: National and grassroots efforts to address the victimisation of queer people by the police in Kenya**

#### **6.1 Introduction**

This thesis argued that people’s responses to police abuse should be understood as a social negotiation that is geared towards generating particular justice outcomes driven by their structural position, their political subjectivity and the resources that they are able to deploy. In this chapter, I examine the the response of queer people at Kenya’s urban margins to police abuse. Scholars have showed that the police target and victimise queer people because of their sexuality, gender identity and/or gender expression in Kenya (HRW, 2015; KHRC, 2011) as elsewhere in the world (Nevius, 2018; Russell & More, 2016; Naik, 2017; Williams, 2012). I show how the criminalization of same-sex relations and the prevalence of homophobic and transphobic attitudes in Kenya not only expose queer people to police abuse but also constrain their ability to pursue police accountability. Aware of the limits imposed by their structural position in the society, I explore the efforts by queer people at Kenya’s urban margins to build solidarity networks that, amongst other things, help them avoid harms by the police. I also explore how those networks have grown into a broader LGBTQ+ movement that is targeting the decriminalisation of same-sex relations, which many queer people in Kenya as a crucial step in addressing the police abuse, and other forms of discrimination that they are subjected to.

Here, I use the term ‘queer’ to refer to the people who share a social positioning that is minoritising and marginalising in relation to the heteronormative ideas of sex and gender (Judge, 2018: 9). I prefer the term queer to the common term LGBTQ+ (in its various permutations),<sup>175</sup> because it resists the kind of stability that terms such as gay, lesbian or LGBTQ+ imply (Jagose, 1996). As Annamarie Jagose (ibid) argued, people’s sexual and gender identities should be understood as a process rather than a property; identity is ongoing and always incomplete (ibid: 83). People’s identities change. Sometimes this is because of people’s own sense of who they are shifting or the emergence of different categories to which people believe they belong. For instance, it is notable that some men identify themselves as Men who have Sex with Men (MSM<sup>176</sup>), which emerged as an epidemiological category in the wake of the HIV/AIDS pandemic (Boellstorff, 2011; Camminga, 2019; Camminga & Wairuri, 2021). This is to say that even where people describe themselves as gay, lesbian, or MSM, these identities should be respected but should not be understood static. Nonetheless, where possible and necessary to provide people’s identities, I use the terms that people used to identify themselves. Moreover, I use the term LGBTQ+ when describing organisations that work with queer people in Kenya because this is how most of my interlocutors in these organisations individually and collectively described them.

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<sup>175</sup> This acronym appears in various forms including LGBT, LGBTI, LGBTQQ (adding Questioning), and LGBTQIA.

<sup>176</sup> Abbreviation for ‘men who have sex with men’, which is itself a short form of ‘men who have sex with men but do not identify as gay.’

The chapter proceeds as follows. First, I provide an overview of the policing of queer people in Kenya. I show that the police abuse they experience is shaped by the criminalisation of same-sex relations as well as the prevalence of homophobic and transphobic attitudes in the society. In the next section, I focus on the extortion of queer people showing how it is often marked by the collusion of police officers with some queer people to target others. In the third section, I examine the strategies that queer organisations at the grassroots are deploying in response to police abuse. Specifically, I explore their community-led efforts to educate queer people about their rights, resolve conflicts involving queer people in order to avoid engagements with the police as well as their efforts to build relationships with the police at the local level. I argue that these interventions have enjoyed mixed success. Finally, I examine the efforts of the LGBTQ+ movement to pursue legal reform as one of the strategies of addressing police abuse. I note that this is a crucial step but ultimately inadequate to address police abuse, as some of my interlocutors observed.

## **6.2 The policing of queer people in Kenya**

Many analysts attribute the targeting and victimisation of queer people in Kenya by the police to the criminalisation of same sex relations (HRW, 2015; KHRC, 2011; ERT, 2012; Shaw, 2018). Kenya's constitution does not expressly outlaw same-sex relations and neither does it protect queer people from victimisation on the basis of their sexual orientation and gender identity (Gitari, 2019). However, Article 45 of the Constitution of Kenya (2010) restricts marriage to adults of the opposite sex. While this provision does not refer to same-sex relations, it is used by some people to argue that against same sex-relations in Kenya as demonstrated by the High Court's decision to partly anchor their refusal to decriminalise same-sex relations on it (Eric Gitari vs Attorney General, 2016). The anchor of the criminalisation of same sex relations in Kenya is the penal code, in particular Sections 162 and 165 (Penal Code, 2010). Section 162, prohibits what it terms as 'carnal knowledge of any person against the order of nature.' This offence is punishable by imprisonment of fourteen years for both parties (where the act is consensual) and twenty-one years where the act is not consensual. Section 165 prohibits what is termed as 'gross indecency' between males, whether in private or in public. The penal code prescribes a punishment of five-year imprisonment for this act. These legal provisions are widely understood to have been imported to Kenya from India by the colonial regime as they bear a close similarity to section 377 of the Indian Penal Code (ERT, 2012). Similar provisions found in the laws of several other former British colonies have therefore been termed as 'descendants' of section 377 (HRW, 2008:6-7; ERT, 2012). These legal provisions are widely understood to relate to the same-sex relations amongst men but not lesbians and bisexual women, transgender and intersex persons (Arimoro, 2021; Shaw, 2018; ERT, 2012; GALCK, 2019). However, these laws are understood to have created the misguided perception amongst the police and the public that gender minorities are criminalised (GALCK, 2019). From this, it is evident that what is policed is far broader than what is illegal.

### *Beyond law enforcement*

It is also evident that the policing of queer people is not necessarily motivated by the enforcement of these laws. Despite these laws being on Kenya's law books since colonial times, there have been very few prosecutions under these provisions of the penal code in Kenya's history. To date, it remains difficult to establish the true picture of the arrests and prosecutions relating to Sections 162 and 165 of Kenya's Penal Code because the police do not provide exact numbers of the people they charge with these offences. Media reports that claim, for instance, that there were 534 arrests related to same-sex relations between 2013 and 2017 (see, for instance, Burke, 2019) are misguided. LGBTQ+ organisations in Kenya have noted that these figures, drawn from reports of the IG of the NPS to parliament, conflate cases of bestiality and rape with cases allegedly involving consensual sex, all of which are categorized under the 'unnatural offenses' provisions in the Penal Code (HRW, 2015). In the period between 2011 and 2016, it seems that there were only two prosecutions on the basis of same-sex relations (Dubuis, 2020). This is to say that, even where the police arrest people under the guise of enforcing these legal provisions they rarely charge them in court with such offences. This suggests that the policing of queer people in Kenya is not really driven by the enforcement of the law in the way that it is intended, such as through prosecutions. Police officers I spoke to for this study told me that one of the reasons why they do not charge people under these legal provisions is that the offences are difficult to prove in court. Police officers in a focus group in Mombasa, for example, noted that it was difficult to charge people under these laws because there was often no complainant.<sup>177</sup> Alternatively, they noted, prosecuting people under these offences would require at least one of the parties to confess to the crime, which was unlikely, as they would risk imprisonment.<sup>178</sup> Previously, the police sometimes relied on the demeaning and bogus anal tests, ostensibly to prove that men had engaged in anal sex but this practice has since been declared illegal by the courts (Shaw, 2018; Ocharo, 2018).

To say that the policing of queer people is not focussed on the enforcement of these laws is not to say that the law does not matter. As I noted in the introductory chapter to this thesis, the law is very important to people's encounters with the state, including the police, because it has the power to construct categories that are imbued with power (Merry, 2003: 351; Butler, 1990; Camminga, 2019). Even though the police did not rely on the provisions of Section 162 and 165 to charge people in court, it is clear that these provisions effectively constitute all queer people as *unapprehended felons*, to borrow Jared Leighton's (2019). That is, the law constitutes queer people as criminals and therefore serves to justify their targeting and victimisation by the police. To be clear, only the act of same sex relations is a crime, not being queer. As one LGBTQ+ rights activist told me, 'most queer people understand the law as criminalising their existence because that is what we see in practise through the police.'<sup>179</sup> Thus, even though the police did not invoke these laws at the point of arrest or even use them in court, most of the queer respondents to this study saw these laws to be central to the problems that they face with the police. Therefore, this should be seen as an invitation for us to examine the ways in which the law is deployed in the policing of queer people. To do this,

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<sup>177</sup> Focus group, police officers, Mombasa, 15 Dec 2021

<sup>178</sup> Ibid.

<sup>179</sup> Personal communication, LGBTQ+ activist, 16 March 2022

we need to pay attention to what transpires in the interactions between the police and queer people at the urban margins.

In a few instances where the queer people I spoke to said that police officers arrested them, booked them at the police station and took them to court, they were often charged with offence such as touting, hawking, loitering or being drunk and disorderly.<sup>180</sup> That is, the police officers followed the procedures that are set out in the law but altered the content. Other participants in the study, including young men, market traders, and female sex workers, made similar claims. These are public order offences for which the word of the police carries the force of proof, which is to say that the police are not required to provide any evidence when they accuse people of committing these offenses. This indicates that whenever the police arrested queer people, they were mainly focused on imposing punishment rather than achieving specific law enforcement ends. They instrumentalise other laws to achieve their goal without having to bear the burden of proving the offences in court. The police know that this strategy works because most of the people they charge with these offences accepted them in court. This is because, over the years, there has emerged somewhat of a conventional wisdom amongst people at the urban margins who are frequently subjected to these arrests and charged in court on how to respond to these charges. As Malcolm, a gay man based in Nairobi told me, people have learnt that it is much better for them to accept the charges, even where they know themselves to be innocent, pay the fine imposed and get out, whether one thinks they are innocent or not.<sup>181</sup> People also understood that denying the charges triggered a long and complex legal process, which they also knew they were unlikely to win.<sup>182</sup> Before the adoption of a new constitution in 2010 that provided the right to bail for everyone, most people who denied charges in court were remanded for 14 days awaiting trial. After that, the cases were known to take a long time, as the police officers often failed to show up in court, occasioning multiple postponements. People have come to see that the process itself constituted the punishment, as Michael Feely (1979) argued, and therefore opted out whenever they could. This ends up being counterproductive, as I discuss in the next chapter. The chances that people will accept the charges in court makes it more likely, that the police will use the courts in this way to impose punishment. This shared understanding of the police and the people at the urban margins of how the system works, made it possible for the police to instrumentalise the law to punish people.

### *Homophobia and transphobia*

While the instrumentalisation of the law by the police to punish queer people is a crucial point to bear in mind, it is not adequate to explain the policing of queer people especially because there is a need to explain the mismatch between what is illegal and what is policed. As noted above, the police target and victimise transgender and intersex people, under the guise of enforcing these laws, even though the law does not criminalise them (GALCK, 2020; Arimoro, 2021). Respondents to this study noted that people whose appearance did not conform to gender norms --women who presented in masculine ways and

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<sup>180</sup> Focus group, MSM, Mombasa, 6 March 2019

<sup>181</sup> Interview, Malcolm, WhatsApp, 4<sup>th</sup> August 2020

<sup>182</sup> Ibid.

effeminate men – were often targeted for arrest and extortion.<sup>183</sup> Abdallah, a middle-aged gay man based in Mombasa, who described himself a *queen* (colloquial for effeminate gay man), said that men like him were more likely to be targeted and victimized by the police.<sup>184</sup> Similarly, Rashid, a young gay man in Mombasa attributed his arrest by the police together with his partner, a transgender woman, as they walked along a public beach in Mombasa to his partner’s appearance.<sup>185</sup> These arrests are not anchored in the law but rather reflect what the police consider worth of their intervention, ideas that are no doubt rooted in societal homophobia and transphobia. Understanding this requires us to lift the veil and look beyond the institution of the police to see the individual police officers both as members of the society and the policing institution, and whose attitudes often mirror the societal views including those concerning homophobia and transphobia.

Without falling into the broad generalisations of African homophobia, which has, been challenged by other scholars (e.g. Thoreson, 2014, it is evident that the Kenyan society has fairly high levels of homophobia and transphobia. For instance, a 2014 study suggested that the vast majority of the Kenyan society (88%) believe that homosexuality is morally unacceptable (Pew Research Center, 2014). Societal homophobia and transphobia is illustrated by the cases where the police arrested queer people because members of the community reported them. In one case in Kisumu, police officers are said to have arrested Rufus, a gay man, who worked for a local health NGO, following a report from the mother of one young man in the neighbourhood who claimed that he was trying to ‘recruit’ her son into homosexuality.<sup>186</sup> In Kenya, religious leaders have often justified homophobic and transphobic violence. One study found that most religious leaders in Kenya opposed same-sex relations and its decriminalisation, with a substantial minority (37%) expressing support for violence against queer people (Mbote, et al, 2018). One bishop in Mombasa is quoted as saying that ‘homosexual people are more dangerous than terrorists’ (Beja, 2012). It is worth noting that there are more affirmative Christian leaders and communities but this is not anywhere near mainstream religious beliefs (van Klinken, 2021).

Some of the queer people I spoke to thought that these attitudes have fomented and sustained homophobic attitudes and violence towards them, including those voiced by the police. This is consistent with the findings of scholars elsewhere that policing goes beyond the enforcement of the law, to also include the enforcement of codes, standards and ideals held by society (Bowling and Foster, 2002). This is to say, that the police often do the work of enforcing social and moral codes, which are not necessarily articulated in the law. It is evident that the perspectives of many police officers in Kenya towards queer people are shaped by their own cultural and religious beliefs that are often deeply homophobic and transphobic. Some of my interlocutors cited cases where police officers who attacked them or refused to offer them service when they went to the police station saying that what they (queer people) were doing was against their (the officer’s) religion and beliefs.<sup>187</sup> In other words, the policing

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Focus group, mixed group, Mombasa, January 2021

<sup>186</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>187</sup> Focus group, mixed group, Mombasa, 8<sup>th</sup> February 2019

of queer people was not always about enforcing the law but sometimes involved punishing those whom the police officers thought did not follow a religious or moral code that the police officers themselves subscribed to. In a focus group with police officers in Mombasa, one officer said that such things – referring to same-sex relations – were unthinkable in his culture adding that ‘no one would try something like that because they know they would be killed.’<sup>188</sup> This is to say that it is impossible to fully understand the policing of queer people in Kenya without paying attention to the broader socio-political context in which it occurs, in which the police are embedded.

This frame of societal homophobia and transphobia also helps us understand the under-protection of queer people by the police; that is, when the police fail to protect the rights that queer people have as people. I heard of several cases where the police had failed to protect queer people who were under attack and even encouraged the violence in some cases. In one case, the police officers who responded to a distress call to rescue two young men who were being beaten by their fellow students at a university in Mombasa after they were caught having sex in a dormitory, legitimised the attack.<sup>189</sup> One officer is alleged to have said ‘*hawa mashoga wanasumbua sana, wanafaa kuchapwa*’ [these gay people are a nuisance, they deserve to be beaten].<sup>190</sup> In other cases, the police officers were reported to have joined in the attacks. Respondents at a focus group with queer people in Kisumu reported an incident on Election Day in 2017 where police officers allegedly joined in the assault of a gay man by some voters who claimed that his vote would bring bad luck to their preferred candidate.<sup>191</sup>

Queer people that I spoke to for this study also noted that the police often subjected them to verbal and emotional abuse whenever they went to the police station. The abuse was particularly targeted at those whose appearance did not conform to gender norms.<sup>192</sup> In some cases, the police sought to embarrass them by turning their encounters, such as arrests, into spectacles. Rachel, a lesbian woman based in Mombasa, recalled an incident where she was arrested together with two of her friends and the police officers asked them to demonstrate ‘how they do it.’<sup>193</sup> In other cases, the police tried to undress people, especially intersex people and transgender women, after an arrest, under the guise of determining their ‘real gender’ so that they would know which cell to place them in. Anita, a trans-woman based in Mombasa told me that this had happened to her several times.<sup>194</sup> In these instances, the police officers were not enforcing any laws but rather pushing a social and moral code that is marked by homophobia and transphobia.

Evidently, the police abuse that queer people in Kenya experience is shaped by the law and societal homophobia and transphobia. I have shown that the police instrumentalise the law in ways that go beyond what is anticipated in the design of the legal system to achieve

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<sup>188</sup> Focus group, police officers, Mombasa, 15 Dec 2021

<sup>189</sup> Focus group, MSM, Mombasa, 6 March 2019

<sup>190</sup> Ibid.

<sup>191</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>192</sup> Focus group, MSM, Mombasa, 6 March 2019

<sup>193</sup> Focus group, mixed group, Mombasa, 8<sup>th</sup> February 2019

<sup>194</sup> Interview, Anita, WhatsApp, 7<sup>th</sup> August 2020

policing outcomes. Those outcomes may be anchored in their commitment to socio-cultural ideas, such as religious beliefs, that are anchored in homophobia and transphobia. In the next section, I show how these factors constitute *outing* as a threat that the police rely on to extort queer people.

### 6.3 Extortion of Queer People by the Police

The queer people that I spoke to for this study highlighted several forms of police abuse that they experienced. Beyond the emotional and verbal abuse that I have noted above, the queer people that participated in this study in Nairobi, Kisumu and Mombasa reported numerous instances of unjustified police violence (physical assaults) and arbitrary arrests. Several of my respondents, especially transgender women, also complained about sexual coercion by the police; that is, being forced to perform sexual acts under threat (Sandfort, et al, 2015). Even though I discuss this in more detail in the next chapter, it is important to note the apparent hypocrisy of police officers who arrested people on the basis of their non-conforming to the hetero-normative sexual and gender expectations and then force them to have sex with them. Which is to say, as one of my interlocutors said, mixing both English and Swahili as Kenyans often do, that '*police officers are also human beings, so wengine wao pia ni mashoga [... some of them are gay]*'.<sup>195</sup> However, in this section, I pay particular attention to the extortion of queer people.

Extortion refers to the act of obtaining property from another, without their resistance because they have been induced by wrongful use of actual or threatened violence (Green, 2004: 556). Sometimes, people may also use the term blackmail, which refers to the threat to expose information that would be embarrassing to the one threatened or cause them some to incur some other form of loss though it seems to fit within the broader concept of extortion (ibid: 557). Therefore, I use the term extortion. It is important to note that extortion by police officers does not only affect queer people. It was noted as a common experience for many people at the urban margins, especially those who engaged in economic activities that were considered, to a greater or lesser extent, illicit. A notable example is sex work that I discuss in more detail in the next chapter. Both queer and cis-gender women sex workers complained that police officers frequently visited the places where they work, which they described as *hotspots*, and demanded for money. Joseph, a middle-aged gay man who was involved in sex work in Kisumu, said that police officers go to their hotspots weekly, sometimes twice a week, and demand that everyone pays Kes 2, 000 (USD 20) or be arrested.<sup>196</sup> Other people who operated businesses that were seen as illegal such as gambling dens made similar sentiments.<sup>197</sup> People generally referred to these regular bribes as *ushuru*, Kiswahili for tax, even though they understood that this was not a formal tax, but an informal one that made their operations on the margins of legality possible. However, I examine the experiences of

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<sup>195</sup> Focus group, MSM, Mombasa, 6 March 2019. *Shoga* is a derogatory word for a gay man in Swahili that gay men have reclaimed.

<sup>196</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>197</sup> Interview, Shikuku, Nairobi, 30 November 2018

queer people here because it helps me go beyond the everyday forms of extortion to examine cases seemingly well-orchestrated efforts to extort people.

### *Threat of outing*

The extortion of queer people has been documented in several countries across Africa for a while now (Thoreson & Cook, 2011; Longjones & Wambere, 2018). However, one of the most significant contributions to the study of the extortion of queer people is Joseph Harry's (1982) study of the extortion of queer people in Chicago (USA). In the study, he examined the extortion of queer people by members of the public and by police officers, terming the latter as 'police shakedowns' (ibid). He noted that the success of extortion rose sharply by the source of the threat with 74% of police shakedowns being successful as compared to 30% of extortion attempts by other people (ibid.). The extortion attempts by the police in Kenya are often successful because, as I discussed above, they can instrumentalise the law and societal homophobia and transphobia against queer people. This makes it possible for the police to secure the compliance of queer people through the threat of *outing*, which refers to the act of revealing the sexual orientation and/or gender identity of another person who would prefer to keep such information a secret. Due to the high levels of homophobia and transphobia in the Kenyan society, the police know that *outing* someone would probably expose them to violence and other forms of abuse from other members of the community, especially at the urban margins. Some people who have been outed have faced physical violence, eviction, and some have lost their jobs (Eric Gitari v Attorney General, 2016). Many such cases have been documented in literature that documents the lived experiences of queer people in Kenya, such as '*Stories of our Lives*' (Chuchu, & Muchina, 2014) and Kevin Mwachiro's (2013) '*Invisible*'. Similar themes of rejection and violence are explored in the widely acclaimed Kenya film, *Rafiki*, a story of romance between two young women set in a Nairobi estate (Gitonga, 2012).

Some of my interlocutors noted cases where they were outed by police officer at the station, thereby placing them in harm's way. Malcolm, the gay man based in Nairobi that I referred to before, claimed that a police officer who arrested him locked him up in the male cell even though he had told the officer that he was afraid of being locked up in there and asked to be held elsewhere instead.<sup>198</sup> Instead, he said that the officer then announced that '*nimewaitea shoga, nimewaitea chakula*' (I have brought you a gay man; I have brought you something to eat). He claimed that he was subsequently harassed and sexually assaulted by three inmates in the cell and his cries for help went unanswered. Another gay man in Mombasa reported a similar incident where a police officer who arrested him to the other inmates under the guise of 'cautioning them' to be careful.<sup>199</sup> This sentiment is under-girded by homophobic attitudes, especially the idea of contagion which suggests that 'normal people' (straight people) may become gay by associating with gay people (Sue, 2010: 193). Such is the irony of homophobia that even though police officers know that it was gay men who were under threat from other men in the cells, they still presented them as the threat and thus put them in harm's way. Thus, many queer people that I spoke to noted were afraid of being outed

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<sup>198</sup> Interview, Mama G, WhatsApp, 4<sup>th</sup> August 2020

<sup>199</sup> Focus groups, MSM, Nairobi, 31<sup>st</sup> March 2019

because of the potential of violence in the communities where they lived and they were afraid of being taken into police cells. Knowing this, police officers used the threat to extort them.

### *Collusion*

In his work, Joseph Harry (1982:559) noted that location was critical in the extortion of queer people in Chicago (USA) because the police often identified places where queer people congregated and targeted them. Many scholars have documented the historical targeting of spaces where queer people congregate such as cruise spots and gay bars by the police in South Africa (Leap, 2004; Cameron & Gevisser, 2013), Turkey (Yuzgun, 1993) and the USA (Stewart-Winter, 2015; Nevius, 2018). As I noted above, the police in Kenya also target the *hotspots*, places where sex work takes place, arrest the sex workers and demanded for money from them.<sup>200</sup> I examine this phenomenon in more detail in the next chapter where I discuss the experiences of women sex workers with the police. However, this is not as significant in the extortion of queer people in Kenya, since the police are only able to target the sex workers and whichever clients they find there, if any. Notably, clients will often come to the *hotspots* to negotiate with sex workers and then leave with them to their houses or other accommodation spaces such as hotels and guest houses (Ombagi, 2019). The difficulty for the police in targeting queer spaces in Kenya is partly because queer spaces in Nairobi are ephemeral and ambivalent in response to the prohibitive legal regime (ibid). As a result, as Ombagi (2019) argues, it is much harder for the police to target them. For instance, one of the queer spaces that Ombagi examined in his analysis is a cruising ground in Nairobi, which masquerades as a cyber cafe.<sup>201</sup> He also examines another space, which he calls The Spot, where sex work by both men (same-sex) and women sex workers, takes place and thus could be termed as a *hotspot*. Ombagi observes that while the negotiations between the women sex workers and their clients occurs in the open and in a dramatic fashion, the negotiation between the men sex workers and their clients occurs in the bathrooms, hidden from view. Ombagi (ibid) reads the spectacle that marks the negotiation of women sex workers with their clients as an attempt to ‘mask the same sex economy that is circulating in the background’ (ibid: 116). Presumably, due to the difficulty of targeting queer people by raiding physical queer spaces, the police in Kenya are now targeting queer people on online spaces including on queer dating apps such as Grindr (Johnson, 2022). This often involves the police officers creating an account on these apps using a fake identify, and then using it to target someone, a phenomenon known as *catfishing*.

In fact, most of the arrests of queer people at the urban margins in Kenya, seemed to have been incidental. People were often caught up in regular street patrols or *msako*, as I discussed in the previous chapter, while they were going about their business in the city centre or in their residential neighbourhoods. For instance, Malcolm, the gay man that I referred to earlier, said that he had once been arrested in a *msako* on a Sunday evening as he was heading home after visiting a sick cousin in another part of the city.<sup>202</sup> As far as he could tell, the arrest

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<sup>200</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>201</sup> Cruising refers to the act of going to a certain areas, called cruising grounds, looking for a sexual partner

<sup>202</sup> Focus group, Kisumu, 31 March 2019

had little to do with his sexuality and more to do with the particular space in the city that he occupied. And, in many cases, they were subjected to the same demands for bribes in exchange for freedom that other people faced.<sup>203</sup> This is to say that many of their arrests seem to have had more to do with their socio-economic status rather than their sexuality and gender identity. In any case, unless they already know someone, it was often not possible for the police to tell that someone was queer. However, once they had been arrested the nature of their engagement with the police changed if the police officers knew or suspected that someone was queer. For instance, in Malcolm's case, the police officers recognised him from previous interactions because of which they demanded that he pay them KES 1,500 (USD 15) before they could release him while other people were being asked to pay KES 500 (USD 5). This suggests that even though location matters in the targeting of queer people in Kenya by the police, it is not as central as it has been elsewhere.

From the experiences and stories that people shared during focus groups and interviews, it seems that in Kenya, the extortion of queer people is primarily shaped by the collusion of police officers with other queer people. People shared several instances in which it seemed that queer people were targeted by police officers in what seemed to be well-orchestrated extortion efforts that my interlocutors suspected involved collusion with people who knew them well. These extortion attempts seemed to target mainly queer sex workers and their clients and 'closeted' gay men, mainly those in the middle class. Some of my interlocutors argued that collusion was a way for the police to access men that they would have otherwise struggled to target due to their socio-economic status because people who have more money are often harder for the police to reach. This was attributed to the ability of people of a higher socio-economic status to secure privacy. As one of my interlocutors put it '*watu wako na pesa wanafanya mambo yao privately* [people with money do their things privately].<sup>204</sup> This meant that they were often out of the reach of the police.

Gay men who engaged in sex work, especially in Nairobi and Mombasa, reported several cases where they had been targeted by the police for extortion. After a few years in sex work in Nairobi, Rufus, a gay sex worker said that he had developed a large client base.<sup>205</sup> However, negotiations on where to go with them remained a persistent challenge. He argued that going to the client's house was risky and took him away from the central business location for long periods, compromising his ability to meet other clients.<sup>206</sup> Together with a friend, they rented a room in the city centre where they could host their clients in order to make it easier. However, they had to give up the room after a short while because of police harassment. He said that he was ambushed by the police several times in the room while he was with a client. On one occasion, he recalled that the police officers demanded to be paid KShs. 5,000 (about US\$ 50) failing which they would be taken to the police station.<sup>207</sup> His client paid the amount to the police but that also meant that he lost his income from that transaction. Similarly,

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<sup>203</sup> Focus group, MSM, Mombasa, 6 March 2019

<sup>204</sup> Interview, Anita, WhatsApp, 7<sup>th</sup> August 2020

<sup>205</sup> Interview, Mama G, WhatsApp, 4<sup>th</sup> August 2020

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

Almasi, a male sex worker in Mombasa, recalled an incident where he and his *mzungu* (white) client, were ambushed by police officers in a hotel room.<sup>208</sup> He claimed that they demanded a bribe of about Kes 20,000 (US\$200) to let them go. In both of these cases, my interlocutors suspected that there were some people close to them who informed on them to the police. Otherwise, as Rufus wondered, '*watajuaje?* [How would they know?]'<sup>209</sup>. Like the suspicion that young men at the urban margins had of their neighbours, Malcolm and Almasi suspected that the police were colluding with some of their colleagues who may have been jealous of their success in landing seemingly wealthy clients.

The suspicion that police officers colluded with some queer people against others were often fuelled by repeated cases of targeting of 'closeted' gay men, especially married men who also had sex with men. My interlocutors noted that these men were harder for the police to target through regular arrests but they were also prime targets because they were likely to pay higher amounts due to the fear of being *outed*.<sup>210</sup> Several of my interlocutors said that police officers often colluded with younger gay men to entrap their targets. The police officers would then ambush them in hotel rooms while they were being intimate and demand for money in order to not expose them.<sup>211</sup> In Kisumu, I heard a case where the police extorted a closeted senior civil servant after they ambushed him in a hotel room with a young gay man that he was courting.<sup>212</sup> He had to pay KES 50,000 (USD 500) to be released. These extortion efforts were also used to target other men who enjoyed social status, such as religious leaders who also had sex with men, and who could be threatened with being *outed*. I heard of a case where a priest was entrapped and extorted by police officers in Mombasa.<sup>213</sup> The priest had gone to the house of a gay young man who offers massage services, which was often used as a front for home-based sex work by queer people. There were two other young men in the house at the time. While he was there, the police ambushed them, arrested them and took them to the Nyalali police station. Even though the young men were adults, the police accused the priest of child sexual exploitation and threatened to charge him in court and invite the media to publicise the case, unless he paid them KES 100,000 (USD 1,000). The priest called the officials of a local LGTBQ+ organisation who helped him negotiate the fee down to KES 60,000 (USD 600) which he paid. My interlocutors noted that the police did not impose any punishment on the young men, which made them suspicious that they had been working with the police officers. The officials of the several queer organisation confirmed the collusion claims because they noted that some young gay men were involved in several cases of extortion that were reported to them by victims.<sup>214</sup> I was not able to interview any of the young gay men who are said to be involved in several of these extortion efforts even though some of my interlocutors attempted to arrange interviews with them. As such, it is difficult to discuss their motivations in detail here. Nonetheless, it is important to note that these young gay men

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<sup>208</sup> Focus group, mixed group, Mombasa, 8<sup>th</sup> February 2019

<sup>209</sup> Interview, Mama G, WhatsApp, 4<sup>th</sup> August 2020

<sup>210</sup> Interview, PEMA official, 15 January 2021

<sup>211</sup> Ibid.

<sup>212</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>213</sup> Interview, PEMA official, 15 January 2021

<sup>214</sup> Ibid.; Interview, safety officer, Nyarwek, Kisumu, 31 March 2019

often occupy a social position in which they have limited power to negotiate with the police or with the men who are their sexual partners, as some other researchers have noted (Onyango-Ouma, et al, 2005). These factors may play a part in their participation in these extortion efforts.

At times, the extortion of queer people was not based on sexual encounters but the 'manufacture' of other charges in order to target queer people that may have been difficult for them to extort otherwise. This is illustrated by the case of Ksavery who works for an LGBTQ+ organisation in Mombasa. Ksavery was targeted by the police on New Year's Eve, as he was driving to his parents' house to usher in the New Year with his family.<sup>215</sup> Perhaps knowing that he was unlikely to be threatened by being outed given that he was already publicly out as queer, the officers accused him of selling drugs. He believes that the police officers were conspiring with his two queer friends with whom he had spent the afternoon at his house. He had then offered a lift to the two friends in his car, dropping them off somewhere along the way. Soon thereafter, police officers ambushed him on the road who arrested him and claimed that they had taken a brown envelope full of *marijuana* from his car. They accused him of peddling drugs, arrested him and said they would take him to the police station. However, they took a long-winded route and kept changing the police station they said they would take him to. Eventually, they parked in a shopping mall where they harassed him, intimidated him, and demanded that he pay them KES 30,000 (USD 300) in order to let him go. When his boss, whom he had called for support, arrived, they negotiated on a fee of KES 15,000 (USD 150) which they paid. He was then released. In other circumstances, Ksavery says he would have opted to go through the court process. However, he believes that the arrest was timed to ensure that he would pay the bribe rather than opt to go through the formal court process, which would complicate matters for the police officers. Being New Years' Eve, the police knew that the threat of staying in police cells for a few days, due to the holidays, before the courts reopen would compel anyone they arrested to pay the bribe if they could. This is the same logic that underlies the '*Friday collection*' that I mentioned in the previous chapter. It is worth noting here that these encounters bring people's suspicion on their friends, as everyone becomes a potential informant to the police or their accomplice.

The extortion efforts by the police were often successful because queer people understood their structural position in the society to be one of disadvantage. The police could deploy colonial-era laws that constitute them as *unapprehended criminals* and the homophobic and transphobic attitudes that carried the constant threat of violence against them. As a result, many of the queer respondents to this study noted that they often had no choice but to pay the money that the police demanded from them, in order to avoid more severe punishment. Even though it was an important survival strategy, paying bribes to the police was also counter-productive because it fed into the stereotypes that queer people have money, which led to further extortion.<sup>216</sup> Though the myth of gay affluence has rigorously debunked by some analysts, it persists (Hollibaugh & Weiss, 2015). The threat posed by the police was so severe

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<sup>215</sup> Interview, PEMA official, 15 January 2021

<sup>216</sup> Ibid.

that people felt they just had to pay to escape their grasp. In the next section, I expand beyond extortion to examine how queer people responded to police abuse more broadly.

#### 6.4 Queer people's responses to police abuse

Queer people at Kenya's urban margins understood that their structural position made it difficult, if not entirely impossible, for them to access state institutions such as the Chain of Command or IPOA to pursue police accountability.<sup>217</sup> Some of them noted that such processes posed the risk of *outing* them and thus exposing them to additional challenges. One of the senior IPOA officers that I spoke to said that they did not receive complaints from queer people even though, as he put it, 'we hear that they are victimised'.<sup>218</sup> In what essentially amounts to institutional gas lighting, he then proceeded to say that 'IPOA encourages queer people to report the cases to them so that they can help them get justice'.<sup>219</sup> A generous reading of this statement may see it as a misunderstanding of the reality that the labeling of queer people as *unapprehended criminals*, to borrow Jared Leighton's (2019) phrase, makes it difficult for them to access justice. However, the findings that I am presenting here are hardly novel; they have been documented widely, as I noted above, so a senior IPOA official should not be able to feign ignorance. A more accurate reading is that officials recognise the complexity of the issue at hand but unable or unwilling to curtail police abuse, resort to government-speak that does little to alleviate the suffering of queer people at the hands of the police.

Be that as it may, there are times when queer people have filed complaints at IPOA, pursuing police accountability. These decisions were motivated by several factors. In some cases, people could report cases to IPOA when they felt that they could attempt to pursue accountability if the form of the police abuse they experienced did not threaten to 'out' them.<sup>220</sup> Jamleck, a young gay man who is an LGBTQ+ activist based in Kisumu, said that he had helped his friend file a complaint against a police officer at IPOA offices.<sup>221</sup> I am not able to disclosing the full details of the case here, as that would risk outing my respondent. For now, suffice it to say that, even though both he and his friend were queer, they felt that the case posed no risk of *outing* them.<sup>222</sup> In more recent time, the NGLHRC has helped 5 people file complaints there following extortion by police officers through *catfishing* on Grindr that I mentioned above (Johnson, 2022). As these processes are still ongoing, there are no substantive outputs to examine here. Yet these report cases present us with the best opportunities to see how IPOA will instantiate its power.

#### *Queer solidarity at the urban margins*

Like many other victims of police abuse, queer people rely on individual and collective response mechanisms to respond to police abuse. At the individual level, many of them negotiated with the police and paid them bribes to avoid escalation of their conflicts any further. Despite the foregoing analysis, the interactions of the police with queer people are not

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<sup>217</sup> Ibid.

<sup>218</sup> Interview, IPOA Official, IPOA Offices, Nairobi, 21 Jan 2021

<sup>219</sup> Ibid.

<sup>220</sup> Focus group, MSM, Mombasa, 6 March 2019

<sup>221</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>222</sup> Ibid.

always acrimonious. Some queer people noted that they had good relationships, with some police officers that they often called to help them resolve a conflict that they were in with another police officer. This phenomenon where people call a police officer they know to help resolve an issue with another police officer has been described by scholars as *contact calling* (Cooper-Knock, 2014). They had developed these relationships with police officers in different ways. Some of them also said that they were or had been engaged in romantic relationships with police officers.<sup>223</sup> Having contacts of a police officers is important for people because it means that one has someone to call when they are in trouble with other police officers. Contact calling is not just important for queer people; it is a strategy that is deployed by people belonging to the various social categories who I interviewed for this study.<sup>224</sup> However, even though the personal contacts sometimes proved useful in resolving conflicts between queer people and police officers, the intervention of the police officers they knew could not be taken for granted. In some cases, my interlocutors noted that the police officers they knew, especially men, were often hesitant to get involved in cases involving queer people because it could affect their reputation amongst their peers.<sup>225</sup>

Over the years, queer people have also established solidarity networks, both formal and informal, that they often rely on for support in responding to police abuse. The informal solidarity networks often taken the form of *chama*, savings and credit groups that are widespread in the Kenyan society (FIDA-Kenya, 2008; Cesnulyte, 2013). Adrian van Klinken (2021) notes the existence of *chama* for queer people. I examine *chama* in more detail in the next chapter where I discuss the response of women sex workers to police abuse. Nonetheless, it is important to note that several of the queer people that I spoke to said that they were members of at least one *chama* with other queer people that they often relied on for financial support including to resolve conflicts with police officers.<sup>226</sup> Queer people at Kenya's urban margins have also established formal solidarity organisations. Many of these were registered in the early 2000s. Some of them emerged from pre-existing informal solidarity networks. For instance, PEMA-Kenya, the LGBTQ+ organisation, emerged from a pre-existing informal solidarity network of queer people in Mombasa.<sup>227</sup> The formalisation of the organisation was triggered by the death of one of their members who had been rejected by his family in life and in death for being queer.<sup>228</sup> When the family refused to conduct a funeral for him, traditionally the responsibility of one's family and clan, his friends had to organise the funeral. Realising that they may never have anyone else to turn to expect themselves they decided to register the organisation that would help them address their shared interests.

Beyond the pre-existing informal networks, the emergence of these organisations was made possible by HIV/AIDS programming that targeted queer people. From the early days of the HIV/AIDS pandemic, it was well understood that it disproportionately affected gay men (Cammaing & Wairuri 2021). However, many governments across the world, including

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<sup>223</sup> Focus group, MSM, Mombasa, 6 March 2019; Focus group, queer people, Mombasa, 8<sup>th</sup> February 2019

<sup>224</sup> Focus group, Kiambiyu traders, Nairobi, 4 October 2018

<sup>225</sup> Focus group, MSM, Mombasa, 6 March 2019; Focus group, queer people, Mombasa, 8<sup>th</sup> February 2019

<sup>226</sup> Focus group, queer people, Mombasa, 8<sup>th</sup> February 2019; Interview, Mama G, Whatsapp, 4<sup>th</sup> August 2020

<sup>227</sup> Personal Communication, PEMA- Officer, 14 July 2019

<sup>228</sup> Ibid.

the Kenyan government, took a long time to acknowledge this fact and act on it. In fact, it was only in 2009 that the Kenyan government acknowledged how crucial male-to-male sexual transmission was in Kenya's HIV epidemic (Gelmon, et al, 2009). Despite the slow response of the government, several health NGO's had already begun running programs that targeted the most at-risk groups amongst whom were sex workers – both cis-hetero women sex workers and queer sex workers – in efforts to prevent the spread of the disease (Mung'ala & de Jong, 2020). These programs revolved around peer-educators who would be trained and in turn train others on how to avoid being infected with or spreading the virus. The peer educators were also expected to distribute supplies such as condoms and lubricants that were aimed at lowering the risk of infection during sexual intercourse. Thus, some queer people were recruited as peer educators. The crucial point here is that these programs provided formal employment to some of the queer people at the urban margins that had not been available before. Over time, some of the queer people became frustrated by how they were treated within these organisations and with the limited scope of interventions by the health NGOs that focussed on HIV/AIDS and neglected the other challenges they faced, including victimisation by the police, violence from the communities in which they lived, and the broader stigmatisation in the society.<sup>229</sup> As a result, some of them left and sought to establish queer-led organisations that would take a broader approach. Having been involved in the work of the health NGOs previously, the founders of these organisations were also aware that they could target HIV/AIDS- related funding to establish organisations and run programs. Hence, some of these organisations that emerged, such as HOYMAS in Nairobi and HAPA-Kenya in Mombasa focussed on HIV/AIDS programs while also offering support on broader issues.<sup>230</sup> Even where their main programs were focussed on HIV/AIDS, the founders and members of these solidarity organisations knew that their safety and security was always going to be one of the key issues they had to address. Thus, HAPA-Kenya and HOYMAS also established medical clinics where their members could access health care that they were so often denied in public health facilities.<sup>231</sup> When queer people have been injured, they often seek medical services at the clinics that are run by these solidarity organisations.<sup>232</sup>

Since the Kenyan government has done little to protect queer people despite being aware of their victimisation, queer people have adopted several strategies aimed at protecting themselves. One of the key strategies they have adopted is to take a community-led approach to security and safety in order to prevent the intervention of the police in conflicts that involve queer people. All the grassroots organisations for queer people that I worked with have safety teams, often referred to as Rapid Response Teams, whose role is to respond to distress call from queer people. For instance, PEMA-Kenya has a Rapid Response Team whose members are spread across Mombasa so that they can respond quickly to distress calls by people from anywhere in the city.<sup>233</sup> The officials at these organizations told me that the Rapid Response Teams often respond to cases of conflicts between queer people that are reported to them as

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<sup>229</sup> Ibid.

<sup>230</sup> Group interview, HAPA-Kenya officials, Mombasa, 9<sup>th</sup> February 2019; Focus group, MSM, Nairobi, 31 March 2019

<sup>231</sup> *ibid*

<sup>232</sup> *Ibid.*

<sup>233</sup> Focus group, mixed group, Mombasa, 8<sup>th</sup> February 2019

quickly as possible to avoid the disputes becoming violent. Anita, leader of the Rapid Response Team at PEMA-Kenya told me that when a dispute escalated to violence, it was much harder to resolve and it was also more likely to attract the attention of other people and the police putting the conflicting parties at even greater risk.<sup>234</sup> They expressed similar reasons for responding to conflict situations involving queer people and members of the public. Anita told me that in such situations, their priority was to remove the queer person physically from the space in order to protect their life before they considered other options they could pursue.<sup>235</sup> Even in those cases, they did as much as they could to avoid the intervention of the police. This was partly because, as they saw it, the police often complicated matters and their response was never predictable; in some cases they were helpful but in other cases they aggravated the situation.<sup>236</sup> Hence, it was best to avoid them. However, this was not always possible, or even desirable, especially in cases where there was violence and someone had been injured. In those cases, whenever they could, they preferred to work with police officers they knew and whom they described as queer-friendly. In other words, avoiding police intervention, and with it the risk of further abuse, queer organisations adopted their own approaches to the safety and security of their members.

The tag of 'queer-friendly' police officers emerges from the efforts of the grassroots organisations to build relationships with police officers at the local level. One of the ways in which they have done this is to run several programs that target the police. Several of the organizations had donated gender desks to police stations in their cities, which had brought them in contact with police officers outside of the usual policing interactions.<sup>237</sup> HOYMAS officials also allowed police officers to access medical care at their clinic, free of charge, as part of their efforts to bolster their relationships with the police.<sup>238</sup> PEMA-Kenya organised training sessions at which they hoped to educate police officers about gender and sexuality and the issues that queer people in Kenya face with the hope that they would change their attitudes towards them. The trainings are couched as trainings on HIV/AIDS so that they are acceptable for the senior police officers who approve them and select the officers to attend them.<sup>239</sup> While a thorough critique of these trainings is beyond the scope of this thesis, it is worth noting that these initiatives are founded on the assumption that police abuse of queer people is based on ignorance of police officers. However, this risks downplaying the broader structural dynamics such as the law and societal homophobia and transphobia that I have already discussed above. This is not lost to the officials at these organisations who are clear that they do not have the capacity, at least not on their own, to target the broader structural factors but felt that they need to do something even if it only shifts the attitudes of only a few of the police officers.

The limits of these interventions by the grassroots solidarity organisations in addressing the police abuse that queer people experienced was reflected in the responses of

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<sup>234</sup> Interview, PEMA official, 15 January 2021

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Focus group, MSM, Nairobi, 31 March 2019

<sup>238</sup> Ibid.

<sup>239</sup> Personal Communication, PEMA Officer, 14 July 2019

the police officers who attended these trainings that I interviewed for this study. Ndunge, a young female police officer I interviewed at a police station in Mombasa told me that she would continue arresting them because, talking specifically of male sex workers, *'hiyo si kazi wanafanya, ni kuvunja sheria* [what they were doing is not work, it's simply breaking the law].<sup>240</sup> Some of the officials at these organisations told me that they had situations where police officers who had attended the training told them that they were uncomfortable with everything they were telling them because it went against their religious and cultural beliefs.<sup>241</sup> However, other police officers said that they would change their policing approach based on the information they had received at these trainings. For instance, Akinyi, an Inspector of Police based in Mombasa told me that she had become more aware of the situation that queer people faced and often supported them to resolve conflicts they were in with other police officers.<sup>242</sup> Thus, these trainings proved meaningful, even if only to a slight extent by expanding the pool of police officers they could rely on for help when their members were involved in conflicts with police officers.

The officials and members at these organisations also noted that even where they succeeded in building better relationships with some police officers, such relationships were at best fragile and short-term, because police officers were often transferred to other locations around the country.<sup>243</sup> Whenever that happened, they had to start afresh which officials at PEMA-Kenya and HOYMAS officials complained about.<sup>244</sup> While some of my interlocutors thought it was a net gain in the end because it contributed to widening the pool of police officers who were aware of LGBTQ+ issues around the country, others proposed for such interventions to be made more sustainable through the introduction of comprehensive sexuality education in the pre-service training of police officers.<sup>245</sup> These indicates something that most queer people understood – their victimisation needs to be addressed a structural level and legal reform was widely seen as good a place as any to start. I turn to this next.

### **6.5 #Repeal162: Decriminalising Same-Sex Relations**

In this thesis, I am arguing that in responding to police abuse, people pursue justice outcomes that they consider feasible. The pursuit of legal reform, in the form of the decriminalisation of same-sex relations, was made feasible by the emergence of Kenya's LGBTQ+ movement and the broader governance reforms that followed the 2007-8 post-election violence. From the grassroots organizations I discussed above, emerged national level LGBTQ+ organisations. One of the key organisations was the Gay and Lesbian Coalition of Kenya (GALCK). GALCK was the umbrella organisation that brings together LGBTQ+ organizations in Kenya (Ocholla, 2011). This was then followed by the emergence of other queer-led organisations whose purpose was to advocate for queer people's rights including the National Gay and Lesbian Human Rights Commission (NGLHRC) and the Inter-sex

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<sup>240</sup> Interview, Police Officer, Mombasa, 15 July 2019

<sup>241</sup> Interview, PEMA Officer, 14 July 2019

<sup>242</sup> Interview, Police Officer, Mombasa, 15 July 2019

<sup>243</sup> Personal Communication, PEMA Officer, 14 July 2019

<sup>244</sup> Ibid.

<sup>245</sup> Focus group, MSM, Nairobi, 31 March 2019; Focus group, mixed group, Mombasa, 8<sup>th</sup> February 2019

Persons Society of Kenya (IPSK). Beyond the fact that the earlier grassroots organisations had opened up space for the emergence of these new LGBTQ+ organisations, it is also significant that the legal landscape had changed. It is notable that the NGLHRC and ISK were all established after the promulgation of the new constitution in 2010. Even though Kenya's new constitution has been celebrated for expanding the Bill of Rights, presenting broad protections of civil and human rights, the new constitution is largely quiet about queer people. It did not expressly provide protections for queer people neither did it outlaw same-sex relations (van Klinken, 2019). As noted above, some people who oppose same-sex relations often read into Article 45 of the Constitution of Kenya (2010) which restricts marriage to adults of opposite sex (*Eric Gitari vs Attorney General*, 2016). However, this conflates the recognition of queer people's rights with marriage, a logical error. The Kenyan Judiciary had also undergone a series of reforms since the promulgation of the 2010 constitution (Mutunga, 2015). Given the shift of the landscape, an affront on the legal regime that marginalised them became feasible.

The new LGBTQ+ organisations soon started to test the extent of the protection of their rights by the constitution in the courts. They recorded a series of important wins. In one case, the NGLHRC went to court to challenge the refusal of the NGO Registration Board to register them unless they removed the words gay and lesbian from the organisation's name (NGLHRC, 2017). They won the case at the High Court, the NGO Registration Board appealed the judgement but lost against at the Court of Appeal where the judges disagreed with the NGO Council's claim that allowing their registration would promote homosexuality in Kenya (*ibid*). The NGO Registration Board has appealed again to the Supreme Court where the matter is at presently. Subsequently, as noted earlier, they won the case challenging the use of forced anal testing as a way of determining if someone had had anal sex (Ocharo, 2018). Around the same time, Audrey Mbugua, a transgender woman, won a court case in which she demanded that the government change the names appearing on her educational certificates and to remove the gender markers on them (Kiplagat, 2019).<sup>246</sup> Moreover, the Intersex Society of Kenya (ISK) also won a court case for legal recognition of intersex people in Kenya (Ochieng, 2019). Subsequently the government recognised Intersex people and the category intersex was included as a gender category in the 2019 national census. From these victories, Kenya's LGBTQ+ movement read the progressiveness of the new Constitution and a reformed judiciary, which signalled to them that an affront on the provisions of the Penal Code that criminalised same-sex relations and thus anchored their marginalisation and victimisation in the society was feasible.

Thus, in 2016, Kenya's LGBTQ+ movement filed a constitutional petition at the High Court in Nairobi seeking the repeal of Sections 162 and 165 of the Penal Code (*Eric Gitari v Attorney General*, 2016). They sought to repeal these sections on the grounds that they were: (1) vague and ambiguous, and (2) contravened several rights of queer people – the rights to equality and freedom from discrimination, freedom and security, human dignity and privacy – that are provided for in Kenya's 2010 constitution (*ibid*). The case gained support of many queer people in Kenya and their allies, both within and without Kenya, and was accompanied

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<sup>246</sup> It should be noted that Mbugua is strongly opposed to the inclusion of transgender people together with other queer people in the LGBTQ+ category (Mbugua, 2011).

by a strong social media campaign under the hashtag #Repeal162.<sup>247</sup> Expectedly, the government challenged the petition. The opposition of this petition by the government fits within a broader history of rejection of queer people's rights by successive political regimes in Kenya. Most recently, this was demonstrated by the public disagreement between President Uhuru Kenyatta and President Barack Obama, when he visited Kenya, then US President, on the rights of queer people (Nairobi News Team, 2015). The petition was also opposed by other parties that claimed to advocate various interests such as the Kenya Christian Professionals Forum (KCPF) that advocated for Christian values and Irung'u Kang'ata, a lawyer and politician, who claimed to advocate for what he termed as 'Kenyan cultures in their common rejection of homosexuality.'<sup>248</sup> I already noted how religious and cultural beliefs underpin police abuse of queer people in Kenya.

I conducted my fieldwork for this study a few months before the ruling of the court was delivered. Many of the queer people I spoke to were hopeful and optimistic, some were less so. While no one was opposed to the decriminalisation effort, some of my interlocutors argued that even if the court decriminalised same-sex relations, it would not be adequate to address their victimisation by the police. Some of them argued that since the police were already not respecting existing laws, it was not likely that they would obey the court ruling. Jamleck, the young gay man from Kisumu that I mentioned earlier, argued that since the police were already not respecting the rights of protestors that are enshrined in the constitution it was unlikely that they would respect the rights of queer people even if the law was changed.<sup>249</sup> In any case, some of them argued that they already had rights that the police were not respecting as demonstrated by the police abuse they were subjected to repeatedly, including arbitrary arrests and illegal detentions. In fact, they noted that their attempts to claim their rights during interactions with police officers often served to aggravate the situation. Hiram, a transgender man who works for an LGBTQ+ organisation in Kisumu, was arrested, assaulted and subsequently detained in the police cells for three days for challenging what he saw as the arrest of his colleague without cause.<sup>250</sup> The police officers termed him a *mjuaji* (know it all), who needed to be taught a lesson.<sup>251</sup> He was only released after sustained efforts by his friends negotiating his release and eventually paying a bribe.<sup>252</sup> This is emblematic of the punishment of people, especially from the marginalised groups, by police officers for lacking respect that Andrew Faull (2017) examines in his study on state policing in South Africa. An important point to make here is that Article 49 (i) of the Constitution of Kenya (2010) requires that suspects be presented to court at the earliest possible opportunity, and in any case not more than 24 hours after arrest. That arrested persons are detained in the police cells for longer than this period, something that the police would deny, is indicative of the failure of the police to respect the rights of the people they arrest, which are enshrined in the constitution. Thus, they understood that their protection from the police required more

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<sup>247</sup> See, Twitter, #Repeal162, undated, < <https://twitter.com/hashtag/repeal162?lang=en> >. (22 Aug 2020)

<sup>248</sup> Ibid.

<sup>249</sup> Focus group, mixed group, Kisumu, 31 March 2019

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

than a change in law or affirmation of their rights. Malcolm put it succinctly when he noted their inability to instantiate their rights in their everyday interactions with police officers saying that *'kwa street hizo vitu hazifanyi kazi* [on the streets, those things [human rights] don't work!]<sup>253</sup>

In any case, the hope of Kenya's LGBTQ+ movement were dashed when the High Court delivered its ruling on the matter in May 2019, just over three years after the petition was filed, declining to grant the petition. On the issue of ambiguity and vagueness of the provision of the law, the court argued that the meaning of the provisions of Sections 162 and 165 of the Penal Code was clear. They noted that 'Carnal knowledge against the order of nature' is understood to mean the sexual penetration of a man or a woman through the anus (Eric Gitari v Attorney General, 2016). They also noted that 'Gross indecency' is defined by the Sexual Offences Act (2008) as any unlawful intentional act which causes, without penetration, any contact between the genital organs of a person, his or her breasts and buttocks with that of another person (ibid). It needs saying that taking recourse to Black's Law Dictionary for the definitions of terms does little to address the real issues that queer people had raised in the petition that were based on their lived experiences. The fact that these laws are deployed against transgender and intersex people who are not criminalised should have been adequate to indicate to the court that the issue at hand was beyond the mere print of words on paper.

Crucially, for my purposes here, the judges dismissed the claim that these legal provisions violated several constitutional rights of queer people in Kenya stating that the petitioners had failed to provide an 'iota of evidence' demonstrating that they had been discriminated against using these laws (ibid). This is not to say that the petitioners did not provide any evidence to the court but rather that they did not provide the kind of evidence that the judges considered to be proof of their victimisation. In particular, the judges seemed to have wanted to see evidence that the petitioners had been arrested or charged under the impugned provision of the penal code (ibid). To my mind, this reflects a failure of the court to acknowledge that the policing of people belonging to marginalised groups in Kenya, including queer people but not only limited to them, is not always carried out under strict adherence to the law. I have noted this already, but it bears repeating that this fact is well demonstrated by the work that has been done by government agencies (NCAJ, 2016), human rights organisations (CHRI & KHRC, 2006) and scholars (Kameri-Mbote & Aketch, 2011). This also points to the difficulty that people face in making legal claims when their subjectivity fails to match to the legal imaginary. This is demonstrated by the work of Kimberle Crenshaw (1989) on the discrimination of black women in the USA by their employers. As I discussed earlier, while the women were making the claim that they were being discriminated against on the basis of both race and gender, this inter-sectional subjectivity was not visible to the courts because the laws provided for the discrimination either on the basis of gender or race but not both (ibid). In this case, queer people do not exist as a legal category in the Kenyan law books except to the extent that same-sex relations are criminalised. To be generous one could say that the court was unable to see, but most likely was unwilling to see, that the subject

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<sup>253</sup> Focus group, MSM, Nairobi, 31 March 2019

position that the petitioners occupied made it nearly impossible to demonstrate that they were targeted and victimised by the police using official police data. The court treated evidence as an objective reality, something that either existed or did not, rather than as the product of social and institutional negotiations by different actors within structural constraints as I have demonstrated so far in this thesis.

Despite the loss at the High Court, the quest for decriminalisation of same-sex relations in Kenya is far from over. The LGBTQ+ movement is challenging the judgement of the High Court at the Court of Appeal. Whatever the outcome of this ruling, it is likely that the matter will end up at the Supreme Court as whichever party loses is likely to appeal the decision. This indicates that, at best, it will take a few more years before Kenya's LGBTQ+ movement knows for sure whether they will succeed in their efforts to have the two sections of the law repealed or not. It is important to acknowledge here that a change in the law that results in the recognition of the full humanity of individuals is, in and of itself, a goal worth pursuing and supporting because it will, to a greater or lesser extent, empower queer people in Kenya to better negotiate the aftermath of police abuse.

## 6.5 Conclusion

This chapter has examined the victimisation of queer people by the police in Kenya, paying particular attention to their extortion by police officers. I have showed that the criminalisation of same-sex relations in Kenya that constitutes queer people as *unapprehended criminals*, and the homophobic and transphobic attitudes in the society make queer people vulnerable to extortion by the police. I demonstrated that many cases of extortion involve the collusion of police officers with other queer people in order to target others. I argued that the structural position that queer people occupy in the society, primarily due to the criminalisation of same-sex relations, makes it difficult – though not impossible – for them to pursue police accountability. As a result, they mainly rely on individual and collective coping strategies to respond to police abuse. Following significant structural changes, I have showed that Kenya's LGBTQ+ movement is now pursuing the decriminalisation of same-sex relations as one of the strategies of addressing their victimisation by the police a reflection of people's response to police abuse as a social negotiation that is geared towards legal reform as justice outcome.

## Chapter Seven

### **'I also have a right to this life': The political subjectivity of women sex workers<sup>254</sup> and their response to police abuse**

#### **7.1 Introduction**

Urban policing is predominantly focussed on people in the informal economy – those engaged in economic activities that are outside of the formal regulation of the state (Bannet & Venkatesh, 2016). This is to say that the police often target people because of what they do for a living; the legality of the economic activity notwithstanding. The economic activities in the informal sector vary in their degree of licitness. These range from legal activities, such as riding *boda-boda* (motorbike); the partially illegal activities such as street vending (Dragsted, 2019); to the outrightly illegal activities such as the making and selling of *chang'aa*, an illicit local gin (Okaru, et al, 2017). This also includes ambiguously illegal activities, such sex work, which I examine in detail in this chapter.

In this final empirical chapter of the thesis, I examine the targeting and victimisation of people at Kenya's urban margins because of the economic activities they engage in. I look at the experiences of women who engage in sex work; women sex workers. Women sex workers are women who receive money or goods in exchange for sexual services (Moore, et al, 2014). To be clear, I am examining the experiences of cis-gender women for this study. In much of the earlier literature, analysts used the terms prostitute and prostitution (e.g. White, 1990) that are now judged derogatory even though they persist in the law books in many countries including Kenya. Here, except when referring to the legal provisions, I use the terms 'sex worker' and 'sex work' because this is how the women I spoke to identified themselves and what they do. Since the policing of people in the informal economy is often shaped by the economic activities that they engage in, here I pay particular attention to the subjection of women sex workers to sexual coercion by police officers. This is not to say that it is the only form of police abuse that women sex workers are subjected to by the police. As I demonstrate in this chapter, they are also subjected to other forms of police abuse.

This chapter supports my overall argument in the thesis by showing that the responses of sex workers to police abuse amounts to a social negotiation, one that is geared towards avoiding getting drawn into complex legal processes, or getting out of them as soon as

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<sup>254</sup> Many of the women who engage in sex work that I spoke to used for this study used the terminology of 'Female Sex Worker', which is also used in much of the literature on sex work, I have opted here to use the term 'women sex worker.' This choice is to do with the need to be deliberate in distinguishing between gender and sex categories. 'Woman' is a gender category and 'female' is a sex category. Here, I am interested in designating gender not sex and therefore use 'woman.' Even though it sound a bit off, due to the adjectival use of gender being the term associated with sex in the English language. In common usage, 'woman' is a noun and should therefore not be used as an adjective, especially because the word 'female' is an appropriate adjective. However, there is no strict grammatical rule against the use of nouns as adjectives, as Mary Norris' (2019) notes, 'nouns morph into adjectives all the time.'

possible when they have been caught. Given the frequency with which women sex workers are exposed to police abuse their responses to it are part of their overall life strategy - surviving a hostile city while caring for their families. I show that women sex workers face structural barriers that constrain their ability to pursue police accountability. As a result, despite the significant effects that police abuse has on their lives, women sex workers often rely on self-help strategies to cope. Their decisions are shaped by their desire to get out of the reach of the police or out of trouble with them as quickly as possible so that they can get back to work and to taking care of their families. This also reflects the fact that in many of these encounters with the police they do not see themselves as rights-bearing citizens. However, on some occasions, especially based on the nature of police abuse that they are subjected to, they may seek the intervention of state institutions of police accountability, primarily the chain of command and IPOA, meaning that they see themselves, on those occasions, as rights-bearing. I note that they see the chain of command as effective in resolving some of the disputes and in generating restorative justice outcomes but not in holding the police officers to account. As I demonstrate below, many of my respondents saw IPOA as being inefficient and ineffective in holding police officers to account for their actions. As a result, people dropped their complaints, as the pursuit of police accountability itself came to be seen as a source of threat to their lives and their livelihoods. This is to say that the political subjectivity of women sex workers as rights-bearing citizens was consistently constrained by their structural conditions. For this reason, police accountability remained a promise that they could not attain.

The chapter proceeds as follows. The next section presents an overview of the policing of sex workers in Kenya, noting the kinds of police abuse they are often subjected to. After that I examine the sexual coercion of sex workers by the police in Kenya. This is then followed by an exploration of the reasons why sex workers regularly feel unable to pursue accountability in the cases of sexual coercion by the police, noting the power imbalances between themselves and the police officers, lacking adequate evidence to sustain complaints and time constraints. In the next section, I broaden the purview beyond sexual coercion to explore how sex workers responded to various forms of police abuse. In that section, I explore the coping strategies they deploy, their efforts to seek redress from the Chain of Command and IPOA, and some attempts to pursue police accountability. The final section concludes the chapter by drawing out the core insights that emerge from my discussions here and highlighting how they support my core arguments in the thesis.

## **7.2 Policing of Sex work in Kenya**

To develop an understanding of the policing of sex workers in Kenya, it is important to pay attention to how sex work has evolved. Analysts have traced the history of sex work in Kenya back to the colonial times (Bujra, 1975; White, 1990). According to Luise White (1990), the earliest form of sex work was the *watembezi* (from the Swahili word *tembea*, to walk), which emerged in the 1800s. In this form of sex work, the women sex workers were street-based and followed men home to offer them sexual services in exchange for a fee negotiated in advance (ibid). This form of sex work was conducted by women who were often unmarried, unemployed, and/or newly arrived migrants to the city, who urgently needed resources to

meet shelter and sustenance requirements (ibid). In the 1920s, two other forms of sex work emerged. One was the *wazi wazi* (Swahili for open) form of sex work where women, notorious for their audacity and brazenness, moved from one workman's door to another loudly broadcasting their erotic assets and canvassing their wares (McClintock, 1991; White, 1990). The other, which is the focus of White's work (1990), was the *malaya* (Swahili for prostitute) which emerged in Pumwani, east of Nairobi, when municipal bylaws prohibited outdoor loitering and prostitution (ibid). The *malaya* form of sex work was an innovation to conform to the law by mimicking marriage (Bujra, 1975; White, 1990). *Malaya* women provided the male migrant workers more than just sexual services; they also performed other forms of domestic labour including cooking meals and offering their clients water for baths (ibid). In other words, as Luise White (ibid) puts it, they provided the men with the 'comforts of home'.

White (1990) understands sex work as a form of defiant labour which allowed women to accumulate wealth and property and avoid forced marriage, hunger, and destitution in colonial Kenya (See also, White, 2009). She argues that sex work provided opportunities for African women to earn money in a country and city that provided few opportunities for them. Recent analysis has sustained this perspective of sex work as being predominantly an economic activity that makes it possible for women to earn a living in an economic landscape that marginalises them (Cesnulyte, 2013). Egle Cesnulyte (2013: 98) notes that women commodify their bodies in order to make a living in a difficult situation defined by little available opportunities to choose from. She notes that women in Kenya have limited access for formal employment opportunities,<sup>255</sup> leaving them to occupy mainly precarious jobs in the informal sector that are marked by poor pay (ibid). Indeed, some of the sex workers that I spoke to for this study said that they engaged in sex work because they were not qualified for other jobs; they saw it as the only economic opportunity that was feasible for them.<sup>256</sup> While these observations are correct, I think they are incomplete because they downplay the agency of the women who engage in sex work. For many of the sex workers that I spoke to, sex work was not the only economic activity they engaged in; it was one of a portfolio of income-generating activities. Many of them were involved in other economic activities ranging from licit activities such as hairdressing to illicit ones such as peddling drugs in order to survive.<sup>257</sup> Further, it is also important to note that some women engage in sex work so that they can explore and experience their sexuality fully (FIDA-Kenya, 2008:13). Sex work is mainly about money, but it is not only about money.

While it is crucial both to recognise the agency of the sex workers in choosing to engage in sex work, and to take seriously their statements that it is a meaningful source of income, we should not disregard the high costs that the women sex workers have to pay. To begin with, engaging in sex work places them at a much higher risk of infection with HIV. Studies have shown that, in countries with a generalised epidemic, the odds of a woman who engages in sex work to be living with HIV is 13.5 times that of a woman who is not (Moore, et al, 2014).

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<sup>255</sup> Women constitute, and have historically always constituted, a minor part of formal sector employees (Kenya National Bureau of Statistics 2011: 72)

<sup>256</sup> Focus group, older female sex workers, Mombasa, 8 Feb 2019

<sup>257</sup> Focus group, older female sex workers, Mombasa, 8 Feb 2019

In Kenya, studies estimate not only that 20 - 45 percent of women who engage in sex work in Kenya are living with HIV but also that one of every three new HIV infections in the country occurs amongst sex workers (Parcesepe, et al, 2016). Several scholars have also noted that sex workers are exposed to stigma, discrimination and high levels of violence from members of the communities where they live, vigilante groups and the police (Bhattacharjee, et al, 2018; Izugbara, 2011; FIDA-Kenya, 2008; Platt, et al., 2018; Decker, et al, 2015). In all the interviews and focus group discussions I held with sex workers for this study, they highlighted experiences of stigmatisation, discrimination and violence from other members of society. In Nairobi, one sex worker said that people in the community often legitimised the violence they experienced, saying '*huyu analala na bwana za wenyewe, wacha apigwe tu*' [this one sleeps with other people's husbands, let her be beaten].<sup>258</sup> The violence and stigma that sex workers repeatedly face have been shown to have a negative impact on their mental health (Roberts, et al, 2018; Beksinska, et al, 2021; Stockton, et al, 2020). Some of the sex workers I spoke to said that they rely on drugs, such as alcohol and marijuana, to help them cope with the struggles they experience.<sup>259</sup> However, some studies have noted that drug use tends to exacerbate the mental and physical health challenges that sex workers face (Bengtson, et al, 2014; Platt, et al, 2018). Even though women who engage in sex work exercise their agency in choosing to do the work, within an environment of significant structural pressures, the negative effects of this work should not be underestimated.

The most recent estimates, now a decade old, indicate that around 6% of women in Kenya engage in sex work (WHO, 2011; Okal, et al, 2011). I follow Kirsten Stoebenau and her colleagues (2016) in seeing sex work as being conceptually distinct from transactional sex. They define transactional sex as 'noncommercial, non-marital sexual relationships motivated by the implicit assumption that sex will be exchanged for material support or other benefits' (Stoebenau, et al, 2016: 187). This helps me to keep my analysis of sex work distinct from the so-called 'sponsor' relationships where a young person receives gifts and/or money in exchange for a sexual relationship with an older person. Even though these relationships exist across the gender and sexuality spectrum, in Kenya the focus has been on relations between younger women and older men. This is illustrated by a recent study by the Busara Centre for Behavioral Economics, a think tank based in Nairobi Busara, 2018. The study found that 20% of young women in Kenyan universities had been or were in a sponsor relationship (ibid).

As in colonial times, sex work in present day Kenya is predominantly an urban phenomenon. Scholars have noted that most women who engage in sex work live and work in the cities of Nairobi, Kisumu and Mombasa and other major towns across the country such as Eldoret (Luchters, et al, 2018). However, the location where the sex takes place has changed. Unlike in the colonial period when sex work was mainly conducted in the home of the sex worker or the client (White, 1990), sex work is presently mainly conducted outside the home. A recent study of sex work in Mombasa found that it was more commonly conducted within entertainment establishments (72% in bars or nightclubs), followed by homes (21%) and the street (7%) (Shannon, et al, 2015). These numbers should be taken as illustrative because of

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<sup>258</sup> Focus group, younger female sex workers, Nairobi, 26th February 2019

<sup>259</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019; Focus group, older female sex workers, Mombasa, 8 Feb 2019

some methodological limitations. The study had a limited geographical scope, covering only one city. It also seems to have not distinguished brothels and sex dens, where many of the sex workers I spoke to said they worked, and seem to have not factored in hotel rooms and guesthouses. Whether they worked in the streets or in specific establishments, the sex workers used the terms *maeneo* or *hotspots* (which I use henceforth) to refer to the places where they worked. People may also adopt different work strategies, for instance engaging in both home-based and street-based sex work.

In keeping with the inter-sectional approach that this study adopts, it is important to note here that the women who engage in sex work are diverse; that is, they belong to many other – and different – social intersecting categories. The women sex workers that I met told me that they had attained different levels of education. While some had dropped out of primary school, others had obtained or were working towards degrees in various Kenyan universities. It is notable that some of them dropped out of school due to pregnancies and were left to fend for their children after being abandoned by the fathers of these children and neglected by their families.<sup>260</sup> Zainab, a young sex worker in Mombasa, was chased away from home by her parents when she got pregnant at 17.<sup>261</sup> She left home and headed for Mombasa City. After sleeping on the streets for a while, some sex workers who saw her on the streets invited her into their sex den, an emic term that sex workers use to define some of the places they work from, offering her shelter and food. She later started engaging in sex work in order to make some money for her upkeep and to have some to spare to take care of her child when she was born.<sup>262</sup> Other scholars have noted the early initiation into sex work, predominantly due to teenage pregnancies. One study found that approximately one-fifth (19.9%) of sex workers in Kenya started engaging in sex work at the age of 16 (Parcesepe, et al, 2016). The women had varied marital status: never married, married, separated, divorced or widowed. A large proportion of the sex workers I met are mothers - a fact that many of them stated repeatedly during the interviews, often casting this identity into opposition with the derogatory and stigmatising *malaya* (Swahili for prostitute). This is consistent with the findings of a study commissioned by the African Sex Workers Alliance (ASWA) that found that 94 % of the sex workers who participated in the study had children, with about a quarter of them (24%) having more than three or more children (Scorgie, et al, 2013). Some of them argued that the need to take care of their children was one of the main reasons why they got into, and have stayed in, sex work after being neglected by the fathers of their children. As one sex worker in Mombasa said, she had got into this work after her husband stopped supporting the family and because '*at the end of the day, children have to eat.*'<sup>263</sup> While some of them are estranged from their families, others are key providers for their families, helping to take care of elderly parents and educating younger siblings.<sup>264</sup> Other scholars have noted this before (Brockerhoff & Biddlecom, 1999).

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<sup>260</sup> Interview, Marilyn Laini, Nkoko Iju Africa, Mombasa, 7 Feb 2019

<sup>261</sup> Focus group, younger female sex workers, Mombasa, 8 Feb 2019

<sup>262</sup> Ibid.

<sup>263</sup> Focus group, older female sex workers, Mombasa, 8 Feb 2019

<sup>264</sup> Focus group, younger female sex workers, Mombasa, 8th February 2019

### *Sex work and the law in Kenya*

Understanding the policing of sex work in Kenya also requires us to pay attention to the law. Sex work has had an ambiguous relationship with the law in Kenya since the colonial times. As noted above, some local governments in colonial Kenya set up laws that were meant to control the conduct of sex work, which shaped the form that sex work, took (White, 1990). However, local governments seem to have acknowledged not just the contribution of the sex workers in the rejuvenation of male labour in the city but also in helping reduce the pressures of housing in the city (ibid). For instance, Luise White (1986:256) notes that in 1938 the city authorities acknowledged that the city saved money on proper housing for Africans because, "the needs of eight men may be served by the provision of two rooms for the men and one for the prostitute.

Unsurprisingly, given Kenya's colonial past, the laws relating to sex work in Kenya appear to have borrowed heavily from the legal regime seeking to control prostitution in Britain. The British legal regime was initially rooted in the Puritan Christian values in the Victorian era of the 1850s (Sanders & Soothill, 2011). The policing of prostitution at that time was based on the Contagious Diseases Acts (ibid). According to Teela Sanders and Keith Soothill (2011:4), this changed in the 1950s when street-based sex work came to be seen as a major social problem. This led to the introduction of offences such as loitering and soliciting, aimed at maintaining what was understood as public order and decency. These changes were happening at the height of British imperialism and these laws were imported into the colonies by colonial regimes, including in Kenya (White, 1990). The laws against loitering and solicitation were introduced into municipal law (ibid). These laws were subsequently retained by many local authorities in the post-colonial period and have been kept by the county governments that were created by the new constitution in 2010 (FIDA-Kenya, 2008; AGT, 2013; Izugbara, 2012). Many counties – including Nairobi, Mombasa and Kisumu – have retained the colonial era by-laws, some with revisions, that directly criminalise and proscribe sex work through crimes such as 'loitering or importuning for the purposes of prostitution.' However, the focus of the national laws is different. Kenya's national legal codes do not define prostitution, neither do they directly criminalize or forbid sex work. Instead, the Penal Code and the Sexual Offences Act of 2006 criminalises the involvement of third parties in sex work, or the compulsion of others, including a child or person with mental disabilities, into sexual intercourse for purposes of gaining from it (Chimaraoke, 2012; FIDA-Kenya, 2008). The Sexual Offences Act of 2006 specifically outlaws offering premises for sexual acts to take place; that is, running a brothel or sex den (FIDA-Kenya, 2008). Many analysts have therefore argued that sex work is ambiguously criminalised in Kenya (e.g. Izugbara, 2012, FIDA-Kenya, 2008; AGT, 2013).

While the somewhat ambiguous criminalization shapes the experiences that sex workers in Kenya have with the police, it is well understood that the policing of sex workers has little to do with the enforcement of these laws. In this regard, the experience of women sex workers with the police are quite similar to those of queer people, which I discussed in the preceding chapter. Previous studies have noted that women are often arrested by the police on suspicion of sex work for various reasons including being out in the streets late or how they dress (e.g. FIDA-Kenya, 2008: 20). In most cases, the female sex workers were not taken

to court following arrest but were often extorted by the police (ibid). In a few cases, my interlocutors said that they had been arrested and charged in court with the offence of 'loitering with the intention of prostitution.'<sup>265</sup> However, in most cases they were charged with other offences such as possession of illegal drugs, especially marijuana, being 'drunk and disorderly' or 'resisting arrest'.<sup>266</sup> As in the case of queer people, some analysts have argued that the police fail to charge sex workers with the prostitution offences because they are difficult to prove (Scorgie, et al, 2013). However, the word of the police has the force of proof for public order or vagrancy offences, by which the police justify targeting people belonging to marginalised groups (Chambliss, 1964). As such, these laws are a potent tool for the police because they do not require that the accused person do or not do anything, but rather they are laws against a "certain personal condition or being a person of a specified character" (Lacey, 1953: 1203; See also Nyabola, 2021).

It is notable that the police do not target and victimise the owners of the premises where sex work is carried out, even though this is outrightly illegal (FIDA-Kenya, 2008). This suggests that what the law does is designate the women who engage in sex work as 'police property' - to borrow Robert Reiner's (2010:123) term that he uses to refer to people whom the dominant powers in society have left to the police to control, including the homeless, sex workers and drug addicts. That is, due to the legal provisions that criminalise sex work, the women who engage in sex work emerge as a category of people against whom the police can deploy their discretionary power with limited consequence to the police officers. Given this legal cover, police officers can couch the various interactions between them and sex workers as law enforcement, even when they are not driven by law enforcement goals.

It is therefore unsurprising that studies have also noted that sex workers in Kenya are disproportionately targeted and victimised by the police. For instance, a national survey of sex workers in Kenya found that 48 percent of the participants had experienced police abuse in the preceding six months (NAS COP, 2017). One of the forms of police abuse that my interlocutors highlighted was arbitrary arrests and illegal detention, especially during *msako*, the street round-ups that I discussed in Chapter 5 (see also, CHRI& KHRC, 2006; van Staple, 2016).<sup>267</sup> In some cases, however, the police specifically targeted sex workers, such as when they raided their *hotspots*.<sup>268</sup> This is not to say that sex workers were only arrested due to sex work related offences; sometimes they were arrested for other crimes such as fighting or selling drugs.<sup>269</sup> <sup>270</sup> In the focus groups, sex workers also noted other forms of police abuse such as threats and intimidation, extortion, physical assault and illegal detention. Other scholars (e.g. Platt, et al, 2018) have also documented these forms of police abuse. Like some of the queer people that I spoke to for this study, especially transgender women, sex workers I spoke to complained about sexual coercion by the police officers. I focus on sexual coercion

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<sup>265</sup> Focus group, younger female sex workers, Nairobi, 26th February 2018

<sup>266</sup> Focus group, younger female sex workers, Nairobi, 26th February 2018

<sup>267</sup> Focus group, younger female sex workers, Mombasa, 8 Feb 2018. .

<sup>268</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2018; Focus group, female sex workers, Mombasa, 8th February 2018. .

<sup>269</sup> Ibid.

<sup>270</sup> Focus group, younger female sex workers, Nairobi, 26th February 2018. .

here because it enables me to examine an issue that remains under-examined in the scholarship and allows me to present a comparison on the ways that women sex workers respond to police abuse. I explore this in more detail in the next section.

### **7.3 Sexual coercion of women sex workers by police officers**

An overview of studies on the policing of people based on the economic activities that they engage in reveals that the kind of work people do often shapes the kind of police abuse they experience. Street vendors are frequently subjected to 'crackdowns' that are aimed at evicting them from the city centre streets (Dragsted, 2019). These 'crackdowns' are often marked by ambush, arrest and confiscation of their goods, as well as in some cases the use of lethal force by the police which sometimes results in serious injuries and death (Linehan, 2007). *Chang'aa* distillers and brewers of illicit brews are subjected to police raids on their premises where police officers physically assault the people they find there, pour away the alcohol they find, destroy the raw materials present at the site and, in some cases, destroy the premises (Aywa, & Ndung'u, 2019). Like other people belonging to marginalised groups, women sex workers told me that they were often subjected to physical assaults and extortion. They also narrated many instances of being coerced into having sex with police officers. I turn to this next.

In our conversations, many of the sex workers used the term rape to describe their experiences of unwanted sex with police officers. Indeed, this is consistent with the legal definition of rape in Kenyan law. The Sexual Offences Act (2008) defines rape as the intentional and unlawful penetration of another person who does not consent with one's genital organs, by means of force, threats or intimidation of any kind. While this definition is comprehensive, matching the definition of forced sex presented by scholars (Sandfort, et al, 2015), the issue of consent is constrained, assessed primarily with regard to the act of penetration. However, as some analysts have showed, consent is nuanced. For instance, Dara Purvis and Melissa Blanco (2020) argue that there are two types of consent – expressed consent and subjective consent – both of which need to be met for sexual activity to not be judged as coerced. Expressed consent refers to the verbal or physical manifestation of consent while subjective consent refers to the internal, subjective choice to engage in sexual activity (ibid. 1503). Therefore, sex that is unwanted qualifies as coerced sex, whether consent has been expressed or not. Moreover, Moly Smith and Juno Mac (2018: 34-35) argue that consent is not only about penetration but also the terms within which people have sex. They point out, for instance, that the refusal of a sex worker's client to use a condom to which they have previously agreed constitutes sexual coercion because consent is about having particular forms of sex on particular terms. For this reason, I go beyond the concept of rape and adopt the term 'coerced sex' – and its variant 'sexual coercion' – to describe the sex that is unwanted, by at least one party, meaning that substantive consent is absent.

In recent years, the focus on the study of police abuse with a sexualised component has shifted towards the question of consent. Earlier studies focussed on what scholars termed as police sexual misconduct (Barker, 1978; Langrage, 1993). Scholars were then examining the phenomenon of male police officers having sex with women while they were on duty, which

they largely saw as consensual (Sapp, 1994). They termed the women who had sex with the police officers 'groupies' and claimed that they were attracted to the uniform and the weapon (ibid). This view has been challenged by two significant developments in the scholarship. The first has been the demonstration that sexual misconduct between police officers against those they police was widespread, and went far beyond women who could be classed as 'groupies'. For instance, analysts around the world have noted cases of sexual coercion of men (e.g. Purvis & Blanco, 2020; Stinson, et al, 2014) and queer people (Lanham, et al, 2019; Goldberg, et al, 2019) by police officers. Some analysts have also noted sexual violence by male police officers against their female colleagues (Collins, 2004; Martin, 1990). More broadly, studies across the world have shown that women sex workers are frequently targeted and victimised by the police (Deering, et al, 2014; Crago, 2009; Bhattacharee, et al, 2018; Tegang, et al, 2010; NASCOP, 2017; Smith & Mac, 2018; Mgbako, 2016). Other scholars have noted that the victimology of sexual coercion by police officers is intersectional and that it disproportionately affects women belonging to marginalized groups (Purvis & Blanco, 2020; Chan, 1997). The second crucial insight, underlying this body of work, was that the sex between male police officers and the people they police often involved coercion (Collins, 2004:526). This has led to a shift in the focus of the debate towards consent and with that the attendant shift towards the usage of the term police sexual violence (ibid; Purvis & Blanco, 2020). It became understood, as Purvis & Blanco (ibid) argue, that sex between police officers and people in their custody should be presumed to be 'coerced sex', even where a person has expressed consent, because they may be doing so because fear or threats made them feel as if they had no choice (ibid). Indeed, some of my interlocutors said that they had sometimes expressed consent to the police officers. However, in most cases, their actions amounted to nothing more than compliance. For instance, in one case a respondent in Kisumu told me that faced with the possibility of being held at the police station, with the uncertainty it carried, she resigned to the situation, saying '*so unaamua tu ubend over umpatie*' [you just accept to bend over and allow him to have sex with you].<sup>271</sup> The sex was certainly coerced and was marked by compliance rather than consent. She certainly did not want to have sex with the police officer as evidenced by, if nothing else, the fact that she still complains about it.

Most of the sex workers who complained about sexual coercion by the police noted that they were coerced into sex following arrest. In the previous chapters, I noted that police officers often demand for bribes from the people they arrest in exchange for their freedom. While sex workers also experienced demand for bribes following arrest, sometimes police officers demanded sex from them in exchange for freedom. Sexual coercion was a common complaint in all the five focus groups that I conducted with female sex workers in Nairobi, Kisumu and Mombasa.<sup>272</sup> In some cases, sex workers suspected that the arrests were motivated by sex. That is how they understood cases where the police officers demanded sex soon after arrest in order for them not to be taken to the police station. In some cases, they were not offered the opportunity to pay bribes or their efforts to do so were rejected, convincing them that the arrests were motivated by the desire of the police officers to have

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<sup>271</sup> Focus group, female sex workers, Kisumu, 31st March 2019

<sup>272</sup> Focus group, younger female sex workers, Mombasa, 8th February 2019; Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

sex with them. For instance, following an arrest on the streets of Mombasa, Zainab recalled a police officer telling her to agree to have sex with him by saying '*tumalize hii story tu mimi nikuachilie* [let's finish this issue and I let you go.]'<sup>273</sup>

Sometimes they said that police officers demanded for sex even after they had received a bribe. Aisha, a female sex worker based in Nairobi, claimed that two police officers who arrested her and her friends at a bar where they were smoking *sheesha* had singled her out.<sup>274</sup> *Sheesha*, a water pipe in which a mixture of tobacco and flavourings or molasses sugar is smoked, was banned in Kenya in 2018 (Osoro, 2018). Although the bar owner paid a bribe for the release of all his clients, the police officers released everyone except her. She claimed that they took her away and demanded that she have sex with them before they let her go. Similarly Yvonne recalled being arrested by the police as she was having sex with her client in a car, in the parking lot of a conference centre in the Nairobi.<sup>275</sup> The client was asked to give them KES 500, which he readily gave, paid her the KES 1,500 fee they had agreed to, and left. Meanwhile, she was taken to the police station where she was locked up. She said that the arresting officer demanded to have sex with her and a bribe of KES 1,000 before letting her go.<sup>276</sup> There were other times where those I spoke to said that the police officers ask for sex in lieu of a bribe when they did not have money to pay it. This was especially highlighted by the younger sex workers that I spoke to in Mombasa who said that they often could not afford the bribes that the police officers demanded.<sup>277</sup>

In some cases, women sex workers complained about situations where police officer scame to them as clients, without disclosing that they were police officers, and they would use their power to get out of their agreements. In Nairobi, Hannah recalled such an encounter where a police officer she had had sex with as a client refused to pay her.<sup>278</sup> When she protested, he identified himself as a police officer and threatened her with his gun. Many also complained that the officers would refuse to use a condom, even where this had been negotiated prior to going to a room to have sex, and threaten them with a gun when they insisted.<sup>279</sup> Public health scholars have noted that negotiations over condom use is one of the most prevalent causes of violence that sex workers experience (Shannon & Csete, 2010). This also raises the important point, which has been raised by other scholars before, that consent is nuanced (Smith & Mac, 2018). For instance in their book, Moly Smith and Juno Mac (2018: 34-35) argue that the refusal of a client to use a condom to which they have previously agreed constitutes rape because consent is not just about agreeing to have sex with a client, it is about having particular forms of sex on particular terms. Changing those terms constitutes coercion.

In other cases, sexual coercion was driven by the realisation by a police officer that a woman with whom he had a different relationship with was also a sex worker. This is what

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<sup>273</sup> Focus group, younger female sex workers, Mombasa, 8th February 2019

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> Focus group, younger female sex workers, Mombasa, 8th February 2018

<sup>278</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>279</sup> Focus group, older female sex workers, Mombasa, 8 Feb 2019

happened to Eunice, a middle-aged female sex worker in Nairobi, who also works as a domestic cleaner, commonly referred to as *mama fua*.<sup>280</sup> *Mama fua* are women who go into people's homes on a regular basis, usually weekly, to clean the laundry and their houses, for a fee. Eunice had been hired by a police officer to do this work for him without knowing that she was also a sex worker. One day, during a raid to the *hotspot* where she operated, the officer found her there and thus discovered that she was also a sex worker. After that, she said that the officer started demanding to have sex with her. She claimed that when she rejected his advances, he started arresting her regularly and harassing her until she gave in. As she saw it, giving in to his demands to have sex with him was the only way that she could continue operating from her usual *hotspot*, even as she continued cleaning for him. She was unhappy because the officer refused to pay her extra money for the sex that he demanded regularly. She said, 'every time he wanted to have sex he called and he never paid me, but I continued doing it so that I could continue working at the hotspot without harassment.'<sup>281</sup> Eventually, Eunice had had enough and refused to have sex with him or to clean for him. After that, she claimed that he and other police officers raided the *hotspot* where she worked and arrested her along with her colleagues. When they got to the police station her colleagues were booked for 'loitering with intent to prostitute' but she was booked for possession of 16 rounds of *bhang* (Marijuana). While BHESP, the sex workers' solidarity organisation, negotiated successfully for the release of her colleagues, they could not negotiate for her because it was against their policy to get involved in matters other than prostitution-related charges. Subsequently, she was taken to the court, and was sentenced to two years imprisonment at the Lang'ata Women's Prison.<sup>282</sup> It was clear to Eunice and her colleagues that the police officer had weaponised his authority to punish her for refusing his sexual advances.

#### 7.4 Barriers to accountability

Police abuse with a sexualised component has been noted by scholars from the colonial times to the present day (Elkins, 2014; CIPEV, 2008; HRW, 2017; Leftie, 2014; Deering, et al, 2014; Crago, 2009; Bhattacharee, et al, 2018; Tegang, et al, 2010; NASCOP, 2017). However, assessing its prevalence has remained difficult because most victims do not report their victimisation to the police or to other authorities (Platt, et al, 2018). To illustrate, one study by the Centre for Rights, Education, and Awareness (CREAW) on sexual violence against women during the post-election violence of 2007-8 in Kenya found that 82% of the victims did not formally report their victimisation to the police or other authorities (CIPEV, 2008). The victims of sexual coercion who participated in that study cited several reasons for not reporting their victimisation; people were allowed to select several options that they felt applied to them. Nearly half of the respondents (45%) said that they did not report their victimisation because they did not believe that anything would be done, and 24% cited fear of being attacked again (ibid). Crucially, for my purposes here, about a third (32%) of the victims said that they did not report anything because they had been attacked by police officers, while another 31% said that they did not report anything because they could not identify their attackers (ibid). In the

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<sup>280</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2018

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

paragraphs that follow, I discuss these two dimensions with respect to the victimisation of sex workers by the police.

### *Power imbalance*

The fact that victims of police abuse fail to report their victimisation because their attackers were police officers shows that they understood the power dynamics between them. This impacted the kinds of justice outcomes they could hope for. Some of the women who had been subjected to sexual coercion by police officers, and who I spoke to for this study, said that it was very difficult for them to report the police officers, whom they saw as wielding a lot of power. In Nairobi, Mwanaisha wondered '*Unareport kwa nani na yeye ni serikali?*' [Whom will you report to when the police officer is the government?].<sup>283</sup> Previous studies have also noted this feeling of powerlessness amongst sex workers, compared to police officers, which is further accentuated by the criminalisation – albeit ambiguous – of sex work in Kenya (Mbote, et al, 2020: 201). The women sex workers that I spoke to for this study understood that their victimisation by the police was based on the structural position in the society as poor women who engaged in a somewhat illicit economic activity. They knew that it was not just about gender, as they saw that the police treated women of a higher socio-economic status – as judged by how they dressed and the fact that they were driving cars – much better than they treated them.<sup>284</sup> They also knew that it was not about engaging in transactional sex since the police treated their clients much better than they treated them, as evidence by Yvonne's case that I narrated above.<sup>285</sup> They understood that their victimisation was not purely about the law enforcement as police officers rarely arrested the owners of the premises where sex work took place, such as Guest Houses, the hotspots, even though the provision of premises for sex work is criminalised (FIDA-Kenya, 2008:20). It was clear to many of them that their victimisation emanated from the fact that the police saw them as people against whom they could deploy their power due to the structural position they occupied in the society. Many of the older sex workers recalled cases where some of their colleagues had been killed, and which remained unresolved many years.<sup>286</sup> They told me that the police would only come to collect the body and take it to the mortuary but did not do much else. One of the leaders of a sex workers organisation in Mombasa summed it up thus: '*kwa sababu ni sex worker, hakuna mtu anajali*' [simply because she was a sex worker, people do not care].<sup>287</sup> Their experience of violence and the community and state response to it suggested to them that they were not seen as rights-bearing citizens.

To understand why the sex worker did not report instances of sexual coercion by police officers to the police or other authorities, we also need to understand their broader experiences when they tried to do so. As Sally Engel Merry (2003) argues, the political subjectivity of victims is partly shaped by their previous experiences with the police and the criminal justice system more broadly. Merry (2003) argued that whether or not people saw

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<sup>283</sup> Focus group, younger female sex workers, Nairobi, 26th February 2019

<sup>284</sup> Ibid.

<sup>285</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>286</sup> Ibid.

<sup>287</sup> Interview, sex worker organisation leader, Mombasa, 7th February 2019

themselves as rights-bearing citizens was influenced by how they had been treated when they attempted to pursue justice before (ibid). If people had negative experiences when they reported their victimisation, such as indication by the state officials that the problem is trivial or that the aggressor does not deserve punishment, it signaled to them that they did not have rights that they could claim (ibid: 344). Sex workers noted having negative experiences with the police whenever they went to report instances of sexual coercion by their would-be clients or members of vigilante groups. They told me that the police rarely helped them but rather used the opportunity to harass and embarrass them.<sup>288</sup> Others noted that the police denied or trivialised their victimisation, as Wangechi, a sex worker in Nairobi, recalled happening to her when she went to a police station to report a case of coerced sex.<sup>289</sup> The police officers told her that there was no difference between the sex that her attacker had had with her and the sex she sold. She said that they told her '*shida ni ati hatakulipa* [the only problem is that he did not pay you]', before chasing her away from the police station.<sup>290</sup> Others noted that when they went to report such cases, the police officers could use those opportunities to demand for bribes or sex in exchange for the assistance.<sup>291</sup> They often did not consider reporting to be worth all this trouble. The few cases in which they attempted to report reflected the triumph of hope over experience.

Underlying some of these police officers' comments towards sex workers is a deeper question of their ability to claim victimhood for sexual coercion. The case where one sex worker in Mombasa went to report an incident of sexual coercion and the police officers suggested that she had no cause to complain because she was a fully-grown woman, and not a young girl, illustrates this well.<sup>292</sup> The police officers told her '*unafaa kuwa umezoea*' [you should have got used to it (sex) by now].<sup>293</sup> At the core of this claim by the police officers is the idea that sex workers did not fit into the image of the 'ideal' victims of sexual coercion because, unlike young girls, they did not meet the standard expected of 'chastity and sexual morality' (Gotell, 2002: 260). Sex workers, and other women who are judged to be promiscuous, are cast as sexually immoral and therefore as not worthy of protection by the state authorities (Randall, 2010: 408-9; Sanders & Soothill, 2011). By dint of engaging in sex work, female sex workers are seen as having given ongoing consent (ibid). Thus, several analysts have reported cases where police officers are alleged to have told female sex workers who attempted to report cases of sexual coercion that they could not be raped because they were sex workers. This is captured in a quote in a South African study where a police officer is alleged to have told sex workers outrightly: 'you're just whores; you can't be raped' (Pauw & Brener, 2003). In Nairobi, one respondent said that police officers refused to record her complaints, telling her 'how many people fuck you in a day? How can it be that only this one person hurt you? ... Just go home, we don't want these kinds of cases here.'<sup>294</sup> In other words,

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<sup>288</sup> Focus group, female sex workers, Mombasa, 8th February 2019

<sup>289</sup> Focus group, younger female sex workers, Nairobi, 26th February 2019

<sup>290</sup> Focus group, female sex workers, Mombasa, 8th February 2019

<sup>291</sup> Focus group, female sex workers, Kisumu, 31st March 2019

<sup>292</sup> Focus group, female sex workers, Mombasa, 8th February 2019

<sup>293</sup> Ibid.

<sup>294</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

sexual coercion was not seen as a violation of their rights because, as Kendra Nixon and her colleagues (2002) argued, female sex workers were seen as existing to be sexually accessible to men. Given these previous experiences, sex workers did not believe that they could successfully claim the protection of their rights from state institutions. For this reason, they did not seek this outcome.

### *Lack of evidence*

Another reason that women sex workers gave for not reporting instances of sexual coercion by the police was that they felt that they did not have adequate evidence to sustain the complaint. As a result, they believed that their efforts to pursue justice would be futile. In the CREAM study cited above, 31% of the respondents said that they had not reported their victimisation because they could not be able to identify their attackers (CIPEV, 2008). Similarly, several of the sex workers that I spoke to told that they often could not report instances of victimisation by the police because they could not identify the officers who had coerced them into sex. They noted that the sex with police officers took place in dark and isolated places, or in police vehicles, which made it very difficult for them to identify the police officers who had victimised them. They noted that the introduction of surveillance technology on the streets, such as CCTV cameras that monitored people's activities on the streets, had led the police to stop engaging with them in the streets where they could be captured on camera.<sup>295</sup> They tended to put them in the police vehicles and drive them to dark and isolated places, where the possibility of surveillance was lower, and then coerced them into sex. Additionally, they noted that police officers have become wary of people recording them on their mobile phones. As such, they noted that police officers often begin by taking away their mobile phones, soon after arrest, to avoid being recorded.<sup>296</sup>

Even in the cases where they could identify their aggressors, the female sex workers noted that they did not have enough evidence to sustain their claims. For instance, in cases where they were coerced into sex by police officers at the police station, part of the necessary evidence would be to prove that they had been at the police station. However, in many of these cases, their presence at the police station was not recorded in the ways that it is anticipated by the law. Hannah narrated a case where she was taken to the police station following an arrest to be detained.<sup>297</sup> However, the police officer on duty who was meant to book her in started caressing her under the guise of conducting a body search, and then followed her into the cells and took her to the toilet where he forced her to have sex with him before he release her. Not only was there no other witness to the act, but her detail had not been entered into the Occurrences Book, commonly referred to as 'The OB', as required by the law. Therefore, even if she wanted to make a formal complaint, it would be impossible for her to prove that she had been at the police station. Moreover, even in the cases where their presence at the station was recorded, their movements within it were not. One sex worker in Kisumu alleged that she had been kept at the station for five days, longer than the legally

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<sup>295</sup> Focus group, female sex workers, Mombasa, 8th February 2019

<sup>296</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>297</sup> Ibid.

allowed time, and repeatedly forced into having sex with the police officers at night.<sup>298</sup> Her movements in and out of the cells were not recorded. Thus, in the absence of other corroborating evidence, it would be impossible for her to prove that she had been victimised. As I noted earlier, state documents are marked as much by what they contain as what they omit, reflecting the exercise of power and agency by various actors (Cooper-Knock & Owen, 2018; Owen, 2013). This severely constrained the possibility that a formal criminal justice process could generate a *legal truth* that matched the *substantive truth* – what actually happened (Summers, 1999: 497). Thus, the pursuit of police accountability would most likely prove to be futile.

Moreover, the female sex workers that I spoke to also noted that they often struggled to access or gather other kinds of evidence that they would need to support their claims. For instance, several of them noted that when they wanted to report cases of sexual coercion, they found it difficult to get P3 forms, the medical documentation issued by medical personnel that is required to prove injuries. Sometimes the health workers stigmatized them. In Mombasa, one sex worker noted that the health care workers had told her that she would be at the end of the queue; '*si wewe ni malaya? Ngojea*' [Aren't you a prostitute? You will have to wait].<sup>299</sup> Their attempts to gather evidence could also pose additional risks to them. For instance, when sex workers have attempted to record videos or take photos of the police officers who victimised them, have been subjected to further abuse. In Mombasa, Zulekha noted an incident where one of her friends had attempted to take a video recording of police officers who were harassing them. However, the police officers noticed that she was recording when her phone fell down during the commotion. The officers took the phone, destroyed it, and then proceeded to assault her as they asked '*sasa ulikuwa unafikiria utatupeleka wapi?*' [Where did you think you'd take it?].<sup>300</sup> Without these kinds of evidence, many of them knew that they were unlikely to be believed. Little wonder that they did not file complaints.

The sex workers also noted that they would struggle to obtain witnesses who would be willing to come forward and support their claims against the police officers. Sexual coercion was often experienced individually in the absence of witnesses. As noted above, police officers took the sex workers from the areas where they worked, taking them away from their colleagues. As such, there were often no direct eyewitnesses who could testify to the instance of police abuse. Even in the cases where their colleagues witnessed the abuse that they had been subjected to, they feared that getting involved in a case to provide evidence would result in their own victimization.<sup>301</sup> In other words, the solidarity of the sex workers was strained by acknowledgment of their own precarity.

### *Punishment of the process*

Time constraint was another major reason that sex workers gave for not reporting police abuse of any kind. Time was a key resource that they often could not afford to deploy

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<sup>298</sup> Focus group, female sex workers, Kisumu, 31st March 2019

<sup>299</sup> Focus group, female sex workers, Mombasa, 8th February 2019

<sup>300</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>301</sup> Focus group, younger female sex workers, Mombasa, 8th February 2019

in response to police abuse. The sex workers emphasized that time was a limited and crucial resource that they had to manage carefully if they were to survive the city. Leaders of the sex worker organisations that I worked with in Nairobi and Mombasa emphasized this to me at the planning stage of the interviews. They warned me in advance that we needed to schedule the interviews in the mid-morning to early afternoon. This would allow the participants enough time to rest in the morning and allow them to leave early enough so that they could prepare to go to work in the evening. Preparing for work involved taking care of their children, including cooking and feeding them, before they left. In Kisumu, that advice was not shared so we scheduled the focus group for 9.30 am on a Saturday morning. This proved to have been ambitious. While I arrived in time at the location of the meeting, everyone else, including the leaders of the organisation that I was working with, showed up two hours later. For some, Friday was the busiest night of the week and so they could not really have made it at the early hour. Others had needed the morning hours to attend to household chores and to their children. One woman brought her baby to the focus group and fed her as we talked. Furthermore, as I noted earlier, many sex workers also engaged in other income generating activities. Managing time well was therefore crucial if they were to keep the multiple things they were handling on an even keel. This is consistent with extant literature on gender and development that has noted the 'time poverty' of women (e.g. Hanmer, et al, 1997).

Given the time constraints they faced, it is unsurprising that they evaluated their responses to police abuse based on the time that the processes required. The sex workers already saw their regular interactions with police officers as constituting a waste of time that negatively impacted their ability to earn a living. Arrest and detention pose numerous challenges for female sex workers. To begin with, they take them away from their places of work, meaning that they are unable to continue making money. This is especially significant for those who operate from *hotspots*. Beyond that, many sex workers are single mothers, as noted above. While working at night, most of them noted that they often left their children locked up in the houses at night as they went to work because they had no one they could rely on to take care of their children.<sup>302</sup> This made it imperative for them to avoid spending nights in the police cells. Additionally, in all three cities, female sex workers raised concerns about being arrested and detained at the police cells when they did not have the prescription drugs that they needed.<sup>303</sup> As noted above, many sex workers are living with HIV, and other scholars have noted this (Izugbara, 2012; Moore, et al, 2014: 2). Reporting instances of police abuse was seen as deciding to allocate further time to the matter. Thus, when one sex worker in Nairobi said that she could report a case to IPOA, one of her colleagues asked her '*Ushaharibiwa time, uende kuharibu ingine?*' [They have already wasted your time, and you want to go and waste more of it?].<sup>304</sup> Another one wondered, 'how can you leave the police cell on a Monday morning, having lost the entire weekend, and then choose to spend more time going to report the case?'<sup>305</sup>

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<sup>302</sup> Focus group, female sex workers, Kisumu, 31st March 2019

<sup>303</sup> Ibid.

<sup>304</sup> Focus group, younger female sex workers, Nairobi, 26th February 2019

<sup>305</sup> Ibid.

The foregoing highlights some of the major reasons that women sex workers cited for not being able to pursue police accountability following victimisation by the police. They understood that they occupied a structural position in society that reflected a significant power imbalance between them and the police officers who victimised them. They were aware that the evidence they would need to prove their victimisation emerged from social negotiations that were shaped by the power that one holds – and they understood theirs to be limited. They knew that they would struggle to access the evidence that could only emerge from negotiations with the state and that, because of their precarity as a group, they could not always rely on their colleagues for witness statements. They also understood that these processes were time consuming and they often could not afford the time that these processes required. In some ways, as Michael Feely (1979) argued in his work, the process constituted the punishment. Nonetheless, as I have demonstrated so far in this thesis, to say that it is difficult for people to pursue police accountability is not to say that they do not do so, or respond to police abuse in other ways. Next, I examine the complex and varied ways in which women sex workers respond to police abuse.

### **7.5 Seeking redress**

In the previous section, I examined the difficulties that sex workers faced in responding to sexual coercion by police officers. I noted how their political subjectivity, structural condition and resource constraints limited their ability to pursue police accountability. In this section, I expand the purview from my focus on sexual coercion in the previous section, to explore how sex workers responded to other forms of abuse. I pay particular attention to the frequent arrests that sex workers are exposed to as well as the confiscation of their property (mobile phones) and physical assaults. I examine the individual and collective coping strategies that sex workers deploy in their response to these forms of abuse.

#### *Coping with police abuse*

Like the poor, young men whose experiences I discussed in Chapter 5, one of the strategies that sex workers deployed to avoid getting in trouble with the police was to escape. They had developed multiple strategies of getting away from the police. One was simply to run away whenever they saw the police.<sup>306</sup> From their experiences of attempting to run away from the police, with varying degrees of success, some of them noted that they had made decisions to avoid wearing high-heeled shoes while at work, instead choosing the rubber-soled walking shoes, in which they could run more easily.<sup>307</sup> They also said that they often planned their escape routes in advance.<sup>308</sup> On other occasions, they attempted to hide from the police officers. Sometimes, they negotiated with the security guards of various buildings around where they worked who would allow them to hide there, for a fee, until the police

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<sup>306</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

left.<sup>309</sup> These strategies did not always work, and they often ended up being arrested by police officers and put into the police patrol vehicles.

Some sex workers attempted to escape from the police when they had been arrested by jumping from the back of the police trucks. This was often easier when the police vehicle stopped and the police officers left to go and arrest other people. For instance, Wangechi, a sex worker in Nairobi, noted an incident where she jumped out of their police truck and managed to get away when the police officers left her unattended to go and pick up sex workers from the street.<sup>310</sup> It was much harder and riskier for them to escape when the police vehicle was moving. Those who had done it said that they had learnt to attempt to jump when the police vehicle slowed down at a speed bump on the road. Yvonne, a sex worker in Nairobi, recalled such an incident when she had been arrested alongside other sex workers.<sup>311</sup> Because she also peddled drugs on the streets, some of which she was carrying at the time of arrest, she was determined to not reach the station, as the discovery of the drugs during the search would complicate her case. On that day, the police had picked up many sex workers and had filled the van, leaving no room for the police officers to sit. As is often then case, the police officers were hanging on the back of the van. Yvonne broached the idea of jumping to some of the other sex workers who were in the vehicle and they agreed to attempt to jump when the vehicle slowed down at a speed bump. When the vehicle slowed down at a speed bump, they pushed the officers off, jumped, and ran away.<sup>312</sup> Some of them, especially those who were wearing low shoes, were able to get away, but the police caught up with many of those who had high-heeled shoes on.<sup>313</sup> Others were caught because they got injured when they jumped and therefore could not get away. Such an attempt was however often counter-productive because it would result in more serious punishment for those who were caught and could also result in collective punishment of sex workers.<sup>314</sup> Nonetheless, in the immediate period, it offered temporary relief to those who were able to escape.

Like most other people at the urban margins, sex workers relied on negotiations with the police officers following arrest to get out of trouble and to avoid escalation of their conflict. Many of them knew to offer the police officers bribes quickly in order to avoid the complexities that came with detention at the police station or being taken to court.<sup>315</sup> Given the frequency of the arrests they experienced, many of them told me that they avoided venturing into the streets or into the *hotspots* without some money in hand, which they could use to bribe the police to get out of trouble.<sup>316</sup> They called this amount of money *msimamo* (swahili for standing), referring to one's ability to negotiate. They noted that the burden of the bribes would sometimes become too much for an individual to bear as a result of which they

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<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Ibid.

<sup>315</sup> Focus group, younger female sex workers, Nairobi, 26th February 2019

<sup>316</sup> Focus group, female sex workers, Mombasa, 8th February 2018

often relied on the support of their friends to pay the bribes.<sup>317</sup> Some had established self-help groups, commonly known as *chama*, which sometimes operated as informal savings and credit groups from which one could borrow at low or no interest, during times of distress.<sup>318</sup> Other analysts have also noted this (FIDA-Kenya, 2008; Cesnulyte, 2013).<sup>319</sup> *Chama* is a common strategy for pooling resources and building solidarity amongst Kenyans from all walks of life, but especially those in marginal positions in the society (Wairire & Muiruri, 2016). As I noted in the previous chapter, queer people have also set up *chama* that they rely on for support. However, building a *chama* on which people can rely takes a lot of time and effort, meaning that people who have known each other for long and built strong social connections are more likely to have a strong *chama*. As a result, many of the older women sex workers I spoke to emphasized the *chama* as a source of support for them. In contrast young sex workers, especially those who were just starting out, did not have such a solid mechanism that they could fall back on for support.<sup>320</sup> Some of them told me that they did not have the means to join such groups and contribute regularly.<sup>321</sup> They also complained that the older women sex workers did not allow them to join their already established groups.<sup>322</sup> Solidarity amongst sex workers had its limits. Some of them also told me that they were in the process of setting up and growing their own *chama*. This made getting out of trouble with the police officers much harder for them.

#### *Seeking redress: The chain of Command*

Despite the difficulties that sex workers face in responding to police abuse, there were some instances where they attempted to seek redress through the state institutions. Just like with the young men whose experiences I examined in Chapter 5 above, senior police officers (the Chain of Command) were the initial – and evidently most preferred – option for many of them who decided to seek the intervention of state institutions. The women sex workers that I spoke to told me that it was much easier for them to access the senior police officers than IPOA. One of their major considerations was the financial costs that the process would require. While IPOA did not charge people to file a complaint, the process itself generated indirect costs, such as transport costs, as well as the opportunity cost that emerged from spending their time making such efforts.<sup>323</sup> Reporting a case to IPOA was contrasted to seeking the intervention of senior police officers whom they could often access by going to the nearest police station, which was often a walking distance away. Even where they needed to pay transport costs to get to the police station, they expected that they would only incur the

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<sup>317</sup> Focus group, LGBTQ+ persons, Mombasa, 8<sup>th</sup> February 2019

<sup>318</sup> Focus group, female sex workers, Mombasa, 8<sup>th</sup> February 2019; Focus group, female sex workers who use drugs, Nairobi, 26<sup>th</sup> February 2019

<sup>319</sup> Sometimes these groups operate as ‘merry-go-rounds’, where everyone contributes to a common kitty and the kitty goes to each person in turn people contribute to a central kitty.

<sup>320</sup> Focus group, younger female sex workers, Mombasa, 8<sup>th</sup> February 2019

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Focus group, younger female sex workers, Nairobi, 26<sup>th</sup> February 2019

expense once as the matters got resolved fairly quickly, unlike what would happen if they reported the matter to IPOA.<sup>324</sup>

It is important to note here that even though the women sex workers seemed to find it easier than young men to access the senior police officers, gaining access to them was not always easy or guaranteed. Access to senior police officers often needed to be negotiated with the officers that one found at the reception of the police station – and they could often prevent people from seeing the senior police officers. In such cases, people succeeded in seeing the OCS or OCPD by deploying various tactics ranging from persistence, refusing to leave the police station, to creating a spectacle that compelled them to respond. This is well illustrated by Zainab's case. Zainab, a woman sex worker based in Mombasa, said that a police officer had confiscated her mobile phone when she refused to have sex with him.<sup>325</sup> When she went to the police station to report the matter to the OCS, the officers she found refused to let her see him and ordered her to leave. She refused to leave and instead started screaming, shouting and being vulgar, thereby creating a spectacle that embarrassed the police officers.<sup>326</sup> They gave in and called the OCS from his office to intervene. Access to state institutions of police accountability was not guaranteed; it had to be negotiated.

Zainab's case is significant in another sense – it involved the confiscation of her mobile phone, which was one of the situations in which the sex workers sought the intervention of senior police officers.<sup>327</sup> Yvonne in Nairobi narrated a similar case. She said that, following a dispute, a police officer had assaulted her and taken her mobile phone.<sup>328</sup> She also went to the OCS and reported the matter, seeking his intervention. The decisions by both Zainab and Yvonne to report the cases of police officers taking their phones away to senior police officers indicated that they considered themselves to be rights-bearing citizens on these occasions, and as deserving of state protection from these kinds of aggression by the police. Unlike in the case of sexual coercion where they felt that their identity as sex workers compromised their ability to claim their rights, the police officers could not easily justify taking away their phones. Secondly, the taking away of their mobile phones was a serious issue, in its own right, because it had an immediate and significant impact on the sex workers ability to make a living. Both Yvonne and Zainab explained, separately, that the mobile phone was crucial to their ability to contact their clients. Other scholars have noted this. For instance, one study noted that when business was slow, they often contacted their regular clients rather than waiting for them to get in touch (Izugbara, 2012).

The foregoing indicates that people's political subjectivity is neither singular nor static but rather is often contingent on the prevailing circumstances. In particular, sex workers see themselves as rights-bearing citizens and seek the intervention of state authorities in response to victimisation by the police. Both Yvonne and Zainab were clear that when they went to report the confiscation of their mobile phones to the OCS, they were simply looking to have

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<sup>324</sup> Focus group, younger female sex workers, Mombasa, 8th February 2019

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Focus group, younger female sex workers, Mombasa, 8th February 2019

<sup>328</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

their mobile phones returned. In the end, both of them got their mobile phones returned. They were satisfied with the outcomes. The police chain of command, in these cases, seems to have been effective in delivering restorative justice outcomes.

Women sex workers also reported cases of police abuse where they suffered serious injuries or felt that their lives had been placed under immediate threat. The case of Mwanaisha, a young sex worker based in Nairobi, is illustrative.<sup>329</sup> She said that one day a police officer, who had frequently harassed her, approached her saying that he had now come to her as a client; he wanted to have sex with her for a fee. After they agreed on the terms, she boarded the police car he was driving and they drove into a forested area in Karen, to the North West of Nairobi. They had sex in the car. When they were finished, she claimed that he refused to pay her, took the money she had, threw her out of the car and drove off. After walking for a while along a road in the area, frightened, she got a lift from a motorist back into the city. She said that she went straight into Central Police Station in Nairobi and demanded to see the OCS to report the incident. She felt that, by dumping her in a forest that is inhabited by dangerous animals, the officer had threatened her life. She recalled telling the OCS '*hata mimi sex worker niko na right kwa hii life*' [even though I am a sex worker, I also have a right to this life].<sup>330</sup> She believed that she had rights that were violated. She felt that, as a human being, she was entitled to protection from the state. She managed to see the OCS and report the case.

In that case, Mwanaisha was frustrated because she felt that the OCS did not do anything meaningful to address the situation – to hold the police officer accountable for her actions as she wanted. Even though she could not articulate what exactly she had wanted, she knew that the response that she got was not what she wanted. She recounted that the OCS said that he sympathised with her but there was nothing he could do because the officer had already been transferred to another station far away.<sup>331</sup> This claim by the OCS made sense to her. She thought the fact that the officer had been transferred and had served his last day at that station was what had given him the courage to escalate his abuse in a way that was markedly different from the frequent arrests and extortion that she had been subjected to before. Still, she refused to accept that the police officer could not be held to account. She was left confused and frustrated. This demonstrates the narrow limits of chain of command, which relies on both formal and informal use of institutional power by senior police officers over their juniors. Due to the prevalence of 'godfathers' in the institution (Mutahi, et al, 2022), the power that an OCS can exercise over a junior officer depends on whether that officer is a higher ranked 'godfather' or not. While this is an interesting area of discussion, it falls beyond the scope of this study.

### *Escalate to IPOA*

Sometimes, when the sex workers felt that the senior police officers they had reported the matter to had not taken it seriously they reported the matter to IPOA. Take for instance

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<sup>329</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

Wangechi's case. Wangechi is a sex worker based in Nairobi, who suffered serious injuries after being assaulted by police officers who also took her phone.<sup>332</sup> She reported the matter to the OCS whom she felt was not taking the matter seriously.<sup>333</sup> After several visits to the police station following up the matter, she complained about it to a friend who encouraged her to report the matter to IPOA.<sup>334</sup> She did. IPOA officers told her that they would investigate the matter. Incidentally, Kwamboka, another sex worker who was also in the same focus group, was at IPOA offices at the same time to report an assault by some police officers in which she had sustained serious injuries.<sup>335</sup> That is how the two met and became friends. In her case, Kwamboka was aware of IPOA and had therefore gone directly there to report the incident. This not only goes to show that IPOA was accessible to some of the sex workers who were victimised by the police, at least some of the time, but also reinforces the point that sex workers sometimes saw themselves as rights-bearing citizens.

Even though several sex workers said that they, or their friends, had filed complaints to IPOA, they noted that many of the cases had remained unresolved.<sup>336</sup> This affected the likelihood that they would file complaints at IPOA. As I noted earlier, Sally Engel Merry (2003) argues that people's political subjectivity as rights-bearing citizens is shaped by their experiences with state authorities. Where the institutions reinforce their subjectivity as rights-bearing citizens, they are more likely to report subsequent instances of abuse and vice-versa. This is not only to do with the process but also the outcomes that these processes generate. For sex workers, the time it took to process the complaints, coupled with the uncertainty of the outcomes, limited the chances of people pursuing police accountability. For many of them, the time it would take to report a case and follow it up, with limited hope of a positive outcome, was time that could be better spent earning money or attending to other more pressing tasks.<sup>337</sup> Talking about the formal processes, one female sex worker in Mombasa said '*shida kubwa ni kungoja process*' [the biggest problem is 'waiting for the process'].<sup>338</sup> That IPOA took a long time to resolve cases was demonstrated by the case of the killing of a sex worker in Kayole, one of the poorer neighborhoods to the East of Nairobi, by a police officer in 2015.<sup>339</sup> The officials at BHESP, where the deceased was a member, had been following up with her family on the case. Just before our focus group discussions, one of the officials at BHESP told me that the victims' family had contacted her to tell her that IPOA had called to alert them that they were embarking on investigations into the case.<sup>340</sup> This was three years later. In the discussion that followed, several of the sex workers wondered how long any of the cases they would report would take, if a case of alleged murder that they considered extremely serious could take so long to process. This discouraged many of them from filing complaints at IPOA.

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<sup>332</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Focus group, younger female sex workers, Nairobi, 26th February 2019

<sup>337</sup> Focus group, female sex workers, Mombasa, 8th February 2019

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

Some of those who had filed complaints at IPOA said that they had subsequently dropped them because of the time it took to process them. For instance, Kwamboka said that she had dropped the complaint against the police officers who had assaulted her when the process took a long time.<sup>341</sup> An important point to highlight here is that since the pursuit of police accountability is based on complaints and the complainants providing evidence, when people withdraw their complaints, the process simply stops (Prateppornnarong & Young, 2019). However, this is not always the case. In the cases of police abuse that gain political salience, as demonstrated by the Baby Pendo case, the processes may be state driven. Where adequate evidence maybe gathered by state agencies, the co-operation of the family of the victims may not be critical to the police accountability proceedings. Kwamboka said that she had transferred to a different city for three months, on the witness protection program, after the police officers threatened her. When the period ended, IPOA was still not ready to proceed with the court case and suggested that she go on another period of witness protection. She refused and opted to drop the complaint. She wanted to get on with her life, including taking care of a family property that she manages. She said, she had to get back to the property because '*nikitoka kila kitu imeharibika juu hapo mimi ndio mkubwa, hapo ndio tu mimi nabelong*' [If I'm not here, things will go awry. I am the boss there. That is where I belong]."<sup>342</sup> Even though she still meets the police officers who assaulted her, they no longer threaten her since she dropped the case.

In other cases, sex workers said that they had dropped their complaints following threats from the police officers. This was what happened in Wangechi's case.<sup>343</sup> After reporting the case, she says it took a while for the IPOA officials to get back to her. In the ensuing period, she said that the police officer had started to look for her. On several occasions, when she went to the hotspot for work, her colleagues told her that someone who fit the description of the police officer who had assaulted her had been looking for her. Eventually, when IPOA called her to follow up on the case, she lied to them saying that she could not follow up the case because she had relocated. She recalled telling them '*nilitokanga ... Nairobi na sioni niko na pesa ya kufuatilia kesi, nimeachana*' [I left Nairobi and I don't think I can afford to follow up that case. I'm no longer interested in the case].<sup>344</sup> In the focus group with her colleagues, she said that she was very afraid of what the police officers might do to her especially because she knew that police officers kill people to cover up their crimes.<sup>345</sup> She feared that the police officer could kill her, orphaning her children. She said that she dropped the case because '*niliona simu isifanye niondokee watoto wangu mapema*' [it is not worth it to die because of a phone and leave my children].<sup>346</sup>

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<sup>341</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

## 7.6 Conclusion

This chapter examines the victimisation of people at the urban margins because of the work they do, focussing on the experiences of women sex workers at Kenya's urban margins. Since the nature of police abuse that people face is often shaped by the work they do, I have paid particular attention to the sexual coercion of sex workers by police officers but also examined other forms of police abuse that they experience. I noted how the ambiguous criminalisation of sex work has produced sex workers as people who are susceptible to victimisation by the police. I indicated that, as sex workers, their structural position in the society, and resource constraints (especially time), limits their ability to report their victimisation and pursue police accountability for cases of sexual coercion. However, in the instances where they felt that police officers had violated rights that they could claim, they sought redress through these state institutions or pursued police accountability, primarily through the chain of command but also sometimes through IPOA. I showed that the outcomes of these efforts were not certain. The chain of command seemed effective at generating restorative justice outcomes but not holding police officers to account. While the purpose of IPOA is mainly to hold police officers to account, I have shown that the time and effort required often led people to drop their complaints. In some cases, people dropped their complaints because police officers threatened them. My discussions in this final empirical chapter support my overall argument in this thesis that people's responses to police abuse should be understood as a social negotiation that is shaped by people's political subjectivity and is geared towards generating the particular justice outcomes that they consider meaningful and feasible. The decisions that people make are also shaped by the resources that are able to deploy, or the lack thereof, the actions and reactions of their friends, their solidarity networks, police officers (the victimisers) as well as the state institutions (chain of command and IPOA). I have noted that the political subjectivity of the victims shapes their decisions on how to respond to police abuse. In cases of sexual coercion where their identity as sex workers creates the presumption of ongoing consent and denies them access to the socio-political category of victim, they felt that they are unable to seek the intervention of state institutions. In cases where the police take away their property or endanger their lives, they felt that they could seek the intervention of the state institutions because they saw these as violations of their rights for which they were entitled to state protection. However, these institutions do not always generate the outcomes that are hoped for, leaving them feeling frustrated. In the ongoing cycle, these experiences shape the political subjectivity of the sex worker, as Sally Engel Merry (2003) argues, further limiting the possibility that they will report abuse in the future.

## Chapter Eight

### Conclusion

#### 8.1 Introduction

Police abuse of power has been a persistent problem in Kenya from the colonial era to the present day, and disproportionately impacts marginalised groups. Kenya's history has also been marked by strong advocacy from citizens and human rights groups who have campaigned for reforms to address this issue. This advocacy has centred around promoting policy solutions to the problem of police abuse, of which the enhancing of police accountability has been prominent (CHRI & KHRC, 2006; World Bank, 2009; CIPEV, 2008; Ransley Taskforce, 2009). The calls for reforms gained significant momentum in the early 2000s following the end of Daniel arap Moi's 24-year rule in 2002. The opposition coalition led by Mwai Kibaki that took power in 2002 then proceeded to institute some reforms (Kivoi, 2021; Hills, 2008; Otiso & Kaguta, 2016; Amnesty International, 2013; Ruteere, 2011). However, the role that the police played in the 2007-8 post-election violence revealed that little had been achieved in terms of making the police more accountable for the power they wield (CIPEV, 2008; Ruteere, 2011). This led to a second wave of reforms, which saw major amendments to the state policing architecture, including the establishment of the NPS that brought the Kenya Police and AP under singular command, and the establishment of the Independent Policing Oversight Authority (IPOA).

Much of the existing scholarship on responses to police abuse in Kenya has focused on an evaluation of IPOA, with many scholars judging its effectiveness to be limited (van Stapele 2016; Osse, 2016; Furuzawa, 2011). This literature has been helpful in laying the groundwork for our understanding of police abuse in Kenya, and the efficacy of the IPOA in responding to the challenge. However, both the literature on police abuse and on police accountability in Kenya suffers from important limitations that this study sets out to address. To gain a fuller understanding of this phenomenon, I argued that it is important to broaden the scope of the research. I have done this in three respects. First, the scholarship on police abuse in Kenya has focused on people belonging to particular social categories such as poor, young men (e.g. Jones, et al, 2017; van Stapele, 2016), queer people (e.g. KHRC, 2011; Platt, et al, 2018), sex workers (e.g. Deering, et al, 2014; NASCOP, 2017) and political protestors (e.g. Adar, & Munyae, 2001; Ruteere & Mutahi, 2019). In this study, I have expanded the purview by considering the victimization of people belonging to various social categories together. This offers a more comprehensive view of the phenomenon of police abuse and the ways in which people at the urban margins respond to it. My study takes intersectionality, the idea that people belong to multiple social categories that are intersecting and inseparable (Sigle-Rushton, 2013; Crenshaw, 1989), seriously. This has helped me account for cases where people who belong to the same social category may have very different experiences with the police. Second, the existing scholarship has displayed a narrow geographical focus. Many of the currently existing studies have been situated in Nairobi, with the specific neighbourhoods of Mathare and Kibera having received much of the attention (Jones, et al, 2017; van Stapele,

2016; Osborn, 2012). I expanded the geographical scope of the analysis. I have examined the phenomenon in different areas of Nairobi (Kawangware and Kiambiyu) and expanded outwards to include Mombasa and Kisumu, Kenya's second and third cities respectively. I have also explored the urban/ rural divide through the Kwekwe case showing that the boundaries often blur. Thirdly, much of the scholarly attention has been directed towards police killings, with other aspects of police abuse such as extorting and sexual coercion not having been subjected to much sustained scholarly investigation. In this study, I have given these other forms of police abuse significant attention in order to gain a fuller view of this problem of police abuse.

This shift in empirical focus has brought about important theoretical insights. At present, the scholarship on police accountability has taken a state-centered approach. That is to say, that the focus has been on the state institutions of police accountability (van Staple 2016; Osse, 2016; Furuzawa, 2011). As a result, it has missed several crucial points. First, by focussing on the institutional architectures and the limited success of IPOA in obtaining convictions, it has missed the ways in which the process unfolds within the state. In particular, it has missed the fact that even state processes are negotiations. In addition to looking at accountability through IPOA, I have also uncovered the role that the police chain of command plays in people's responses to police abuse, which much of the scholarship has missed. This is important because many people at the urban margins seem to have easier access to senior police officers than IPOA. Secondly, by focussing on state agencies, it has ignored aspects of people's responses to abuse that exist beyond the state but are no less important. . As a result, the role of the intermediaries – such as human rights organisations and media as well as local human rights defenders and local politicians – have often been overlooked. Finally, and most centrally, current scholarship fails to pay attention to people's responses to police abuse that go beyond police accountability altogether. I relied on the scholarship on dispute resolutions, especially the work of Sindiso Mnisi Weeks (2015, 2017) and Sally Engel Merry (1980, 2003) to apprehend the complexity and dynamism of how people negotiate the aftermath of police abuse. I highlighted that people shift forums, abandon processes or pursue multiple goals in their response to police abuse. I show that people do so both within and without the state institutions, often in ways that blur the distinction between formal and informal processes.

This concluding chapter summarizes the overall argument of my thesis, drawing together the key insights that have emerged from the preceding analysis. The chapter proceeds as follows. In the section that follows, I will present a summary of the research findings. This is followed by an overview of some of the potential areas for future research. The thesis ends with some reflections on the contributions that the study makes to our understanding of how people navigate the aftermath of police abuse at Kenya's urban margins.

## **8.2 Summary of the Findings**

This thesis examines the negotiated aftermath of the police abuse at Kenya's urban margins. It set out to answer the question: *how – and to what effect – do people at Kenya's urban margins respond to police abuse?* The innovation of this study is its centring of the victims of police abuse in its analysis and its use of insights from socio-legal theory – specifically the disputes resolution scholarship – to understand how victims respond to police abuse. My argument is that people's responses to police abuse are best understood as a social negotiation that is shaped by their structural position in society, their political subjectivity, and the resources available to them. In this process, people deploy individual and collective self-help strategies, and recruit intermediaries to help them counter power imbalances, navigate officialdom, and avoid further harms. I have also shown that people seek to generate justice outcomes formally and informally, both through the state institutions of police accountability and beyond them. In this section, I will present an overview of the core insights that have emerged from this study.

### *Pursuing police accountability*

I have noted that Kenya's state policing architecture includes the NPS chain of command, the IAU, the NPSC and IPOA, which are mandated to hold police officers accountable for their actions. In this thesis, I have focussed mainly on the IPOA and the NPS chain of command because they are public-facing; meaning that they receive complaints directly from the victims of police abuse. I have noted that some people consider the punishment of offending police officers to be a desirable and meaningful response to abuse. In other words, police accountability matters. In some cases, the process generates the outcomes that it is intended to generate, leading to the imposition of sanctions against police officers. However, I have noted that many people face numerous barriers in pursuing police accountability through these institutions, even where they may want to, because of their structural position in the society, their political subjectivity, and a lack of resources that may be necessary for such endeavours. I summarize my findings with respect to each of these, in turn, in the paragraphs that follow.

Throughout this thesis, I have shown that people's structural position in society shapes their ability to pursue police accountability when they have been victimised by the police. That is to say, that people who occupy marginalised social positions have a limited ability to pursue police accountability. I have noted that the legal and political discourses that produce people as police property (Reiner, 2010), thereby predisposing them to police abuse, also constrain people's ability to pursue police accountability. In Chapter 5, I showed that the ability of poor, young men to pursue police accountability is limited by their discursive construction as a security threat, which emerges from the coalescing of gender and class in societal ideas of threat. In Chapter 6, I demonstrated that the criminalisation of same-sex relations in Kenya, and the attendant societal homophobia and transphobia, constrains the ability of queer people to pursue police accountability, especially in cases that might *out* them and thereby expose them to further harms. Similarly, in Chapter 7, I noted that the ability of women sex workers to pursue police accountability is constrained by the ambiguous criminalisation of sex work and the social stigma it has engendered.

The limits of people's structural position can sometimes be overcome, making the pursuit of police accountability possible. One of the ways in which this seemed possible was when victims fit the category of an *ideal victim*, as did Kwekwe Mwandaza and Baby Samantha Pendo, whose cases I examined in chapters 3 and 4. The *ideal victim* is a socio-political construct, developed by Nils Christie (1986), which is used by analysts to refer to people who are easily assigned the identity of a victim when they have been victimised. Another way in which these structural barriers seemed to be overcome was when police officers killed people in circumstances where adequate evidence to sustain the pursuit of police accountability was possible. I noted this in the few cases wherein the families of poor, young men killed by the police have been able to pursue police accountability in ways that the young men themselves would have found difficult to do when they were alive. The sentencing to death of Nahashon Mutua, former OCS of the Ruaraka Police Station in Nairobi, for killing Martin Koome Manyara while he was in custody is illustrative (Republic v Nahashon Mutua, 2018; see also, Wairuri, 2022a). Another possibility is for people to organise and challenge the structural forces that predispose them to police abuse. Though they have not yet been successful in that effort, I highlighted the efforts of Kenya's emergent LGBTQ+ rights movement to pursue decriminalisation of same-sex relations in Kenya. They see the legal provisions that criminalise same-sex relations as being at the roots of their abuse by police and constraining their ability to pursue accountability following victimisation.

I have also demonstrated that people's ability to pursue police accountability is shaped by their political subjectivity. Political subjectivity refers to the ways that people under the authority of another (subjects) feel, respond and experience (Lurhman, 2006; Holland & Leander, 2004; Krause & Schramm, 2011). In this respect, I paid particular attention to what Sally Engel Merry (2003) terms as people's political subjectivity as rights-bearing citizens, which shaped their decisions on whether to report their victimisation or not, where they report, and whether they sustain the effort. She argues that people who see themselves as rights-bearing citizens are more likely to attempt to file complaints formally and sustain them, and vice versa. Through a comparison of the different ways in which women sex workers respond to different forms of police abuse, I go beyond Merry's (2003) work to show that people's political subjectivity is neither singular nor static. In the cases where women sex workers were subjected to sexual coercion, I noted that they did not see themselves as rights-bearing citizens. In many of those cases, they did not report the cases of abuse or attempt to pursue accountability. This was mainly because of prior experiences where their cases were not taken seriously or where they were subjected to further abuse when they sought to report cases of sexual coercion. As Merry (2003) has argued, people see themselves as rights-bearing citizens when that subjectivity is reinforced by state institutions. In this case, mainly due to the presumption of sex workers as having always consented to sex, the state institutions did not reinforce their political subjectivity as rights-bearing citizens. However, in cases where sex workers felt that the police had placed their lives or livelihoods under immediate threat, they attempted to pursue accountability because, in those situations, they saw themselves as rights-bearing citizens and therefore as deserving of state protection. I illustrated this with

Mwanaisha's articulation that '*hata mimi sex worker niko na right kwa hii life*' [even though I am a sex worker, I also have a right to this life].<sup>347</sup>

My analysis here also shows that the resources that people have at their disposal, or the lack thereof, shapes how people respond to police abuse. By resources, I am referring to the economic, social, and political resources, such as money, knowledge or personal connections, available at the individual and collective levels, which people can deploy in response to police abuse. With respect to economic resources, I noted that people may fail to file complaints against police officers because of the considerations of how much the processes cost, both in terms of money and time. Even where the institutions do not charge a direct fee it costs money to travel to their offices. These processes also have an opportunity cost; they take people away from their work, effectively reducing their incomes. I explored this especially when examining how women sex workers assessed how to respond to police abuse, especially on whether to pursue police accountability. Social connections also matter in how people respond to police abuse. As I have argued here, to be able to pursue police accountability people often have to recruit intermediaries to help them counter power imbalances, navigate officialdom, and avoid further harms. In the Kwekwe Mwandaza case, I demonstrated the crucial role that the media and human rights organisations played in facilitating the pursuit of accountability, including gathering evidence and supporting the victims. However, I noted that sometimes the support was not adequate to overcome the efforts by the state to forestall accountability as in the Baby Pendo case. Organisational contacts also matter. To draw again from Kwekwe's case, I noted that accessing the intermediaries that one may need in their efforts to pursue police accountability may itself require intermediation. In that case, I showed that Kwekwe's uncle Hussein contacted Ngumbao Kithi, who then negotiated internally with Ferdinand Omondi who provided coverage that gave the case prominence. In other cases, especially when discussing the experiences of poor, young men with police abuse, I noted that their ability to access human rights organisations that would help them with the pursuit of accountability depended on the availability of a local paralegal who had contact with these organisations.

### *Beyond police accountability*

My examination of people's responses to police abuse in this thesis reveals that police accountability is not the only thing that people pursued. I showed that, in many cases, people deployed individual and collective self-help strategies. In some cases, they sought the intervention of state institutions, especially the chain of command, to generate justice outcomes informally. I revisit both of these dimensions in detail below.

Many people deploy individual self-help strategies in response to police abuse. In the discussion on the experiences of poor, young men with the police, I showed that they often attempt to avoid encounters with the police where possible, including running away when they see them, changing jobs and attempting to move locations. I also showed that queer people and women sex workers also made efforts to avoid being taken to the police station

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<sup>347</sup> Focus group, female sex workers who use drugs, Nairobi, 26th February 2019

especially by offering bribes quickly to the police whenever they were arrested. I noted that people saw it as a necessary part of their survival in the city to carry money that they could use to escape encounters with the police, which they experienced regularly. These costs add up. Thus, women sex workers have formed *chamas*, self-help groups through which they raise the funds that they need to bribe police officers.

I have also shown that people have set up solidarity groups that help them attempt to mitigate the many challenges they face, including police abuse. These organisations take different approaches. One important approach is advocacy, at the local level. I showed that queer people's solidarity organisations are seeking to expand their contacts with police officers and recruiting police officers whom they see as 'queer friendly' to help them negotiate with other police officers. They are also lobbying people who hold institutional power to intervene in disputes between their members and police officers. The organisations of women sex workers also deploy this approach. I noted cases in which the leaders of their solidarity organisations negotiated with senior police officers to release members who had been arrested by police officers. Another important approach is self-provision. This is illustrated by the case of queer people deploying their own community approaches through the rapid response teams that are aimed at generating security and justice outcomes outside of the state policing. These rapid response teams intervene in conflicts involving queer people to prevent them from escalating to a point requiring police intervention. Seeing as this community considers such mechanisms to often be more effective than the police in resolving disputes suggests that we must expand our considerations of how to address police abuse to include taking seriously ideas about creating spaces that are police-free. That is, building spaces that are beyond the police or outside their reach. This to my mind, is not the same as police abolition since as I have shown here, people at the urban margins still want police protection (see also Wairuri, 2022a). However, it is to say that the reach of the police should be curtailed to limit their ability to abuse people.

Even though these individual and collective self-help strategies are often effective in helping people avoid or get out of trouble with the police, they also have their limits. I have shown that police officers may refuse to take bribes offered or take them and still subject people to the very harms that they were hoping to avoid. Attempting to run away from the police may result in more severe punishment for the individuals who are subsequently arrested, or even more widespread collective punishment of the group. Moving away from the city to rural areas for safety may also prove to be unsustainable, as I showed in the discussion on the experiences of poor, young men, because the discourse of them being a security threat can be weaponised in the rural areas as well. Even where people have established relationship with police officers that they hope to rely on to negotiate with other police officers, the intervention and impacts of such ties in a dispute are often unpredictable.

My study has demonstrated that people may also seek to deploy the state institutions of police accountability to generate redress informally. In particular, I have noted that people often seek the intervention of senior police officers to resolve conflicts that they were having with a police officer. Like the Headman in Sindiso Msini Weeks' (2015) analysis of conflict resolution in South Africa, I have shown that the senior police officers in the case of Kenya are

not expected to perform this role in a strictly formal manner, even if their mandate emanates from their institutional position. The police chain of command was preferred because people saw the senior police officers as being easier to access and the processes as efficient and effective. As I have shown in the discussion on the experiences of the women sex workers for instance, senior police officers were able to resolve their complaints - such as getting their confiscated items back - in a way that they found satisfactory, within the parameters of what they deemed feasible. In some cases, people reached out to IPOA in similar fashion, seeking for them to warn the police officers who were victimising them, rather than to institute formal complaints. However, IPOA seemed to be ill-suited for such efforts, frustrating victims of police abuse. This indicates that victims may value multiple forms of state action, which stretch beyond prosecution or career-based sanctions against the police officers who victimise them, and thereby blurring the distinctions between informal and formal procedures. Alongside this pursuit of justice outcomes sits a range of strategies that victims employ to limit or resist police abuse. These vital responses to police abuse are missed in state-centric accounts, which focus on the success or failure of formal accountability mechanisms.

I have also shown that significant changes in the broader social-political context may also make it possible for people to pursue justice outcomes that they may not have been able to previously. For instance, the Victims Protection Act of 2014 makes it possible for victims to pursue compensation in ways that they may not have been able to do before. I demonstrated this in Kwekwe Mwandaza's case (Chapter 3), where the family is now in the process of pursuing compensation from the state. In some cases, the changes in the socio-political landscape have made it possible for people to pursue transformative justice goals. This is well illustrated by the efforts of Kenya's emergent LGBTQ+ rights movement to pursue decriminalisation of same-sex relations in Kenya.

I showed that the growth of the LGBTQ+ movement itself, a new constitution, and a reformed judiciary have made it feasible for the movement to pursue the decriminalisation of same-sex relations with a vigour that was difficult to attain before. Amongst other things, people expect this to reduce their victimisation by the police. While such a change will be valuable, I also noted that it would not entirely solve the problem since the victimisation of queer people, as that of other people, is not entirely attributable to law enforcement.

My study also finds that people's responses to police abuse are dynamic. People's choices of strategies to deploy and the ends they seek shift over time, mainly due to access to additional information or the responses of other actors. The reactions of various actors, not least the police, can significantly impact people's decisions. For instance, some people said that they dropped formal complaints following threats from police officers, while others decided to pursue accountability when the abuse was sustained. People may also be frustrated by the processes involved and thus decide to drop their complaints. The complexity of the processes and the time they took was an important consideration for many people. Others, such as Baby Pendo's parents, decide to pursue accountability when the pursuit of certain justice outcomes becomes imperative. Even then, the access to resources, especially as marked by the attention of media and human rights on a matter, may expand the ability of the victims to pursue police accountability.

### 8.3 Looking Forward

This study raises additional questions that need to be subjected to scholarly inquiry but which, at present, fall beyond its scope and may therefore form the basis for future research. There are three dimensions, which I think could enhance our understanding of these phenomena.

The first dimension is geographical. This study has primarily focused on the experiences of people at the urban margins. It is situated at the urban margins because previous studies have shown that people who occupy these locations are disproportionately affected by police abuse (Auyero, et al, 2014). However, as I noted earlier, scholars have shown that people in rural areas are also subjected to police abuse (Ruteere, 2008; HRW, 2008; Willis & Chome, 2014). As the case of Kwekwe Mwandaza shows, police abuse affects people in rural Kenya, as does the Kianjokoma brothers' case, which demonstrates this issue with respect to provincial towns. The findings this study makes could be enhanced by expanding the geographical scope beyond the urban margins to areas including CBDs, peri-urban areas, smaller towns, and rural areas.

The second dimension relates to the social categories of people who are subjected to police abuse. I noted that much of the scholarship on police abuse in Kenya has focussed on police killings of poor, young men (Jones, et al, 2017; van Stapele, 2016; Osborn, 2012; Ruteere, 2008; Wairuri, 2022a). In this study, I have expanded the focus by examining the experiences of people belonging to other social groups, including women sex workers and queer people. I have shown that even though there are similarities between the experiences of people belonging to these social categories, there are also important differences in the kinds of police abuse they are subjected to and the ways in which they respond to it. This suggests that there may be dimensions that we are still missing by not examining in-depth the experiences of people belonging to other groups that are seen as disproportionately targeted and victimised by the police. For instance, it would be important to examine the experiences of more people engaged in the informal sector who are also exposed to police abuse regularly, including street vendors, *matatu* operators and people involved in the alcohol business. The insights that I have generated here could also be deepened by examining the experiences of migrants.

The third dimension relates to the perspectives and experiences of police officers. The focus on the victims of police abuse in this study is appropriate. It has revealed some crucial insights that have been missed in much of the literature on police abuse and how people respond to that abuse. However, in doing so, the study has not examined in detail the perspectives of the police officers. While there have been notable contributions to the study of police culture in Africa, most recently the work of Andrew Faull (2017) in South Africa, there remains a lacuna in our understanding of exactly how police officers in Kenya view themselves and how they make decisions during policing encounters. My study has focussed on the perspectives and experiences of the victims of the police - that is one part of the puzzle. Further examination of the perspectives and experiences of police officers - the other part of the puzzle - will help us gain a more comprehensive understanding of the phenomenon of police abuse and responses to it at the grassroots. This will be crucial if we are to truly address

this challenge. This would also require us to consider the roles played by the municipal police – the enforcement arms of the County Governments.

#### **8.4 Concluding Remarks**

My study has challenged the primacy that is given to police accountability, in scholarship and policy, as a response to police abuse. I have shown that police accountability is important to many victims of police abuse. However, by tracing the responses of victims to police abuse, it becomes evident that police accountability is just one of several justice outcomes that victims of police may pursue. The study reveals that victims may value multiple forms of state action, and these stretch beyond police accountability to include informal redress and avoidance of further harm. In many cases, people respond to police abuse by deploying individual and collective self-help strategies. In other words, in many cases people see police abuse as a reality to be survived rather than challenged. This is because they are conscious of the constraints that their structural position, political subjectivity, and resource endowment place on their ability to challenge police abuse. To be sure, my study has not focussed on what people consider to be ideal ways of responding to police abuse. Rather I have centered the practical ways in which people respond to police abuse.

In 1990, Claude Ake, a Nigerian political philosopher, argued that for development in Africa to be sustainable it has to be built on the innovations that Africans have developed to deal with the problems they face (Ake, 1990). In many cases, however, attempts to address socio-political problems that people face fail to generate meaningful results because they fail to pay attention to prevailing socio-political realities, and often disregard the innovations that exist at the grassroots. This has been well illustrated by the scholarship that has examined police reforms in Africa, which shows reforms to have been counter-productive (Steinberg, 2011; Ruteere & Pommerolle, 2003; Hornberger, 2013; Wairuri, 2022a). It is reflected in the ideas that have been pursued to address the problem of police abuse. While the impact of police abuse, especially in terms of statistical data on victims and victimisation, has been central to the advocacy and debates about police accountability, the perspectives of the people who are most affected by police abuse do not seem to prominently shape the nature of the reforms. As a result, the ideas that have been implemented have largely travelled from elsewhere as part of the efforts to, as David Bayley (2001) has put it, ‘democratize the police abroad.’ As these ideas have been adopted and adapted by the political elite in Kenya, the voices of the people who are most affected by police abuse, and their grassroots-based and innovative ways of dealing with the problem, have been decentred. I have shown here that the current approach leaves much room for improvement. This thesis is an attempt to include some of these voices, thoughts, and to challenge the received wisdom on how police abuse should be addressed. It is my hope that, in doing so, the study provides the basis for subsequent discussions on how these innovative ways can be incorporated in the state’s attempts to address the problem of police abuse.

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