

THE CRIMINAL JUSTICE RESPONSE TO TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS IN KENYA

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I. INTRODUCTION

Trafficking in persons is a crime committed when a 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, kidnapping, fraud, deception, abuse of power or of position of vulnerability, giving payments or benefits to obtain the consent of the person having control over another person. This is a crime normally done by people who are highly connected, and it is a wide syndicate of people doing it for personal gain. People are mostly trafficked for the purpose of using the victims for the purpose of cheap labour, sexual exploitation, organ harvesting and surrogacy.

A. Kenya Research Reports on Counter Trafficking in Persons

Trafficking in persons is not only a national problem but a regional and global problem as well. Kenya has been described as a country of origin, transit and destination in human trafficking by various reports as outlined below:

1. The National Crime Research Centre on Human Trafficking in Kenya, 2015

This is a government research centre which made the following findings: Trafficking of people from Kenya to other nations was the most prevalent (external trafficking) in Kenya at 60.2%. Forms of trafficking prevalent in Kenya were labour and sex related at 44% and 53%, respectively. Trafficking involves children, men and women at 33%, 26% and 41%, respectively. Victims of human trafficking are children, men and women whose socio-economic profiles are low income, impoverished, illiterate, unemployed, victims of domestic violence and social exclusion.

2. The CRADLE

This is a legal organization that researched and compiled the 'Children Foundation Trends Report on Child Trafficking in Kenya, (2014)'. The report highlighted child trafficking in Kenya based on the cases the organization had handled. According to the report, trafficking represents exploitation in different forms such as child labour, domestic labour, street begging, child sexual exploitation, prostitution, child sex tourism, and servitude among others. The report further indicated that 41.3% of children, both male and female between the ages of 10-14 years, are trafficked to offer cheap labour. Factors facilitating trafficking for children include poverty, ignorance and porous borders. The report indicated that there is a lack of reporting of trafficked persons. Trafficked children are threatened, physically harmed, traumatized and brainwashed.

Victims of trafficking in Kenya are overworked, suffer physical and sexual abuse, non-payment or under-payment of wages, poor working conditions, and restricted or no access to education. Research investigating the impact of trafficking experience on women has found that the conditions listed above have immense effects on their physical, reproductive, and mental health and may lead to drug and substance abuse, decreased social and economic well-being, and decreased access to health and support services. In Kenya trafficked children may not be aware that they are being trafficked. Some are too young to understand the dangers of being moved from one place to another. Older children are promised a job or education by the traffickers. Many children are trafficked from rural to urban areas for domestic labour, fishing, agricultural farms, pornography and sexual exploitation.

B. Causes of Child Trafficking

Causes of internal child trafficking are mostly social and economic which include poverty, lack of equal

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opportunities, lack of family support, gender inequality and domestic violence. Causes of external child trafficking are mostly deceit, arranged marriages, child theft and promises for further education. Children are trafficked through Kenya to other destinations. Kenya has played different roles in counter trafficking in persons as well as smuggling as outlined below.

1. As a Country of Origin

Kenyans are trafficked to other African countries such as South Africa, Rwanda, Uganda, to European countries such as Germany, Italy, Ireland, the United Kingdom and the Netherlands for the purposes of domestic labour and sexual exploitation; to the Middle East and North American countries for domestic work, forced labour, and commercial sexual exploitation. In the recent past, Kenya has cracked down on all the illegal agencies that were trafficking people to the Middle East when cases of Kenyan citizens dying or becoming incapacitated due to maltreatment from their employers increased and raised alarm. It is estimated ten deaths of Kenyan citizens happened in the Middle East in the years 2016 to 2018. Trafficking of Kenyans also caused social problems. Many children were left without the care of both parents; some were neglected by the caregivers who the children were entrusted to by their parents, many families separated or divorced when the breadwinners went away and could not send support to their families. Some of the serious cases that were handled, among others, are:

- In 2016, three children below the age of 10 years were rescued from their traffickers at the Kenya-Tanzania border where the perpetrator was crossing to Tanzania to hand over the children to his clients. He was arrested and charged in court and sentenced for life. Children are normally trafficked for organ harvesting and religious offerings.
- In mid-2017, two Ugandan women were intercepted while trafficking two children, one less than a year old and the second was under 2 years old. The women were charged with two accounts of trafficking and were jailed for 30 years for each account.

2. As a Country of Transit

Identified victims include Ethiopian, Somali and Indian nationals trafficked through Kenya en route to South Africa and the Middle East. They are smuggled into the country through porous border points and taken to houses in informal settlements or crowded estates where it is hard to be identified by the police. However, many cases have been identified and pursued through the justice system, and these are some of the examples:

- In 2017, 20 Ethiopian nationals were rescued from one of the towns in the outskirts of Nairobi when in transit to South Africa. They were all rescued and arraigned in court. Some of the victims were used as state witnesses. This helped the police to pursue the smugglers. Victims were repatriated back to Ethiopia, and one of the smugglers was arrested and the verdict has not been given since the criminal investigation is still in progress.
- On 2 April 2019, fifteen (15) Burundi women were rescued in a house in Nairobi in Kayole estate while on transit to Saudi Arabia for domestic labour. The victims were arraigned in court on 4 April 2019. Thirteen of the victims were repatriated back to Burundi and two are in witness protection as state witnesses to assist in investigations.
- In September 2018, five Ugandan women were intercepted in Nairobi while being trafficked to Oman. One of the traffickers was arrested immediately; the second one after a few days and the third one is still at large. The girls served as witnesses in court and were repatriated back to Uganda. A ruling has not yet been issued.

3. As a Country of Destination

Citizens of other African and Asian countries have been identified as victims of trafficking in Kenya working as casual labourers, commercial sex workers, beggars on behalf of the traffickers or domestic workers. A few examples are outlined below:

- From 2009 to date, there have been more than 50 Ethiopian girls and women who have been arrested in different parts of the capital city Nairobi working as sex workers. In February 2019, many Somali

girls were rescued from child labour working as servants. One of the girls, a 12-year old, had been trafficked from Somalia to be married off but was rescued early on the morning of the ceremony. The girl was placed in a safe house and enrolled in school. The perpetrators were arrested, and the verdict has not yet been given.

- Young women recruited for surrogate motherhood were rescued from the jaws of a trafficker who has not been arrested to date but whose case the police are still tracking. The trafficker recruits the young women with a promise to pay them handsomely to carry babies who are normally conceived after an IVF procedure (external fertilization) and the babies are taken away and given to couples without children. However, the young mothers are never compensated as promised. Some of the ladies who were ready to leave the safe house were reunified with their families, but those who did not feel ready are still in the safe house awaiting recruitment by economic empowerment groups.
- In August 2018, seventeen Nepalese women were rescued from trafficking in a brothel in Nairobi. They were arraigned in court and all were witnesses in the case. They were repatriated back to Nepal after testifying but the case is still going on in court.

C. Challenges Encountered in Handling Counter Trafficking in Persons Cases in the Justice System

- i. Most of the time the perpetrators are never arrested, and this hinders progress;
- ii. Communication barriers because most of the victims are non-Kenyans who need interpreters who are not readily available in court (i.e., Nepalese);
- iii. Delay in investigation which derails cases;
- iv. Poor coordination for trans-border cases; hence premature termination of cases;
- v. There is limited access to safe houses to give psychosocial support to the distressed and threatened victims to collaborate with actors in the justice system.

D. Possible Solutions

- i. High level of public awareness creation on counter trafficking in persons so that they can report cases when there are high chances of apprehending perpetrators before they move out of the area of operations;
- ii. All courts need to make arrangements for acquiring interpreters prior to the hearing of cases;
- iii. There is a need for global coordination on counter trafficking in person cases so that both the rescuing country and the country of origin can quickly collaborate to have the cases handled fairly and appropriately to meet global standards;
- iv. There is need to have safe houses across the country, possibly in each county, with all the support mechanisms such as counsellors on board so that victims can receive relevant support in a timely manner. This will enable victims to give testimony in a timely manner without any fear.

E. Current State of Counter Trafficking in Kenya

Kenya, as a Member State to the Palermo Protocol, has been submitting a report every year to the United States State Department showing the progress made to combat human trafficking. As discussed below, Kenya as a country has set up various strategies to combat human trafficking and smuggling in various aspects.

II. LEGAL FRAMEWORK

A. Laws¹

1. The Constitution

Article 2 (5) and (6) of the Constitution provide that any treaty or convention ratified by Kenya shall form part of the Law of Kenya under the Constitution. The effect of this is that the said conventions are applied by the municipal courts. Chapter 4 of the Constitution on the Bill of Rights contains fundamental rights and freedoms, some of which can be the basis for protecting the victims of trafficking in persons. These include the right to life; equality and freedom from discrimination; right to human dignity; protection against slavery, servitude and forced labour and freedom of movement and residence and protection of victims of offences. Article 59 (2) (g) under this Chapter also sets up a Commission that promotes respect for and develops a culture of human rights in Kenya. One of the principle functions is to ensure compliance with obligations under treaties and conventions relating to human rights. All the above rights cover a cross-section of abuses that are notorious within the context of human trafficking, such as murder, torture, inhuman or degrading treatment, discrimination, restriction of movement and where a person has been employed, poor remuneration.

2. The Counter Trafficking in Persons Act, 2010

The Kenyan Parliament enacted the Counter Trafficking in Persons Act on 17 September 2010. The Act's intention is to implement Kenya's obligation under the United Nations Convention against Transnational Organized Crime, particularly in its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. This National Plan of Action to combat human trafficking articulates the 3Ps approaches namely: Prevention, Protection and Prosecution. The Act also comprehensively covers the offences of trafficking in persons and other related offences, modalities of trial of offenders and an elaborate system on victim assistance. It further establishes a fund for victims of trafficking.

For purposes of implementation, the Act provides for the establishment of an Advisory Committee under section 19. The primary function of the Committee is to advise relevant Ministries on interagency activities aimed at combating trafficking and the implementation of preventive, protective and rehabilitative programmes for trafficked persons. The membership of the Committee is diverse and comprehensive. The Counter Trafficking in Persons Act has repealed and amended sections of the Penal Code, the Sexual Offences Act 2006 and the Children Act, 2001 that touch on trafficking. The Act became effective in 2012.

In 2016, the counter trafficking secretariat developed regulations on the implementation of the Counter Trafficking in Persons Act, 2010. The regulations stipulate exhaustively the procedure each actor in the criminal justice system is supposed to follow while serving the victims of trafficking without harming them further.

3. The Witness Summons (Reciprocal Enforcement) Act, Chapter 78 of the Laws of Kenya

This is an Act of Parliament providing for the enforcement of witness summonses issued by courts of certain foreign countries. The thrust of this Act is to permit the inter-state summoning of witnesses between Kenya and other countries for the purpose of giving evidence in criminal proceedings. Such summonses would help in shaping criminal investigations and trials of matters connected with human trafficking, in view of the trans-boundary nature of trafficking-related offences.

4. Witness Protection Act

Kenya enacted the Witness Protection Act, which established the Witness Protection Programme in December 2006. The witness protection programme is a special scheme that endeavours to protect and assist witnesses of crime from being threatened, intimidated and even harmed by criminals for cooperating with law enforcement and prosecution authorities. Witnesses under threat are rescued and placed in safehouses and are also given security to court and back.

¹ The Counter Trafficking in Persons Act (No. 8 of 2010), The Draft Counter-Trafficking in Persons Regulations, 2016, The National Plan of Action for Combating Human Trafficking Strategic Framework 2013-2017, The Constitution of Kenya 2010. Children's Act, 2001, Witnesses Protection Act, 2015.

B. Policies

1. National Referral Mechanism Guidelines

The document assists in identification of victims of trafficking and highlights the reporting procedure to assist the victims in getting help and to restore them to their original condition.

2. Police Standards of Operations (SOPS)

The SOPs were prepared within the framework of a working group of law enforcers and key players from civil society service providers with the aim of identifying current ways in which trafficking in persons is handled at the pre-trial stage in Kenya. This is a guide to the police officers giving a sequence of activities from the reporting point all the way to the courts while applying regional differences and current best practices.

3. Prosecutors' Manual

The document gives direction on how to categorize cases related to counter trafficking in persons, charge the offender and impose an appropriate penalty for each offence. This was to avoid discrimination and ensure fair trials. The manual is to be used by prosecutors.

4. Guidelines for Identification of Victims of Human Trafficking

The Counter Trafficking in Persons Act, 2010 (CTiP), which implements Kenya's obligation under the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol), clearly sets out the components that constitute the offence of trafficking in persons. Kenya therefore developed the identification Guidelines to help the key actors in the public when well sensitized to be able to assist in reporting. The key factors, such as the police and authorized officers such as probation officers, chiefs and children's officers, can be able to identify, screen and interview victims ethically and with professionalism. Through identifying the victims early enough, they assist in the arrest of perpetrators, the rescue of the victims and also ensure that there is evidence available in court that will contribute to deterrence of further human trafficking.

The Guidelines clearly stipulate the process of identification of trafficked victims as follows:

- Definitions of human trafficking and smuggling;
- Who can identify a victim of trafficking;
- Indicators for assessing victims;
- Steps of identification;
- Risk assessment and protection;
- Screening interviews;
- Best practices for children and adult interviews;
- Who should be contacted first after ascertaining that the person or child is a victim of trafficking.

5. Achievements during the Period from 2013-2017

- Cases of persons involved in trafficking in children have been prosecuted;
- A human Trafficking Unit at the Police headquarters was created in 2003 to handle issues related to trafficking in persons;
- Enforcement of the Counter Trafficking in Persons Act;
- The Government has enforced the Sexual Offences Act and the Children's Act, 2001 which both touch on trafficking in persons, specifically women and children;

- The Ministry of Tourism has reviewed the Act and has included issues on Child Sex Tourism;
- The Ministry of Labour has a National Plan of Action on child labour which includes trafficking;
- Setting up of the Counter Trafficking Advisory Committee and its Launch on 8 July 2014;
- Development of the National Plan of Action for Combating Human Trafficking Strategic Framework 2013-2017;
- The Kenyan government has established a place of safety for both adult and child victims of trafficking.

III. CHALLENGES FACED IN DEALING WITH COUNTER TRAFFICKING CASES IN KENYA

- a) Poor reporting of cases of trafficking in persons because many victims fear harm by the perpetrators or being prosecuted for being in the country illegally;
- b) Lack of community-based structures to enhance reporting by the public;
- c) Low levels of awareness of the concept of counter trafficking in persons; hence there is little knowledge on identification of victims and reporting procedures;
- d) Witnesses fear for their safety and opt out of the criminal justice system; hence premature termination of cases;
- e) Lack of a database in which all cases can be consolidated to measure the magnitude of the problem which can meet reporting obligations and case management;
- f) There are no firm international cooperation mechanisms such as mutual legal assistance and joint investigations;
- g) Lack of strong reciprocal arrangements to enhance international cooperation to counter trafficking in persons;
- h) New crime trends among children are emerging daily, like gang rape;
- i) Crime trends change every now and then while the behaviour modification processes have not been streamlined fast enough to meet the needs of the children involved in child trafficking;
- j) Corruption in society;
- k) Gender inequality.

IV. CONCLUSION

The Kenyan government has reached a milestone in terms of the criminal justice response to trafficking in persons and smuggling of migrants. Many perpetrators have been judged and sentenced and many victims rescued, protected, repatriated back to their countries of origin, and victims of Kenyan origin have been reintegrated to their natural homes. In terms of legal framework, much has been done and various legal frameworks have been developed to prevent, protect and prosecute traffickers. The criminal justice system adheres to the UN Protocol to which Kenya acceded in 2005, which provides an internationally agreed definition of trafficking in persons, but also provides elaborate measures for preventing and suppressing trafficking in persons while ensuring protection and rights of victims are upheld. Kenya has also set up both private and public safe houses for the victims of trafficking. Finally, Kenya has been able to identify, arrest, and expeditiously deal with smuggling and counter trafficking cases because of the wide linkage and strong collaboration that has been built between the key actors in the justice system and the community.