



Kenya

Dr. (Hon. Causa) Lady Justice Roselyn Naliaka Nambuye E.B.S.

Judge of Appeal – Kenya

Introduction

I take this opportunity to sincerely thank the Good Lord for the mercies showered upon me and for the opportunity to stand here before this distinguished gathering. I am also grateful and appreciate most sincerely both the invitation accorded to me by the Pontifical Academies of Sciences and Social Sciences and the sponsorship accorded to me by my parent Association IAWJ. Also to be appreciated is my parent Institution, the Kenya Judiciary, through the Hon. the Chief Justice of the Republic of Kenya and President of the Supreme Court of Kenya, as well as the entire sisterhood of the IAWJ-Kenya Chapter for the additional facilitation. I am proud to be part of this distinguished gathering whose purpose is not only to say a big NO to global human trafficking but also to pool efforts, resources and also to speak with one voice against this most heinous and degrading vice of human trafficking. I am also here to learn, share and exchange views on global best practices on combating the vice. The wealth of knowledge gathered by myself as well as my fellow sisters from Kenya, who are also part of this distinguished gathering, will go a long way to enrich the current judicial efforts in assisting the Nation combat the vice at the national level through judicial pronouncements.

Is Kenya's response to the call to combat human trafficking necessary?

The answer is a big YES. The reason being that such efforts would not only be commendable, but they are also well founded both on the International and Regional Human Rights instruments that Kenya, as a sovereign state, is a party to. This will also be in line with the Constitutional and legal frameworks that Kenya has so far put in place in response to the call from the International Community for it to team up with other like-minded global community members in combating this now global vice of Human Trafficking. The second reason is that Kenya, as a Nation, being bound by the principle of State responsibility, is not immune from this vice, both as a perpetrator through its own citizens who may engage in the vice on the one hand, and as a victim also through its own citizens who may fall prey to the perpetrators on the other hand. By reason of the above, it therefore follows that Kenya as a Nation cannot afford to perch itself on whatever fence available, fold its arms *akimbo* and then sit and watch the perpetration of the vice go on unabated within its borders. It is therefore safe for me to say categorically that it was in obedience to the above international obligation that Kenya acceded to numerous International and Regional human rights instruments aimed at combating the vice. It is also for the same reason that Kenya as a Nation included a provision in its constitution for direct application of the international and regional human rights instruments it has acceded to by its Municipal courts of law. This is provided for in Articles 2(5) & 2(6) of the Kenya Constitution 2010. These provide as follows:

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Other enabling factors:

These include easy accessibility to a wealth of information on the subject instruments, which are easily digestible to assist in the implementation of any policies that may be put in place for this purpose. There is also easy accessibility to judicial pronouncements from across the globe. These go a long way to enrich the jurisdiction quality of jurisprudential pronouncements in the Municipal Court.

What are these handy tools?

These are the core international instruments used to combat human trafficking as highlighted through institutional research material as follows.

The most important international instrument to combat trafficking is the Palermo Protocol, a supplement to the UN Convention against Transnational Organized Crime (2000). Article 5 of the Protocol requires States to criminalize trafficking, attempted trafficking, and any other intentional participation or organization in a trafficking scheme.

Two International Labour Organization (ILO) conventions focus on forced labour or services: The ILO Forced Labour Convention (Convention No. 29 of 1930) and its newly adopted Protocol, which defines forced or compulsory labour, and the ILO Abolition of Forced Labour Convention (Convention No. 105 of 1957).

The Slavery Convention (1926) defines slavery, and its Supplementary Convention describes “practices similar to slavery”, including debt bondage, and institutions and practices that discriminate against women in the context of marriage.

The UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) requires States to punish any person who exploits the prostitution of another.

The International Covenant on Civil and Political Rights (ICCPR) prohibits a number of practices directly related to trafficking, including slavery, the slave trade, servitude and forced labour.

Instruments concerning the trafficking of women

The Convention on the Elimination of All Forms of Discrimination against Women requires States to take all appropriate measures to suppress all forms of trafficking in women and exploitation of prostitution of women. General recommendation No. 19 identifies trafficking as a form of violence against women because it puts women at special risk of violence and abuse. Trafficking is incompatible with the equal enjoyment of rights by women and with the respect for their rights and dignity.

Instruments concerning the trafficking of children

The Convention on the Rights of the Child (1989), and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (2000), prohibits trafficking in children for any purpose, including for exploitive and forced labour. Article 39 of the CRC requires States to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse”. The CRC also requires States to recognize the right of every child to education (Article 28) and “to facilities for the treatment of illness and rehabilitation of health” (Article 24). The Optional Protocol to the Convention on the Sale of Children specifies particular forms of protection and assistance to be made available to child victims.

Additionally, the ILO’s Worst Forms of Child Labour Convention (Convention No. 182 of 1999) prohibits perpetrators from using children under 18 years of age for all forms of slavery or practices similar to slavery, trafficking, debt bondage, serfdom, forced or compulsory labour, and prostitution. Article 7(2)(b) and (c) requires States to take effective and timely measures to provide for the rehabilitation and social integration of former victims of the worst forms of child labour, including trafficking, as well as to ensure their access to free basic education, and, wherever possible and appropriate, vocational training.

Instruments concerning foreign victims

Article 7 of the Palermo Protocol says States should consider potential measures for allowing foreign trafficking victims to remain, temporarily or permanently, in the state in which they were trafficked. The UN High Commissioner for Refugees (UNHCR) has noted that some people who have been trafficked or who are at risk of being trafficked may be entitled to international refugee protection under the Convention relating to the Status of Refugees (1951) and its 1967 Protocol if they have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Article 8 of the Palermo Protocol deals with the possible repatriation of trafficking victims. It notes that when a State returns a victim it should do so with due regard for the safety of that person. Repatriation “shall preferably be voluntary.” A person’s right to return to his or her country of origin is affirmed by the International Covenant on Civil and Political Rights.

Additionally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) expands the rights of migrant workers and calls upon States to effectively protect their rights as reflected in article 68.

Observation on Kenya’s exposure to international instruments on human trafficking

From the information gathered on the above through institutional research services, there is sufficient basis for saying that Kenya is not a stranger to international human rights instruments on the subject.

The UN Convention against Organized Crimes (UNTOC) was the first globally binding instrument where there was global agreement on the definition of trafficking in persons as a crime. The Convention sought to combat transnational organized crimes while providing a mechanism for domestic and international cooperation in the investigation and prosecution of human traffickers. This was operationalized by The Protocol on Protection of

Victims and Respect for Human Rights and The Protocol against the Smuggling of Migrants. Kenya ratified UNTOC and the protocols.

Is there any other source of handy tools

The answer is YES. These comprise several international action plans aimed at assisting countries to combat the vice which are also operational. These include the United Nations Office for Drugs and Crime (UNODC) coordinating the implementation of UNTOC and Protocols by State Parties; the EU Global Action Plan 2015-2019; as well as the UN Inter-Agency Coordination aimed at improving coordination of UN agencies to better combat human trafficking and smuggling of migrants. The African Union Commission Initiative against Trafficking (AU.COMMIT) of 2012 operationalized the Ouagadougou Action Plan to combat trafficking in Human especially Women and Children of 2006. Kenya has ratified all these international instruments and treaties.

1. Regional instruments

The basis for Kenya's participation in the implementation of Regional Human Rights Commitments is based on the undisputed fact that Kenya has been a member of the African Union (AU) and its predecessor the Organization of African Unity (OAU) since its independence in 1963. At the regional level, Kenya has ratified the following key human rights Instruments:

1. The African Charter on Human and Peoples' Rights (African Charter) 1981;
2. The African Charter on the Rights and Welfare of the Child 1990;
3. In Chapter 21 of the Treaty for the establishment of the East African Legislative Assembly Act No. 2 of 2000, there is provision for health, social and cultural activities, with respect to co-operation in health activities. Pursuant to this provision, the Partner States have undertaken to develop a common approach through the education of the general public and their law enforcement agencies for the control and eradication of all forms of trafficking be it for illicit or banned drugs or human trafficking.

2. Kenya's constitutional and legislative frameworks on human trafficking

The major National legislative framework on the subject is the *Counter Trafficking in Persons Act No. 8 of 2010*. In this Act the offence of trafficking of persons is defined in section 3(1) of the Counter Trafficking in Persons Act No. 8 of 2010 assented to by Parliament on 13 September 2010 and commenced by Gazette Notice on 1 October 2012, as follows:

(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of— threat or use of force or other forms of coercion; abduction; fraud; deception; abuse of power or of position of vulnerability; giving payments or benefits to obtain the consent of the victim of trafficking in persons; or giving or receiving payments or benefits to obtain the consent of a person having control over another person.

The penalties for the offence of trafficking of persons are created by section 3(5) and (6) of the Counter Trafficking in Persons Act which provide as follows:

(5) A person who trafficks another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.

(6) A person who finances, controls, aids or abets the commission of an offence under subsection (1) shall be liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.

In addition Section 5 of the Counter Trafficking in Persons, Act No. 8 of 2010 provides for the offence of promotion of trafficking of persons as follows:

A person who—

knowingly leases, or being the occupier thereof, permits to be used any house, building, or other premises for the purpose of promoting trafficking in persons; publishes, exports or imports, any material for purposes of promoting trafficking in persons; or manages, runs or finances any job recruitment agency for the purposes of promoting trafficking in persons; by any other means promotes trafficking in persons, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life."

The Constitution of Kenya, which has been lauded as a most progressive document, contains Article 28 on Human Dignity which provides as follows:

“Every person has inherent dignity and the right to have that dignity respected and protected”. Since human trafficking is a form of human indignity, the same is outlawed by this Article.

Other supportive legislative initiatives that are also in place are as follows:

A. The Legal Aid Act No. 6 of 2016 which makes provision for persons eligible to receive legal aid services to include a person who is indigent or resident in Kenya and is—

(a) a victim of human trafficking.

B. The Children’s Act No. 8 of 2001 makes provision *inter alia* for the protection of a child from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction etc.

C. The Kenya Citizenship and Immigration Act No. 20 of 2011 contains section 53 which makes provision for General offences which include offences committed by a person (s) who smuggle (s) or is (are) reasonably suspected to be engaged in smuggling of human beings. It also makes provision for attendant penalties *inter alia* as follows:

2) *Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;*

3) *Any person convicted under subsection (1)(q) is, in addition to the prescribed fine and or term of imprisonment as the case may be, liable to pay for the cost of maintenance and removal of the person he employed.*

4) *For purposes of paragraph (1)(p), a person who is a victim of the offence of human smuggling may not be held liable so long as he identifies and is willing to act as a witness in the prosecution of the smuggler.*

D. The Merchants and Shipping Act No. 4 of 2009 makes provision for Liability for smuggling as follows:

Where a seafarer employed in a Kenyan ship is found in civil proceedings before a court in Kenya to have committed an act of smuggling, whether within or outside Kenya, he shall be liable to make good any loss or expense that the act has caused to any other person.

E. The Criminal Procedure Code Cap 75: contains section 42A which provides *inter alia* as follows:

2) *In proceedings under the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act, the prosecution may, with leave of court, not disclose certain evidence on which it intends to rely until immediately before the hearing—*

a. *if the evidence may facilitate the commission of other offences;*

b. *if it is not in the public interest to disclose such evidence;*

c. *where there are grounds to believe that disclosing such evidence might lead to an attempt being improperly made to persuade a witness to make a statement retracting his original statement, not to appear in court or otherwise to intimidate him.*

F. The Sexual Offences Act No. 3 of 2006 contains a provision that prohibits Child sex tourism. It makes provisions *inter alia* that a person including a juristic person who introduces, organizes or facilitates contact with another person under the auspices of promoting tourism, in any manner, in order to promote conduct that would constitute a sexual offence against a child is guilty of an offence of promoting child sex tourism and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.

Is Kenya complying with international and regional laws on combating human trafficking?

The answer is a big YES. Reason being that the highlights on both the constitutional and legislative frameworks highlighted above is sufficient demonstration that Kenya is making efforts to combat the vice.

Practical examples of Kenya compliance with international and regional laws on combating human trafficking through judicial pronouncements in cases involving human trafficking offences.

A few of these have been sampled for purposes of demonstrating that the legislation is in force and the same is being enforced.

In Hamed Adullahi Vs. Republic [2017] eKLR

The appellant, **Hamed Abdullahi Hamed**, was convicted on own plea of guilty for the offence of promotion of trafficking in persons contrary to section 5(d) of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars of the offence were that on 6 February 2016, in Maua Township of Meru County, he promoted the trafficking of fifteen Somali nationals by receiving them and facilitating their transport using motor vehicle registration number KCF 706 C, Mitsubishi Fuso from Modogashe to Maua where they were arrested en route to Nairobi.

The appellant was sentenced to pay a fine of twenty million or in default to serve twenty years imprisonment. He now appeals against both conviction and sentence.

On appeal, the High Court had this to say:

The appellant pleaded guilty to the charge. After the facts were read to him, he confirmed them to be true. This plea was unequivocal.

The consequences of pleading guilty to a charge are obvious as day follows night. The trial court has no business of cautioning any accused of the consequences. If the trial court cautions on the consequences, (s)he may be accused of trying to influence the accused not plead guilty. This may be interpreted as bias in favour of the accused. The accused is left to freely and consciously plead in whichever way he chooses. The only duty that the trial court must exercise with care is to ensure that the accused understands the charge he is responding to, and that his plea is unequivocal. This is why upon pleading guilty, the facts are read out and the accused asked to confirm if they are factually correct before a conviction is entered. In the instant case, this was observed.

Section **5(d)** of the **Counter-Trafficking in Persons Act** provides as follows:

A person who—

(d) by any other means promotes trafficking in persons, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.

The learned trial magistrate meted the minimum sentence provided by the law. He cannot be faulted.

The upshot of the foregoing is that the appeal must fail. The same is dismissed and the appellant will serve the sentence meted out by the learned trial magistrate.”

A. In Criminal Appeal 82 of 2017 Muhammad Asif vs. Republic [2017]eKLR

The Appellant was charged with and convicted of the offence of trafficking of persons contrary to Section 3 (1)(d), as read with section 5 of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars of the offence were that on 30 May 2016 at upper Kapiti Estate in Athi river sub-county within Machakos County, he was wilfully and unlawfully found trafficking a total of eleven adults. He was sentenced to serve five (5) years imprisonment or to pay a fine of Kshs 5,000,000/= for the offence.

On appeal, the High Court had this to say:

In this regard, for a person to be charged under section 3(1) (d) and 5 of the Counter Trafficking in Persons Act no. 8 of 2010, the evidence should indicate that the accused person has:

(a) recruited, transported, transferred, received, held, concealed, or harboured the victim, or exercised control, direction or influence over the movements of the victim; and by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and done this for the purpose of exploiting the victim or facilitating their exploitation.

Section 2 of the Act defines “exploitation” to include but is not limited to—

(a) keeping a person in a state of slavery; subjecting a person to practices similar to slavery; involuntary servitude;

(d) forcible or fraudulent use of any human being for removal of organs or body parts; forcible or fraudulent use of any human being to take part in armed conflict; forced labour; child labour; sexual exploitation; child marriage; forced marriage.

The offence of trafficking in persons captures the entire trafficking continuum, and engagement in just one of these trafficking “stages” is sufficient. Therefore different persons or groups of people may be responsible for different aspects of the trafficking crime. The offence is thus formulated in such a way as to capture the different

actors along the trafficking continuum, including those who do not directly exploit the victim's labour or services, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.

In the present appeal the evidence of PW1, PW2, PW3, PW4 and PW6 was that the Appellant kept eight persons in a rented house, for which each person paid him ten dollars a day for accommodation and food. This evidence points to the act of harbouring persons which is one of the elements of the offence of trafficking in persons. However, there was no evidence adduced as to any other purpose for which the Appellant was harbouring the persons, and the witnesses PW1, PW2 and PW3 clearly indicated that the person who was to transport them to Brazil was one Kashif, and the purpose for which they were going to Brazil was also not shown. There is thus no evidence that demonstrates that the Appellant personally intended to exploit any victims, or that he knowingly facilitated exploitation by another person.

2. In *Halima Adan Hassan & another v Republic* [2018] eKLR

The appellants were charged in the Magistrate's Court at Mandera with four (4) counts. In count 1, they were charged together with trafficking in person contrary to section 3 (d) (e) and sec. (3) as read with section 3 (5) of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars of the offence were that on diverse dates between 25 May 2018 and 29 May 2018 in Mandera township, Mandera County, jointly received Bishara Hassan Isaack, a Somali citizen having conspired with another person for onward transportation to Nairobi by means of deception. They were convicted on appeal.

The High Court had this to say:

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The only serious mistake of the magistrate was the failure to warn the appellants about the seriousness of the offences. The courts have held that it is important for trial courts to warn unrepresented accused persons on the seriousness of the offence before convicting them on a plea of guilty in cases of serious offences. See **Simon Gitau Kinene vs Republic** [2016] eKLR. In my view, had the magistrate warned the two appellants about the seriousness of the offence before convicting them, they would most probably have changed their minds and pleaded not guilty. On that score alone, I will allow the appeal.

25. It has been argued that a retrial should not be ordered as the charge is defective. In my view, the offence herein being a very serious offence in Count 1 and the appellants having merely served a few months in prison, an order for retrial is justified in the interests of justice. The issue of an alleged defective charge will be determined by the trial court and should thus be raised in the trial court which has powers to determine that issue.

26. Consequently, I allow the appeal, quash the conviction and set aside the sentences imposed. I however order that a retrial be held on the same charges before the same court. In this regard, both appellants will remain in custody and taken to the Mandera Principal Magistrate's Court for retrial on the same charges preferred against them. The case will be mentioned in Mandera Court for progress on a date I will hereafter fix.

27. It is so ordered.

Non-Governmental Organizations

These also have a footing in Kenya. They operate under a legal regime, namely the Non-Governmental organizations co-ordination Act No. 19 of 1990. The Act makes provision for the establishment of a board to put in place relevant infrastructure for the recognition, registration, operation of the activities of the NGOS registered under the said frameworks. *Scientific and technological development and such other matters as may be of national interest.*

An example of an NGO operating in Kenya, which is engaged in the fight against human trafficking, is Awareness Against Human Trafficking (HAART). This is a non-governmental organization working on the problem of human trafficking in Kenya. It was founded in 2010.

HAART works on five levels:

- Prevention of trafficking through awareness. HAART runs workshops on human trafficking to create awareness of human trafficking in Kenya. Young@HAART is the youth program of HAART. The youths are trained on human trafficking and they also spread awareness to their communities
- Protection of victims of human trafficking. The victims' assistance team works with victims of human trafficking and, based on the individual case, HAART will try to provide assistance, which can be counselling, transport, training, economic empowerment, school fees, medical assistance, legal aid and rescue.
- Prosecution of trafficking offenders. HAART works with local authorities to arrest and prosecute traffickers.

- Policy and cooperation with other like-minded organizations. HAART works in partnership with other organizations and is part of networks such as the Mixed Migration Task Force, the Kenya Peace Networks and COATNET
- Research on trafficking. Most notably, in 2016 HAART published an extensive report[1] on human trafficking of internally displaced persons (IDPs) in Kenya.

Conclusion

Kenya is committed to the fight of this vice. It has already put in place appropriate constitutional and legal frameworks for that purpose. Courts of law are already enforcing the law. There is therefore sufficient demonstration that there is serious commitment on the part of Kenya to join hands with the international community to fight the vice. Any logistical constraints that may be faced in the fulfilment of that commitment are beyond this paper, save to say that these will be addressed as and when they arise.

[1] Displacement, violence and vulnerability: Trafficking among Internally Displaced Persons in Kenya (2016). HAART Research Series No. 1.