



Kenya

Hon. Christine Mukami Njagi

Senior Resident Magistrate

Jomo Kenyatta International Airport (Jkia) Law Courts

Introduction

Kenya is a nation strategically placed within the East African Community. It is an economic hub for both trade as well as tourism. Being such a lucrative hub, Kenya is facing major challenges in the areas of trafficking in persons and also smuggling of persons, all contributing towards organised crime in the country. There are various forms of organized crime and they include the smuggling and trafficking of humans, drug trafficking, dealing with small arms, trafficking in wildlife products, illicit trade in counterfeit goods and money laundering.

According to the 2014 Trafficking in Persons Report by the National Crime Research Centre, the most common type of trafficking in Kenya is trafficking for labour, followed by child trafficking and trafficking for prostitution. Most internally trafficked people come from rural areas (70.5%) whereas in external trafficking majority come from urban areas.

What is trafficking in persons? Trafficking in persons is defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the 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 the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”. This is the definition as per the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, commonly known as the Palermo Convention.

From the above definition it is evident that there are three constituent elements:

- (a) *The Act*(what is done): Recruitment, transportation, transfer, harbouring or receipt of persons.
- (b) *The Means*(how it is done): Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.
- (c) *The Purpose* (why it is done): For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs. To ascertain whether a particular circumstance constitutes trafficking in persons, consider the definition of trafficking in the Trafficking in Persons Protocol and the constituent elements of the offence, as defined by relevant domestic legislation.

Smuggling of Migrants is a crime involving the procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident. Migrant smuggling affects almost every country in the world. The differences between trafficking in persons and migrant smuggling are:

Consent: The smuggling of migrants, while often undertaken in dangerous or degrading conditions, involves migrants who have consented to the smuggling. Trafficking victims, on the other hand, have either never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers.

Exploitation: Smuggling ends with the migrants' arrival at their destination, whereas trafficking involves the ongoing exploitation of the victim in some manner to generate illicit profits for the traffickers. From a practical standpoint, victims of trafficking also tend to be affected more severely and to be in greater need of protection from revictimization and other forms of further abuse than are smuggled migrants.

Transnationality: Smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another State or only moved from one place to another within the same State.

Legal framework of trafficking in persons

International legal framework

The *Palermo protocols* are three protocols that were adopted by the United Nations to supplement the Convention against Transnational Organized Crime. These are:

- (a) The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children.
- (b) The Protocol against the Smuggling of Migrants by Land, Air and Sea.
- (c) The Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.

At Article 5 the Protocol requires States to criminalize trafficking, attempted trafficking, and any other intentional participation or organization in a trafficking scheme. At Article 8 the 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”.

The 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 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, slave trade, servitude and forced labour.

The Convention on the Rights of the Child (1989), and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (2000), prohibit 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. The Office of the High Commissioner for Human Rights also has the recommended Principles and guidelines on Human Rights and Human Trafficking. The Convention on the Elimination on all forms of Discrimination against Women (CEDAW, 1979); The United Nations Declaration on the Elimination of Violence against Women (1993).

The Global Plan of Action to Combat Trafficking in Persons, 64/293 seeks to urge Governments worldwide to take coordinated and consistent measures to try to defeat the scourge. It calls for governments to do this through the ratification and implementation of the Protocols, encourages interagency cooperation, seeks measures to prevent the trafficking in persons, protects and assists the victims of trafficking, actively prosecutes the crimes of trafficking in persons and manages a UN Trust Fund for Victims which aims to help Governments, intergovernmental and non-governmental organizations provide these vulnerable people with protection and support for their physical, psychological and social recovery.

The list is not conclusive but these are just some of the legal frameworks at the international level.

Regional legal framework

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol 2003) at Article 4 (2) (g) urges states to prevent and condemn trafficking in women, prosecute the perpetrators of such a trafficking while Article 11 seeks the protection of asylum-seeking women, returnees and IDPs against sexual exploitation.

The African Charter on Human and People's Rights (Banjul Charter) was adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986. At Article 5 recognises that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The African Charter on the Rights and Welfare of the Child (ACRWC) 2009. At Article 15 provides that: Children should be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with their physical, mental, spiritual, moral, or social development. Article 16 provides that: Children should be protected from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse. Article 27 provides that: Children should be protected from all forms of sexual exploitation and sexual abuse. Article 28 provides that: Children should be protected from the use of narcotics and illicit use of psychotropic substances.

Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children as adopted by the Ministerial Conference on Migration and Development, Tripoli, 22-23 November 2006. The general principles are that: Trafficking in human beings, within and between states, is a scourge which states are determined to address. Measures to prevent and combat trafficking in human beings should be based on respect for human rights including protection of victims, and should not adversely affect the rights of victims of trafficking. Special attention should be given to the United Nations Protocol to Prevent, Suppress and Punish trafficking in persons, especially women and children. The best interest of the child, including as recognised in existing international conventions, shall be considered paramount at all times.

Poverty and vulnerability, an unbalanced distribution of wealth, unemployment, armed conflicts, poor law enforcement system, degraded environment, poor governance, societies under stress as well as non-inclusive societies, corruption, lack of education and human rights violations including discrimination, increased demand for sex trade and sex tourism are among the root causes of trafficking in human beings and must be addressed.

To deal with awareness and prevention the plan of action proposes Governments to: Ensure education and training, including life-skills, awareness raising and counselling, as key preventive measures to combat trafficking in human beings. Endeavour to provide viable employment or other livelihood opportunities for youth in general and in particular for young women at risk, especially in regions prone to trafficking. Adopt specific measures to promote the rights of the child and protect children from trafficking.

Raise awareness about trafficking in human beings through engagement of the mass media and information campaigns. Promote training of those in key positions, in particular the police authorities in African countries, and capacity building to combat trafficking in human beings. Establish rehabilitation centres to assist victims of human trafficking, especially women and children and ensure their safety, protection and facilitate their recovery and social reintegration. Commission further research and information, including on the extent, forms and root causes of trafficking and collect and exchange information on the means and methods used by the traffickers.

The list is not conclusive but these are just some of the legal frameworks at the regional level.

National legal framework

Recognizing the seriousness and gravity of trafficking in persons crimes, Kenya has put in place a robust legal framework for dealing with such crimes. The Constitution which is the supreme law of the land recognizes that general rules of international law shall form part of the law of Kenya applicable (article 2(5)) and also that any treaty or Convention ratified by Kenya as forming part of the law of Kenya (article 2(6)). The Bill of rights in chapter four of the Constitution also provides for the protection of various rights including right not to be held in slavery or servitude (article 30) and right not to be treated or punished in a cruel, inhuman or degrading manner (article 29(f)) among other rights.

In addition to the Constitution, several Acts of Parliament criminalize acts of trafficking in persons. They include:

The Sexual Offences Act, Act No. 3 of 2006: The Act domesticates specific provisions of the UN Convention on the Elimination of all Forms of Violence Against Women as well as the UN Charter on the Rights of the Child. It provides for: offences with a child (Section 12), Child sex tourism (Section 14), Child prostitution (Section 15), Child pornography (Section 16), Exploitation for prostitution (Section 17) and also provides for minimum and mandatory sentencing and for protective measures for vulnerable victims and witnesses.

The Penal Code, Cap 63, Laws of Kenya provides also for the prosecution and punishment of residual trafficking in persons offences. Some of the section herein include the detention of female for immoral purposes (Section 151), criminalizes male person living on earnings of prostitution or soliciting (Section 153), criminalizes women living on earnings of prostitution or aiding, etc. prostitution (Section 154), premises used for prostitution (Section 155), brothels (Section 156), kidnapping (Sections 254/255), Abduction (Section 256), kidnapping or abducting with intent to confine (Section 259), kidnapping or abducting to subject to slavery (Section 260), wrongful confinement/concealment (Section 261), kidnapping or abducting a child under 14 years with intent to steal (Section 262) and unlawful compulsory labour (Section 266).

The International Crimes Act, 2008 domesticates the Rome Statute and makes provision for punishment of acts of genocide, crimes against humanity and war crimes. Under the Act, as read with the Rome Statute, acts of forcible transfer coupled with rape, sexual slavery, enforced prostitution, sexual enslavement, forced pregnancy, enforced sterilization of any other form of sexual violence may constitute crimes against humanity if committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.

The Counter Trafficking in Persons Act, 2010 is an Act of Parliament with the intention of implementing Kenya's obligations under the United Nations Convention against Transnational Organized Crime particularly

its protocol to prevent, suppress and punish trafficking in persons, especially women and children, to provide for offences relating to trafficking in persons and connected purposes.

The Act provides as follows: It ensures that confidentiality of victim's particulars are maintained, provides for victim impact statement, provides for the remedy of restitution, provides for victim immunity from prosecution, provides for support and protection of victims of trafficking in persons, exempts victim's from paying fees in civil suits, empowers a prosecutor to seek for orders of confiscation and forfeiture of proceeds of crime subsequent to investigations and identification, provides for the repatriation of victims to and from Kenya and establishes a National Assistance Fund for Victims of Trafficking in Persons.

The Act also creates the Counter trafficking in persons advisory committee which is mandated to oversee and propose actions to the cabinet secretary responsible for women and children aimed at prevention of trafficking, protection of victims and prosecution of perpetrators. The offences criminalized under the Act include:

- Trafficking in persons at Section 3 provides for the offences of trafficking another person, for the purpose of exploitation and for financing, controlling, aiding or abetting trafficking. The penalty is imprisonment for a term of not less than 30 years; or fine of not less than 30 million shillings; or both and upon subsequent conviction, life in imprisonment.
- Acts that promote child trafficking at Section 4 notes that initiating or attempting to initiate adoption, fostering or guardianship proceedings for the purpose of child trafficking. The penalty is imprisonment for a term not less than 30 years; or a fine of 20 million shillings; or both and upon subsequent conviction, life in imprisonment.
- Promotion of trafficking in persons at Section 5: Willingly and knowingly leasing premises for the purpose of promoting trafficking of persons or; publishing, exporting or importing, any material for purposes of promoting trafficking in persons; or owning, managing, running, or financing any job recruitment agency for the purposes of promoting trafficking in persons; or by any other means promotes trafficking in person. The penalty is imprisonment for a term not less than 20 years; or a fine of 20 million shillings; both, and upon subsequent conviction, life in imprisonment.
- Acquisition of travel documents by fraud or misrepresentation at Section 6: Acquisition of travel documents by fraud or misrepresentation knowingly misrepresenting any fact with the aim of facilitating the acquisition of travel document or fraudulently obtaining any document from the Government agencies, with the intention of aiding in an offence of trafficking in persons. The penalty is imprisonment for a term no less than 10 years; or a fine of 10 million shillings; or Both, and upon subsequent conviction, imprisonment for a term of not less than 10 years without the option of a fine.
- Facilitating entry into or exit out of the country at Section 7: Facilitating, aiding or supporting the exit or entry of persons from or to the country at international or local airports, territorial boundaries and seaports for the purpose of promoting trafficking of persons. The penalty is imprisonment for a term no less than 30 years; or a fine of 30 million shillings; or Both, and upon subsequent conviction, imprisonment for a term of not less than 30 years without the option of a fine.
- Interfering with travel documents and personal effects at Section 8: Interfering with travel documents and personal effects confiscating, concealing, destroying or in any other manner dealing with any identification or travel documents, of another person in furtherance of trafficking in persons or in order to prevent that other person from leaving the country or seeking redress from the government or appropriate agencies. The penalty is imprisonment for a term no less than ten years; or a fine of 10 million shillings; or Both and upon subsequent conviction, imprisonment for a term of not less than 10 years without the option of a fine.
- Life threatening circumstances or death at Section 9: Causing a victim of trafficking in persons to experience any permanent or life threatening bodily harm; or causing by reason of the act of trafficking in persons, the death of the victim of trafficking or affliction of any other life threatening or terminal health condition. The penalty is life imprisonment.
- Trafficking in persons for organized crime at Section 10: Being engaged in trafficking in persons as part of the activities of an organized criminal group or directed other persons to commit an offence as an activity of an organized group and the penalty is life imprisonment.
- Confidentiality at Section 11: Making public the name and personal circumstances of the victim of trafficking in persons or any other information intending to establish the identity of a victim of trafficking in persons and the circumstances of trafficking in persons commits an offence. The penalty is imprisonment for 5 years; or a fine of not less than 5 million shillings; or Both, and in the case of a body corporate, a fine of not less than 10 million shillings.

- Restitution at Section 13: Provides that a person convicted of an offense under this Act, may be requested to make restitution or compensate the victim for the cost of any medical or psychological treatment and necessary transportation accommodation, other living expenses, or any other relief that the Court may consider just, in addition to any other punishment prescribed under the Act.
- Other penalties are provided at Section 26: (1) Non-Citizens who have been convicted of an offense under this Act are to be deported immediately after completing their sentence, and will not be allowed to re-enter Kenya. (2) Government Employees and Officials are liable to imprisonment or a fine, if they knowingly issue or approve the issuance of travel documents or other documents to any person who fails to go through the proper procedures and requirements instructed by the law, with the intention of assisting in the commission of an offense. (3) If the Offender had adopted, fostered, or had a child in guardianship who is the subject of an offense under this act, the court will rescind the adoption, fostering, or guardianship. The child will be dealt with in accordance with the Children Act, 2001.

Case law from Kenya

Trafficking in persons in Kenya is at times confused with the smuggling of persons, mostly for labour or sexual exploitation. Most of the people who pass through the Court system and/or the borders are always in search of better employment opportunities and the ruse is always that they are advantaged to cross borders for the same to be guaranteed. They are thus received in the country on the deception of better employment opportunities, only to be exploited for labour and sex. Almost all victims of human trafficking may state that they were lured to the traffickers by their friends, families and/or acquaintances with promises of better futures, but very few note that they were threatened or coerced.

From the few cases that I have been able to handle at the various stations such as Kwale County and in Nairobi County, I have noted that the victims usually note that they were in search of work or marriage opportunities and were informed of opportunities available in either Kenya and/or in the Arab countries of Saudi Arabia and Oman. They would then travel to Kenya, be hosted within a residential area with others, documentation would be processed and they would then be transported and/or hire a vehicle to bring them to the airport. Since they would have no idea where to proceed and may draw attention to themselves they would be arrested and charged in Court.

Most of the experiences that we have with smugglers are in the case of Ethiopians being crossed through the borders. They are transported in vehicles across the borders either at Mandera or through Lunga Lungu, and they are then housed in small enclosures before they try and find their way out of the country to South Africa, which is noted to be the ideal destination for better employment terms.

When they are arrested most of them are charged Under Section 53 of the Kenya Citizenship and Immigration Act, Act No. 11 of 2011. The offence is noted at Section 53 (1) (j): unlawfully enters or is unlawfully present in Kenya in contravention of this Act. At 53 (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 imprisonment for a term not exceeding three years, or to both.

In the case of *Muhammad Asif v Republic* [2017] eKLR, Republic of Kenya, in the High Court at Machakos, Criminal Appeal 82 of 2017, Honourable Lady Justice P. Nyamweya stated as follows when she allowed an appeal against the State in this case. She noted that:

“I am convinced that this is not a proper case for retrial. I have in this regard particularly noted the concession by the Prosecution that no evidence was brought of the offence of trafficking in persons as against the Appellant. 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
- (b) 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
- (c) 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;
- (b) Subjecting a person to practices similar to slavery;

- (c) Involuntary servitude;
- (d) Forcible or fraudulent use of any human being for removal of organs or body parts;
- (e) Forcible or fraudulent use of any human being to take part in armed conflict;
- (f) Forced labour;
- (g) Child labour;
- (h) Sexual exploitation;
- (i) Child marriage;
- (j) 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”. She thus allowed the appeal.

In the case of *Joseph Fundi & another v Republic* [2013] eKLR, Republic of Kenya, in the High Court of Kenya at Embu Criminal Appeal No. 26 of 2013, *Consolidated Criminal Case No. with 29 of 2013. In this case Joseph Fundi and Kareem Mukami were charged in Count I with the offence of trafficking for sexual exploitation contrary to section 18(1) (b) as read with section 18(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were as follows: On 12 October 2010 at Gichegere Village, Gichegeri sub-location within Embu County, jointly intentionally arranged the travel of MN from Kimangaru to Gichegere believing that the said MN would likely be defiled by Joseph Fundi after the journey. On Count I the 2nd Appellant was sentenced to fifteen (15) years imprisonment. The appeal was allowed, as there was no evidence to support the charge.*

Challenges

- 1) Lack of proper representation of the victims of trafficking. This leads to revictimization of the victims of trafficking by being charged for offences such as prostitution, being illegally present in Kenya.
- 2) Lack of interpreters for the victims who are normally charged with offences under the Kenya Citizenship and Immigration Act.
- 3) No funding opportunities for shelters and or safe houses to house the victims during trial process. Funding is limited to the Witness Protection Agency for them to be able to sustain the witnesses in Court. These facilities are few and have limited available capacity and resources. Most of them are run by Non-Governmental and Humanitarian Organizations.
- 4) Challenges in prosecution and investigation of these cases as most of the victims are not able to identify their perpetrators. They never meet the actual perpetrators. Some of the officers within the police station are not sufficiently trained to handle such cases. As such, investigations undertaken are often limited to proving individual and less complex offences rather than trafficking in persons offences.

In most cases, the police officers assigned to investigate Trafficking in Persons cases lack the specialized training and skill to do so. They also do not possess the basic tools to carry out complete investigations.

Just like investigations, prosecution of trafficking in persons cases require specialized training, skill and expertise. Where this is lacking, cases may be lost due to poorly drafted charges or inefficient presentation of evidence.

- 5) In most cases, trafficking in persons is grossly under or non-reported due to the risk threat and trauma faced by victims/survivors/witnesses, the fear of stigmatization and reprisals and lack of awareness of victims/survivors/witnesses that the acts are crimes of a grave nature.

- 6) Victims living with disabilities are usually in a predicament with reporting the cases and/or testifying in courts for example if a victim is dumb, blind or deaf.
- 7) Delay in operationalization of the victim trust fund which is meant to assist victims of trafficking.

Recommendations and conclusions

Create legal ways to satisfy the demand for labour from abroad, aiming at preventing exploitation and focusing on those groups of persons who are averse to risk. Promote greater awareness on human trafficking agenda.