



## Kenya

### The Kenyan Context

Judge Agnes Kalekye Murgor

#### Introduction

There is little accurate data on human trafficking in East Africa. What is known is that much of the current trafficking is for labour or sexual exploitation. Kenya is a source, transit, and destination country for men, women, and children who are then subjected to forced labour and sex trafficking.

Kenya is situated in East Africa. It is bisected horizontally by the Equator and vertically by longitude 38°E. The country is bordered to the north by South Sudan and Ethiopia, to the east by Somalia and the Indian Ocean, to the south by Tanzania, and to the west by Lake Victoria and Uganda. Its borders are porous, and policing is mainly at border points, which leaves the rest of the borders open to trafficking. Consequently, her location provides strategic vantage points convenient human trafficking.

#### Statistics

As stated earlier, statistics in the area of human trafficking in Kenya are rare and difficult to come by, because of the diverse and complicated nature of human trafficking activities. That said, in 2016 the Kenya government reported 530 investigations of potential trafficking cases.

#### Domestic trafficking

Within the country this mainly occurs in cases involving children, where victims are subjected to forced labour in domestic service, agriculture, fishing, cattle herding, street vending, and begging. About 70.5% of internally trafficked people are from the rural areas, and transportation is mainly by road. In about 40% of cases, the recruiter is a relative or a person known to the victim.

Girls and boys are exploited in prostitution, including in sex tourism on the Kenya coast, and at times, women in prostitution, “beach boys”, or family members facilitate their exploitation. Children are also exploited in sex trafficking by people working in areas where khat (a mild narcotic) is cultivated, near Nyanza’s gold mines, stone quarry mines, and by fishermen on Lake Victoria.

#### External trafficking

External trafficking is the most prevalent form of trafficking in Kenya. In these cases it is mainly for labour, followed by child trafficking and trafficking for prostitution and sexual exploitation. Poverty, illiteracy, corruption, unemployment and the desire for better paying jobs are the main factors contributing to external trafficking. These cases are mainly from urban areas, i.e. cities and towns. Transportation here is usually by air to destinations. It occurs in three main ways:

i) External trafficking: where Kenya is used as a source for victims to be trafficked to countries. In this case

- Kenyans voluntarily migrate to other East African nations, South Sudan, Angola, Europe, the United States, and the Middle East – particularly Saudi Arabia, Lebanon, Kuwait, Qatar, United Arab Emirates (UAE), and Oman – in search of employment, where in many cases they are exploited in domestic servitude, massage parlours and brothels, or forced manual labour.
- Kenyan men are deceptively recruited from universities with promises of overseas jobs, but are forced into prostitution in Qatar and UAE.

ii) As a trafficking destination it is found:

- Where women are trafficked from other countries such as India, Bangladesh and Nepal into Kenya or from Rwanda and Burundi into Kenya’s coastal regions for purposes of sexual exploitation and prostitution.
- Indian women who are recruited to work in mujra dance clubs in Nairobi face debt bondage, which they are forced to pay off by dancing and performing sex acts.
- Children from East Africa and South Sudan are subjected to forced labour and sex trafficking.

- Kenya's largest refugee camp complex, Dadaab, hosts hundreds of thousands of refugees and asylum-seekers, and the security situation limits some humanitarian access, assistance, and protective services. Some children in Kenya-based refugee camps may endure sex trafficking, while others are taken from the camps and into forced labour.

- Trucks transporting goods from Kenya to Somalia return to Kenya with girls and women who are subsequently placed into brothels in Nairobi or Mombasa.

iii) As a transit point for trafficking: where Kenya is used as a transit destination for victims trafficked from south and south east Asia through Kenya and then on to Europe.

## **International and regional instruments on Human Trafficking**

United Nations 1949 Convention for the suppression of the traffic in persons; United Nations Convention on the Rights of the Child and its Optional Protocol; Convention Against Transnational and Organized Crime; Protocol to Prevent and suppress trafficking of human beings especially women and children (Palermo Protocol) ILO Convention on Worst Forms of Child Labour (1999); United Nations Model Law on Trafficking in Persons; Global Plan of Action to Combat Trafficking in Persons and resolutions; Guidelines Relations to the Status of Victims of Trafficking and Persons at Risk of being Trafficked as Refugees; United Nations General Assembly Resolutions; UN treaty and Charter based mechanisms decisions/recommendations.

## **Regional Instruments**

United Nations Model Law on Trafficking in Persons; Global Plan of Action to Combat Trafficking in Persons and resolutions; Guidelines Relations to the Status of Victims of Trafficking and Persons at Risk of being Trafficked as Refugees; United Nations General Assembly Resolutions; UN treaty and Charter based mechanisms decisions/recommendations; Reports of Special Rapporteurs. Banjul Charter (article 5 – Prohibition of all forms of exploitation and degradation, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment); The Maputo Protocol against trafficking in women, and protection of asylum seeking women, returnees and IDPs against sexual exploitation; The African Charter on Rights and Welfare of the Child.

## **Kenyan Legislation**

Despite the large number of international and regional instruments in place to address Human Trafficking, in Kenya there are only 2 main Acts of Parliament that are applicable. These are:

### **1. Sexual Offences Act**

Sections 14, 15, and 17 of the Sexual Offences Act of 2006 prohibit the facilitation of child sex tourism, child prostitution, and forced prostitution, and prescribe penalties of 6 to 20 years' imprisonment – penalties that are sufficiently stringent and commensurate with those prescribed for other serious offenses. Prosecutors, however, rarely pursued cases under these provisions of the act.

### **2. Counter Trafficking in Persons Act No. 8 of 2010**

Section 1 of the Counter-Trafficking in Persons Act of 2010, which came into force in September 2012, prohibits all forms of trafficking and section 3(5) prescribes a sufficiently stringent minimum punishment of 15 years' imprisonment, which is commensurate with that of other serious crimes, such as rape.

Most cases for human trafficking would normally include charges under the Sexual Offences Act, or viceversa.

## **Challenges faced by Judges and judicial officers in applying local laws**

Application of the Counter-Trafficking in Persons Act of 2010 has been an immense challenge to judges and judicial officers. This is because:

The law does not provide adequate definitions on the different aspects of trafficking; The cases are not well investigated or prosecuted and therefore the various elements of the crime are difficult to prove to the required standards; Inadequate protection for victims and witnesses who are then reluctant to testify; Unawareness of the police on the charges applicable.

As an example of these challenges experienced by the Courts, the *Kenya Court of Appeal Case No. 252 of 2012* aptly describes the case in point.

The facts of the case are that *the appellant* was convicted of the offence of trafficking for sexual exploitation contrary to section 18 (1) (a) of the Sexual Offences Act, 2006. The particulars of that offence were that the appellant "*in the year 2004, intentionally and knowingly facilitated the travel of PW1 from Rwanda, across the border of Kenya for sexual exploitation*".

The evidence was that PW1, aged 15 years old, came into the country under the care of the appellant in October 2004. Her evidence was that the appellant brought her to Kenya, under the pretext of taking her to school. But the appellant did not take her to school, and instead subjected her to domestic work and to look after the appellant's children. At some point, the appellant travelled to Tanzania and returned with a man who she claimed was her brother, who pestered PW1 for sex, but she refused. It was further alleged that the appellant again travelled abroad for some time, leaving her alone with the man; and that on another occasion, a business man came and visited who demanded a kiss from PW1, but she declined and went into the bedroom. The appellant then followed her there, and told her that the man was offering her 1,000 US dollars, as well as a business in Malawi, if she would sleep with him, but PW1 still refused. In 2007 the appellant enrolled PW1 in a local Primary School. PW1 continued to live with the appellant until June 2007 when the appellant beat her and threw her out of the house. PW1 sought refuge in PW3's house. PW1 later reported that she was being sexually exploited by the appellant and this led to the appellant's prosecution.

In dealing with the issues the Court enquired:

"Is this evidence enough to sustain the offence of trafficking for sexual exploitation contrary to section 18 (1) (a) of the Sexual Offences Act?" That section provides for that offence in the following terms:

*18.(1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either*

*(a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act*

...

*is guilty of an offence of trafficking for sexual exploitation.*

A plain reading of this section shows that the essential elements of the offence which must be proved by the prosecution as against an accused person are that there has to be the facilitation or movement of a person across the border, with the main intention of committing any crime under the Sexual Offences Act. Therefore, there must be evidence that the accused person was an active participant in the action of facilitating the movement across the border, as well as in facilitating the commission of the sexual offence.

This is an issue that was dealt with by this Court sitting in Nakuru in the decision of *Kenneth Kiplangat Rono v Republic* [2010] eKLR (Criminal Appeal 66 of 2009) wherein it stated of section 18 (1) that:

*The section under which the appellant was charged focuses on the person who arranges or facilitates travel of another person within Kenya or outside Kenya. It also focuses on the victim and then any other person who might take advantage of the arrangement and who does something to the victim which would amount to the commission of an offence.*

The Court then defined the term "trafficking in persons for sexual exploitation" by drawing on both the dictionary meaning of the term, as well as the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons* and stated that:

*There are thus three constituent elements: the act (recruitment, transportation, transfer, harbouring or receipt of persons); the means (threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments of benefits to a person in control of the victim) and the purpose (exploitation – including the prostitution of others, sexual exploitation, forced labour, slavery or similar practices). That definition informs the recent domestic legislation in Kenya (The Sexual Offences Act) focusing on sexual exploitation" (emphasis in original).*

The Court concluded that for a conviction to be sustained these elements are essential and must all be established. So that, while it may be true that the appellant facilitated the entry into Kenya of PW1, if the element of sexual exploitation was not proved, then a conviction will not be sustained.

But a look at the facts point to other forms of exploitation. Had the charge sheet been properly drawn up, other charges such as *forced labour, slavery or similar practices* may have been included.

The facts also beg other questions, what happened to PW1? Should the employer not have ensured that she returned back to the safety of her home? Questions abound...

## **Recommendations**

To conclude, more requires to be done in respect of Human Trafficking Cases in Kenya. The laws must more adequately address the crimes behind trafficking; more robust investigative and prosecutorial work is needed; training of all persons in the justice sector is a necessity; enhanced witness protection.

Thank you.