



Malawi

The Current Status of Trafficking – The Malawian Judicial Perspective

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Contextual analysis

The context of trafficking in Malawi, similar to many countries in Africa, is poverty. As the country struggles amid globalization efforts, Malawians wanting to migrate are in the hundreds, and large numbers of these are women and children. Women particularly bear the pressure of finding alternatives for their families' survival. Thus, migration for work to the cities or overseas is an option for the desperate. Then, as migration continues to be exploited by many sectors, especially recruitment agencies, it becomes the easiest channel for trafficking women and children.

Internal trafficking is prevalent. Although there has been no sustained data to support this contention, the general feeling has been that the practice is growing both in terms of numbers and organisation.

Overview of human trafficking in Malawi

Robust trafficking laws in place – Trafficking in Persons Act (TIPA) and Child Care, Protection and Justice Act (CCPJA). Continued sensitization of trafficking in communities. Malawi is still rated as Tier 2 by the United States. Prosecution of reported cases.

Judicial perspectives

Magistrates (lay and professional) still handle most of the trafficking and related offences in Malawi. The High Court mostly handles confirmations, reviews and appeals of the said cases. Most trafficking cases are still being handled as 'run of the mill' criminal cases. The role of the sentencer starts with the charge. A defective charge limits our ability to sentence effectively, so courts heavily rely on prosecutors' ability to draft proper charges.

Sentencing trends

Inconsistency in sentencing despite the law not having an option of a fine, which is a unique feature of the Malawian TIPA. Most cases deal with trafficking of persons for labour exploitation into neighbouring cases. Most victims are children and young offenders.

General sentencing principles apply

The Sentence must be proportionate to the offence and the harm caused. Must reflect the aggravating and mitigating factors, as per Sections 260 of the CPEC. Section 260(2) of the CP&EC states that the court may receive evidence from both the accused and the prosecution, from or on behalf the victim and also from any relevant reports which would enable the court to access the gravity of the offence (for example, psychological reports). Act as a deterrent to others who are considering getting involved in trafficking. As in all offences, you must look at the nature of the offence itself. The previous record of the accused person. The personal circumstance of the particular accused or offence.

Malawian sentencing stresses that judicial officers must always consider the TOTALITY principle.

Select number of cases

The Republic v John Mponda, Criminal Case No. 352 of 2017 – Convicted of 3 counts of trafficking contrary to section 14(1) of the Trafficking in Persons Act. Mponda had abused the victims' position of vulnerability and harboured them with an intention of using them as bar hostesses and sex workers without their consent. The court imposed 5 years imprisonment. The Republic v Saukira Saidi, Criminal Case No. 208 of 2017 – Pleaded guilty of two counts of trafficking; one under section 14(1) of the Trafficking in Persons Act and the other of child trafficking under section 79 of the Child Care, Protection and Justice Act. The court imposed 3 years imprisonment for 1st count and 5 years imprisonment for 2nd count to run concurrently. The Republic v Retina Chiyenda, Criminal Case No. 30 of 2018 – Convicted of child trafficking contrary to section 15(1) of the Trafficking in Persons Act for recruiting a child with intention of transporting her to RSA. The court imposed 8 years imprisonment with hard labour from date of arrest.

Latest developments in Malawi

National registration and birth registration laws enacted. National registration exercise undertaken in 2018. Elements of TIPA have come into effect. National Co-ordination Committee has finally been gazetted and

has convened their first meeting. Protection Officers have been appointed and will imminently be gazetted. TORs for the secretariat of the Committee have been drafted and the Head will be the Minister for Home Affairs and Internal Security. Civil Society have mobilised themselves to address trafficking. Malawi Network Against Trafficking ('MNAT') has been established, chaired by WOJAM

Women judges association of Malawi and the fight against trafficking

Has strategically adopted the issue for its programming work. Carried out a number of programmes, projects and sensitizations on trafficking which have included: Renovated 2 courts to make them 'victim' friendly courts. Development of Trafficking in Persons Handbook for Magistrates and Judges. Workshops, Trainings and Sensitizations on Gender Justice issues with a focus on trafficking. Training of Trainers – Training of WOJAM members to take active role and train others on gender justice issues. Training of Judges and Magistrates on laws that deal with gender justice especially TIP with a focus on sentencing and victim related adjudication. Training of Prosecutors-evidential aspects, dignity towards a victim before, during and after trial. Training of Victim Support Unit Officers-treatment of victims of gender-based violence, trafficking in persons, abduction, and kidnapping. Training investigators – elements of offences such as sexual assaults, defilement, abduction, kidnapping, labour exploitation of children. Training of community members like chiefs, religious leaders – what constitutes gender injustice issues, how to handle them formally or informally. Training of Social Welfare Officers – treatment of victims of abduction, child marriages and labour exploitation. Training of Immigration Officers – How to identify trafficking in persons, actors, how to curb it and how to deal with victims of trafficking in persons.

Challenges

A number of magistrates continue to fine offenders for trafficking cases. The Immigration Act is outdated with most smuggling-related offences being fine-based before imprisonment; as such needs review. Sentencing trends show Victims are rarely considered as part of the sentence and catered for e.g. compensation, psychological assistance, etc. Forfeiture is hardly imposed. Malawi has high levels of illiteracy which creates knowledge gaps. Legal literacy is still low – knowledge of recently passed laws is minimal and Lack of resources affects protection of victims as well as services to victims. Funds from the Anti-Trafficking Fund have to be operationalised.

The way forward

Sustained and integrated Capacity Building activities needed for all sectors of society Continued Tailor-made trainings for criminal justice workers, namely police, immigration, prosecution, Judiciary, Community Policing, Prisons, Faith Based Organisations ('FBO's). Translation of the TiP Act into a number of local languages. Mass awareness programmes across the country. Lobbying for establishment of "safe homes" and strong witness protection systems to be put in place. Establishment of "victim friendly" Courts. Creation of Guidelines for Victim Protection and establishing safe homes, including vetting.