

A Critique of the role of the Government in Combatting Human Trafficking in Kenya.

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Declaration

I, TRACY ADHIAMBO ODHIAMBO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

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LEGAL INSTRUMENTS

The Constitution of Kenya 2010

National Statutes

The Children Act of 2001, Cap 141

Sexual Offences Act, 2006, Cap 62 (a)

The Victim Protection Act No. 17 of 2014

Counter-Trafficking in Persons Act of 2010

The National plan of Action for combating Human Trafficking and Strategic Framework (2013-2017)

International statutes

United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Art. III (2000). (*United Nations, Palermo Protocol*)

African (Banjul) Charter on Human and Peoples' Rights (October 1986)

CASES

Beatrice Akomo Ongito v Republic (Criminal Appeal No.274 Of 2012)

F.M.N v Republic (Criminal appeal case 321 of 2007)

George H. Mwakio v Republic (Criminal appeal case 169 of 2008)

K.K.R v Republic (Criminal appeal case 66 of 2009)

ACRONYMS

USAID	United States Agency for International Development
UNICEF	United Nations Children’s Emergency Fund
ICC	International Criminal Court
COTU-K	Kenya’s Central Organization of Trade Unions
ANPCANN Neglect	African Network for the Prevention and Protection of Child Abuse and Neglect
UNODC	United Nations Office on Drugs and Crime
HAART	Awareness against Human Trafficking organization
ILO	International Labour Organization
UNCRC	United Nations Convention on the Rights of the Child
NPA	National Plan of Action
ICC	International Criminal Court

ABSTRACT

Human trafficking has been 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.¹

Human trafficking does not take place in social and political isolation. The government is therefore tasked with the responsibility to ensure that this atrocity is nipped in the bud. When the social and political circumstances allow for and support the forceful theft of human labour, there is a need for deconstruction. A deconstruction of the laws that create this environment or an improvement of the same. Human trafficking is squarely located within the larger context of workers' rights, immigrant rights and human rights.² According to the UNICEF Innocenti Insight, Kenya is a primary source of origin, transit and destination for human trafficking.³ This may be indicative of a general lack of concern by the government to deal with the atrocity. To this end, this research is hinged on mainly trying to figure out where the problems are in policy and regulation in order to improve Kenya's status in the global arena as regards this subject.

¹ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Art. III (2000).

² Wolken C, 'Feminist Legal Theory And Human Trafficking In The United States: Towards A New Framework' 409.

³ UNICEF, *Innocenti Insight; Trafficking in Human Beings, especially Women and Children in Africa*, Pg. 10-12.

CHAPTER ONE

RESEARCH PROPOSAL

BACKGROUND

Human trafficking has been defined as the recruitment, transportation, transfer, harbouring or receipt of persons.⁴ This includes, for the purpose of exploitation; the threat of or use of force or other forms of coercion, abduction, fraud, deception, abuse of power against a position of vulnerability or giving or receiving benefits for the consent of a person having control over another person.⁵ It can as such be seen as a form of neo-slavery.⁶ Human trafficking originated from historic times where ownership of slaves was considered prestigious; with slaveholders even describing it as a service to the slaves as they were being “shipped away from the barbarities of their home life.”⁷ These in fact, were some of the proposing points for Trans-Atlantic slave trade. Although at this day and age slavery seems like a far-fetched concept, it actually still subsists in its original form.⁸ Many jurisdictions have legislation prosecuting and preventing human trafficking however, this business continues to grow and now rivals drug trafficking on the global arena.⁹

The Trafficking in Persons Report revealed that Kenya, “is a source, transit and destination country for men, women and children subjected to forced labour and sexual exploitation, violence and human trafficking.”¹⁰ This has further been evidenced by the emergence of situations where many Kenyan citizens are trapped in foreign countries like Saudi Arabia under atrocious work

⁴ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Art. III (2000).

⁵ United Nations, *United Nations, Palermo Protocol*, Art. III (2000)

⁶ Musinguzi B, Human trafficking: The modern form of slavery eating up East Africa, <http://www.monitor.co.ug/Magazines/PeoplePower/Human-trafficking--The-modern-form-of-slavery-/-/689844/1974562/-/rj815s/-/index.html> .

⁷ Colson C, *God and Government*, Goodreads 2007,112.

⁸ Michelle Rickert, ‘Wilberforce’s work is not done: ending human trafficking and modern day slavery’¹⁰.

⁹National Underground Railroad Freedom Centre, ‘Slavery Today: Human Trafficking’, <<http://www.freedomcenter.org/slavery-today/>> .

¹⁰ United States Department of State: *Diplomacy in Action, Trafficking in Persons Report*, 4 June 2008 <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215492.html>. See also Ongiri I, Kenya lands on US human trafficking list, <http://www.nation.co.ke/news/Kenya-lands-on-US-human-trafficking-list/-/1056/2888148/-/wvdqmy/-/index.html> .

conditions.¹¹ These atrocious work conditions include scenarios where individuals are physically abused and denied identification documents, such that they are trapped and have no way of returning home.¹² In Kenya, there exist rampant and an unfortunately severely overlooked situations; where minors from poverty stricken families are taken across county and country borders to work as domestic workers and do other exploitative odd jobs for little pay.¹³

Furthermore, there have also been cases where Kenyan citizens have been abducted and taken to foreign countries¹⁴ and have faced torture in foreign countries. In the case of *Beatrice Akomo Ongito v Republic*¹⁵ a Kenyan defendant was charged with transnational commercial sexual exploitation. The complainant was said to have been transported to Tanzania and locked in a deserted house where she was beaten and sexually abused.¹⁶ Other reported cases include cases of trafficking for sexual exploitation.¹⁷ These cases mostly involve adults taking advantage of minors. An example of this is *F.M.N v Republic*.¹⁸ In this case, the defendant was charged with trafficking for sexual exploitation contrary to section 18(a) of the Sexual Offences Act.¹⁹ Another reported case was *George H. Mwakio v Republic*.²⁰ In this case a man was charged with defilement and trafficking for sexual exploitation. In this case, the defendant transported the minor from Kenya to Tanzania where she was eventually rescued by the police at Kitoto Police Station. The accused was also arrested and handed over to Kenyan police.²¹ In yet another case, *KKR v R*, 15 year old girl was abducted from school by her brother's friend who pretended to be taking her home but drove to his house instead where he kept her for two days and had sexual encounters with her. He was charged with child trafficking for sexual exploitation.²²

¹¹ Haddadi A, 'Kenyan Graduates Trafficked to Saudi Arabia, UAE, Qatar and Kuwait by Embassy Staff', International Business Times, 26 March 2012 <http://www.ibtimes.co.uk/embassy-staff-help-human-trafficking-cartel-send-319444>.

¹² Burns C, *Iscah's Escape From Saudi Arabia: Abused Kenyan Domestic Worker Tells Her Story*, Equal Times, 18 December 2015 <http://www.equaltimes.org/iscah-s-escape-from-saudi-arabia#.VxXmgfl97IU>.

¹³ Kerry J, 'Trafficking in Persons Report', June 2014.

¹⁴ Mwangi G, The Nation, Kenya, Aug. 29, 2004, www.religionnewsblog.com/8585/deya-babies-are-victims-of-trafficking.

¹⁵ *Beatrice Akomo Ongito v Republic* (Criminal Appeal No.274 Of 2012)

¹⁶ *Beatrice Akomo Ongito v Republic* [2013] eKLR.

¹⁷ Zachary Ochieng, News Africa, August 2002, www.newsfromafrica.org/newsfromafrica/articles/art_854.html.

¹⁸ *F.M.N v Republic* (Criminal appeal case 321 of 2007) eKLR.

¹⁹ *F.M.N v Republic* [2009] eKLR.

²⁰ *George H. Mwakio v Republic* [2008] eKLR.

²¹ *George H. Mwakio v Republic* [2008] eKLR.

²² *K.K.R v Republic* [2009] eKLR.

STATEMENT OF THE PROBLEM

Kenya's anti-trafficking efforts have improved; especially in the aspect of greater investigations of suspected trafficking cases.²³ However, Kenya has not yet complied fully with the minimum standards for the elimination of human trafficking that embody the Trafficking in Persons protocol²⁴ to which it acceded on the 5th of January 2005. The government's efforts have long remained uncoordinated with lack of strong oversight and has created an environment conducive for trafficking.²⁵ Furthermore, the law enacted as at 2010, The Counter Trafficking in Persons Act, has had little impact on human trafficking.²⁶

Though Kenya is said to have shown marked improvement in its anti-trafficking efforts, there has been no indication by way of evidence of such effort. In fact cases dealing with this heinous atrocity have shown a lack of co-ordination and oversight. This is arguably promotive of a conducive environment for trafficking.

JUSTIFICATION OF THE STUDY

An extensive amount of research has been done on human trafficking.²⁷ This research is, however, still justified as an insignificant amount of research has been focused on Kenya specifically.

Furthermore, the problem is evidenced in Kenya with many emergent cases of people being trafficked for work especially in Saudi Arabia.²⁸ Other situations include that of youth being ferried across borders for the purposes of work for no pay, or where the parents or guardians get compensated.²⁹ The issue of human dignity arises here as many constitutional rights are deprived when a person is sold to another as they lose all forms of freedom, which is also against the provisions of the African Charter.³⁰

²³ United States Department of State: *Diplomacy in Action, Trafficking in Persons Report*, 4 June 2008.

²⁴ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons*.

²⁵ United States Department of State: *Diplomacy in Action, Trafficking in Persons Report*, 4 June 2008.

²⁶ Regional Migration, http://www.regionalmms.org/fileadmin/content/rmms_publications/series_booklettwo.pdf (13 December 2015).

²⁷ Shelley L, *Human Trafficking; A Global Perspective*, Cambridge University Press, Part III.

²⁸ Haddadi, 'Kenyan Graduates Trafficked to Saudi Arabia, UAE, Qatar and Kuwait by Embassy Staff', *International Business Times*, 26 March 2012.

²⁹ Kaunga J, 'Study on Child Labour-Kenya', *International Labour Organisation*, 2008, 34. See also The degradation of work, trafficking in persons from a labor perspective: The Kenyan experience.

³⁰ Article 6, African Charter on Human and Peoples' Rights, 1986.

OBJECTIVES OF THE STUDY

The general objective for this research is to find the loopholes in the law that promote trafficking in persons and provide recommendations for its control so as to restore human dignity to those affected.

The specific objectives are:

- i. To describe the scope of the following mechanisms with regard to human trafficking; The Children Act (2001), The Constitution of Kenya (2010), The Sexual Offences Act (2006), The Victim Protection Act (2014), Counter-Trafficking in Persons Act (2010) and The National plan of Action for combating Human Trafficking and Strategic Framework (2013-2017).
- ii. To analyse the mechanisms set up to combat trafficking, with regard to human trafficking, in part or in whole.
- iii. To look into various interpretations of the mechanisms set up to combat trafficking by the judiciary in order to determine the effectiveness of the mechanisms and;
- iv. To make recommendations for the improvement of the mechanisms.

RESEARCH QUESTIONS

This study seek to answer the following questions:

- i. What is the legal situation in Kenya as regards human trafficking?
- ii. What are the legal mechanisms in Kenya that have been put in place to combat trafficking?
- iii. Whether the mechanisms set up to combat trafficking are effective in combatting human trafficking in Kenya.

RESEARCH METHODOLOGY

Strategy

To analyse the legislations put in place in Kenya in part or in whole in order to determine their effectiveness. To this end, research has been conducted regarding trafficking in persons and is available. The strategy is to conduct new research on an existing global topic, applying it to the situation in Kenya.

Method

The qualitative method of research is applied. This is because the aim is to address each legislation specifically in part or in whole with regards to trafficking in persons. This is in order to ensure that all scopes are covered in the research.

Approach

The main approach applied in this research is the use of desktop and library resources. This is because, as the subject is of a sensitive nature.³¹ Using other forms such as interviews would compromise the security of victims. Furthermore, acquired evidence from documented cases available in previously documented cases is sufficient to analyse the effectiveness of legislation.

LIMITATIONS OF THE STUDY

The scope of trafficking runs way beyond what this study can possibly search for. The nature of human trafficking is a sensitive one and thus acquiring information first hand from interviews and questionnaires may be difficult.

³¹ Priority is usually accorded to victims: from a HAART correspondent.

CHAPTER TWO

THEORETICAL FRAMEWORK AND LITERATURE REVIEW

INTRODUCTION

Human trafficking originated from historic times where ownership of slaves was considered prestigious.³² Slaveholders at the time described it as a service to the slaves as they were being “shipped away from the barbarities of their home life.”³³ This in fact, was one of the proposing points for Trans-Atlantic slave trade.³⁴ At first impression, it would seem that the fact that slavery is an atrocity is a universal truism. However, this has not always been the case. Historically, slavery was acceptable and was backed by philosophical views.

The first part of this chapter consists of a theoretical framework. This research is hinged on the natural law legal theory, the dignitary theory and the feminist legal theory. This chapter also includes a literature review of the core texts used in this research and a conclusion.

THEORETICAL FRAMEWORK

Natural law legal theory.

Among other legal theories, this research is hinged on the natural law theory. This theory is applied in two ways. First is the classical natural law theory. This theory suggests that moral propositions are objective. To this end, laws that are inconsistent with morality are considered unjust laws.³⁵ The classical natural law theory proposes that natural law is comprised of precepts of an eternal law that rule the conduct of rational beings (possessing reason and free will). This theory proposes that promulgated laws are only valid to the extent that the content attunes with natural law. If the content averts from natural law, it is considered a perversion of the law. The classical natural law theory is appropriate for this research as it deconstructs the arguments that backed slavery.³⁶ It is also appropriate for this research as the sections of legislations to be discussed in this research deal directly with the plight of the human person. The classical natural law theory widely promotes the concept of human dignity through the precept of preservation of life.

³² Rickert M, ‘*Wilberforce’s work is not done: Ending Human Trafficking and Modern Day slavery*’, 9.

³³ Colson C, *God and Government*, Goodreads 2007, 112.

³⁴ Rickert M, ‘*Wilberforce’s work is not done: Ending Human Trafficking and Modern Day slavery*’, 9.

³⁵ St. Thomas Aquinas, *Summa Theologiae*, I-IIae, 95, 2.

³⁶ Locke J, *The Second Treatise of Government*, Barnes & Noble 2004, 4.

Second is the contemporary natural law theory. According to Lon Fuller, the natural law theory should be procedural. He proposes that this theory goes beyond merely looking at the substantive content of legal rules, but assesses them on morality as well.³⁷ This theory is appropriate for this research due to the fact that the research seeks to show that the disengagement between the people and the state could be the main problem of implementation.

Natural law has been described as the use of reason to deduce the binding rules of moral behaviour.³⁸ The reason for adopting this approach is the fact that one of its precepts directly involves preservation of life³⁹ and thus preserving human dignity. Natural law applies the use of reason, which means that it applies to all rational beings (humans), to maintain a natural environment of harmony and equality between human persons and as such strives to protect human beings against unjust rules and injustice in general.⁴⁰ The natural law approach is therefore necessary for this research as it is difficult to separate the concept of human trafficking from the aspect of morality.

John Locke proposed that slavery must be understood in relation to the context of the nature of human beings as a product of a higher creator; that is, having been made in the image of that creator.⁴¹ He observed that man's freedom from total and arbitrary power was necessary to man's self-preservation. Man, in exercising his freedom could not possibly enslave himself to another human person, giving that person total control over his life, including the power to take away that life. Hence slavery cannot be considered to be in tow with natural law.⁴² Although slavery finds Biblical backing, John Locke provided that this was merely drudgery. He proposed that the Biblical definition of slavery did not quite capture the entirety of the scope of actual slavery. According to Locke, a slave must by definition be under the absolute, arbitrary power of another, to take away his life, when he pleases.⁴³ In scriptures the slavery institution that a person could sell himself into the person was not to be under an absolute, arbitrary, despotic

³⁷ Fuller L, *The Morality of Law*, Yale University Press, 1977.

³⁸ Strauss L, *Natural Right and History*, 1968, 3.

³⁹ St. Thomas Aquinas, *Summa Theologiae*, I-IIae, 91, 1.

⁴⁰ St. Aquinas, *Summa Theologiae*, I-IIae, 91, 1.

⁴¹ Locke J, *The Second Treatise of Government*, 4.

⁴² Locke J, *The Second Treatise of Government*, 4.

⁴³ Locke J, *The Second Treatise of Government*, 4.

power.⁴⁴ Additionally, the Bible specifically forbids kidnapping someone and selling him or her into slavery.⁴⁵

Dignitary Legal Theory

This research will also be backed by the dignitary theory. The dignitary theory aims to assert that administration and administrative law should be centred mainly on preserving the dignity of persons rather than merely upholding the interests of the state.⁴⁶ This approach attempts to develop an analysis of administrative due process focusing on enhancing human dignity. Proponents of this school of thought propose that these values should be intrinsic to the processes themselves.⁴⁷ This theory provides that governmental decision-making should be aimed towards preserving the dignity of its citizens. This theory is appropriate for this research. This is because one of the main issues with regards to the implementation of legislation against human trafficking is the fact that the legislations seem to focus more on the state than on persons themselves.

Feminist Legal Theory

The feminist legal theory will also be supplementary to the natural law theory. As Ann Tickner describes it, “Feminists’ commitment to the emancipatory goal of ending women’s subordination is consistent with a broad definition of security that takes the individual situation in broader social structures as its starting point.”⁴⁸ This theory contributes widely in the social construct of human trafficking as it identifies ethical and pragmatic grounds for transferring the analytical focus from states to people.⁴⁹

The feminist legal theory’s analysis on human trafficking disputes the conventional security framework customarily applied by states in dealing with trafficking in persons. This is evidenced by the fact that it prioritizes on the security of trafficked persons.⁵⁰ It also considers the plight of the victims in relation to the traffickers and the state. This theory recognizes the ethical and pragmatic sphere around extending the focus beyond states and to persons themselves.

⁴⁴ Rickert M, ‘*Wilberforce’s work is not done: Ending Human Trafficking and Modern Day slavery*’, 9.

⁴⁵ See Exodus 21:16.

⁴⁶ *Mathews v. Eldridge: Three Factors in Search of a 'Theory of Value'*, (1976), 44.

⁴⁷ Thibaut & Walker, *A Theory of Procedure*, (1978), 12.

⁴⁸ Tickner A, *Gendering world Politics*, Goodreads 2001, 48.

⁴⁹ Lobasz J, ‘Beyond Border Security: Feminist Approaches to Human Trafficking’ 319.

⁵⁰ Lobasz J, ‘Beyond Border Security: Feminist Approaches to Human Trafficking’ 319.

Furthermore, trafficking in persons is notorious among the organized crimes for featuring sexist trends with women (and children) being at the highest risk.⁵¹ The feminist legal theory therefore seeks to deconstruct such stereotypes especially in categorizing trafficking victims.

There are other forms of modern day slavery that are almost unrecognizable on the face of it, because the technique employed in perpetration has advanced so much so that the slaves themselves may at times fail to recognize their own situation. Human trafficking falls into this category.⁵² Many countries have laws that govern human trafficking but sadly these laws have not been effective in combatting the same in fact, the business has grown and now rivals drug trafficking on the global arena.⁵³

LITERATURE REVIEW

Shelley provides an insight on all forms of human trafficking globally and regional perspectives focusing on various continents.⁵⁴ She starts with a historical perspective and compares it with the modern perspective. Her argument gives an insight on the rise and cost of human trafficking, focusing on various forms of human trafficking in various regions of the world. She concludes that human trafficking will probably grow in the 21st century as a result of the growing economic and demographic inequalities worldwide and can only be effectively combatted through the co-ordination of government, civil society, business community, multilateral organizations and the media.⁵⁵ This book, does not provide recommendations on what mechanisms governments are to employ in order to achieve this. Which is the one of the objectives of this research.

Rickert argues that the attention that modern advances have allowed to be focused on social improvements has merely served to change the face of, rather than combat slavery.⁵⁶ This is evidenced by the fact that more slaves existed in the world by the year 2009 in comparison to the

⁵¹ Legislations around the world as described in chapter three of this research allude to the fact that women (and children) are the primary key populations at risk of human trafficking.

⁵² Batstone D, *Not For Sale*, (2007)1-3, 7. See also Wolken C, 'Feminist Legal Theory and Human Trafficking in the United States: Towards a New Framework' 1.

⁵³National Underground Railroad Freedom Centre, 'Slavery Today: Human Trafficking', <http://www.freedomcenter.org/slavery-today/>, on 15 June 2016.

⁵⁴ Shelley, *Human Trafficking: A Global Perspective*, Part III.

⁵⁵Shelley, *Human Trafficking: A Global Perspective*, 295.

⁵⁶ Rickert M, '*Wilberforce's work is not done: Ending Human Trafficking and Modern Day slavery*' Faculty Publications and Presentations, Paper 89, 2009.

Trans-Atlantic trade 350 years prior.⁵⁷ The paper is directly centred on neo-slavery and examines historical challenges and successes in abolition in relation to the modern manifestations of slavery.⁵⁸ It provides information on modern legal attempts to attack underground markets throughout the world while giving several true victims' stories. It concludes that in dealing with this problem, the government must work hand in hand with organizations and individuals to effectively combat trafficking.⁵⁹ The paper, however, fails to give recommendations on how governments can do this.

Khatiwada focuses on keeping the human face in the picture.⁶⁰ The author projects that the approaching human trafficking from a criminal perspective takes away from the sensitivity of the issue and as such gives a lower priority to human rights. This study seeks to agree with this author and delve deeper into the human rights aspect of trafficking.⁶¹

International Organization for Migration provided an assessment⁶² with information on the factors that may be related to an individual's likelihood of being trafficked in the East African region and the broad impact that trafficking may have had. The report provides insight on the situation of Kenya; particularly being a country of origin, destination and transit for human trafficking. It also provides insight on the fact that numerous trafficking cases have been reported in Kenya.⁶³ This assessment also fails to give recommendations on what steps the government can take to directly deal with the issue of human trafficking.

Milbrandt provides stateless persons are at a higher risk of being trafficked.⁶⁴ This is similar to the situation with Kenya's internally displaced persons.⁶⁵ Focusing on Thailand, he projects that stateless persons are denied the ability to seek and secure employment, thus being susceptible to

⁵⁷Rickert M, 'Wilberforce's work is not done: Ending Human Trafficking and Modern Day slavery' Faculty Publications and Presentations, Paper 89, 2009.

⁵⁸Rickert M, 'Wilberforce's work is not done', 10.

⁵⁹Rickert, 'Wilberforce's work is not done', 38.

⁶⁰ Khatiwada A, 'Trafficking in Persons: A Human Rights Based Approach', 2006.

⁶¹Khatiwada A, 'Trafficking In Persons: A Human Rights Based Approach', 2.

⁶² International Organization for Migration, 'Human Trafficking in East Africa, "Research Assessment and Baseline Information in Tanzania, Kenya, Uganda and Burundi"', 14.

⁶³ International Organization for Migration, 'Human Trafficking in East Africa', 14.

⁶⁴ Milbrandt J, 'Stateless', *Pepperdine University School of Law Legal Studies Research Paper, Series paper number 2102/6*, 2011.

⁶⁵ Migiro K, 'Human trafficking rife among displaced Kenyans, charity researchers say', 22 March 2016, <http://af.reuters.com/article/topNews/idAFKCN0WO22I>. An **internally displaced person (IDP)** is someone who is forced to flee his or her home but who remains within his or her country's borders. A large number of Kenyans became internally displaced after the 2007-2008 post-election violence.

trafficking.⁶⁶ He recommends that states employ adequate mechanisms to protect the ‘stateless’ from human trafficking and ensure proper identification and recovery of trafficking.⁶⁷ However, he does not adequately cover the scope that this study seeks to reach as it does not provide adequate recommendations of mechanisms that can be used by the governments.

Aston and Paranjape provide that the problem with combatting trafficking perhaps stems from the lack of a precise and accurate definition of trafficking.⁶⁸ This has led to there being leeway for perpetrators in tweaking methodologies and successfully avoiding prosecution by the ICC. The paper fails however, to give recommendations on how state co-operation can improve the situation.

UNICEF provides information pointing towards the fact that Kenya is a primary country of origin and a source of destination and transit for human trafficking.⁶⁹ The perception is generally that countries that fall under these specifications are less concerned with the problem of trafficking.⁷⁰ USAID does not cite Kenya as one of the countries in Africa that has an existing program to combat human trafficking,⁷¹ which leads us to the gap that this study is trying to fill.

Kenya has taken minimal steps towards combatting human trafficking and perhaps the scarcity of literature on Kenya’s situation is an indication on the general lack of concern by the country as regards this issue. This study therefore seeks to fill in this gap by providing awareness through research on this specific area and giving recommendations on how the government can deal with this issue.

CONCLUSION

According to John Locke, man’s freedom from total and arbitrary power is necessary to man’s self-preservation.⁷² Such that, in exercising this freedom, there is no possibility that man could enslave himself to another human being voluntarily.⁷³ This brings forth the notion of slavery. With

⁶⁶ Milbrandt J, ‘Stateless’, 5.

⁶⁷ Milbrandt J, ‘Stateless’, 29.

⁶⁸ Aston J and Paranjape V, ‘Human Trafficking and its Prosecution; Challenges of the ICC in prosecuting Human Trafficking’, 2011.

⁶⁹ UNICEF, ‘Innocenti Insight, Trafficking in Human Beings, Especially Women and Children in Africa, “Kenya”’ 2005.

⁷⁰ UNICEF, ‘Innocenti Insight, Trafficking in Human Beings, Especially Women and Children in Africa, “Kenya”’ 2005. See also Thipanyane T, Human Trafficking: African Perspective, <http://www.jurist.org/forum/2015/03/tseliso-thipanyane-trafficking-africa.php>.

⁷¹ USAID, ‘Anti-Trafficking in Persons Program in Africa: A Review’, April 2007.

⁷² Locke J, *The Second Treatise of Government*, (First published 1690, Barnes & Noble 2004) 4.

⁷³ Locke J, *The Second Treatise of Government*, 4.

this respect, the natural law legal theory backs this research on the basis of human dignity and a moral analysis of current legislation. The feminist legal theory is also essential to this research as it seeks to deconstruct the classical application of security frameworks in states. The issue of trafficking has characteristically been addressed at state level while the persons themselves have been dealt with secondarily. It proposes that legislations apply directly to trafficked persons.

CHAPTER THREE

AN OVERVIEW OF THE EFFECTIVENESS HUMAN TRAFFICKING LEGISLATION IN KENYA

Before 2012, Kenya had no legislation that directly dealt with the scourge of human trafficking specifically. The main law that currently deals with human trafficking is the Counter Trafficking in Persons Act that came into force in 2012. Prior to this, in order to address claims of perpetration of crimes of this nature, other legislations were relied upon. Sections of the Penal Code,⁷⁴ Sexual Offences Act⁷⁵ and Children's Act⁷⁶ partially addressed the issue. The following is the current legal framework put in place to combat human trafficking in Kenya.

NATIONAL STATUTES

The Constitution of Kenya 2010

The importance of the constitution was expounded by Mohammed J In the case of *State v. Acheson*⁷⁷ where he stated that “The constitution of a nation is a mirror reflecting the national soul, identification of ideas and aspiration of the nation.

The Constitution does not directly deal with the issue of human trafficking. It has, however, provided that every person has inherent dignity and the right to have that dignity respected and protected.⁷⁸ This is in tandem with the natural law theory. The constitution is the supreme law that binds all state organs and all people. It further provides that the purpose of recognising and protecting human rights is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.⁷⁹ This is in line with the main principle behind combatting human trafficking which is interconnected to the concept of human dignity as described in the theoretical framework in chapter two.

Since the basis of the claim of combatting human trafficking lies primarily in the protection of human rights and human dignity, the bill of rights addresses this issue.⁸⁰ The constitution provides

⁷⁴ Chapter XXV, Penal Code 81 of 1948, Cap 63.

⁷⁵ *Sexual Offences Act, 2006*, Cap 62 a.

⁷⁶ *The Children's Act of 2001*, Cap 141.

⁷⁷ *State v. Acheson* 1991 20 SA 805, 813.

⁷⁸ Article 28 Constitution of Kenya, 2010.

⁷⁹ Article 19 (2) Constitution of Kenya, 2010.

⁸⁰ Chapter 4, The Bill of Rights, *Constitution of Kenya*, 2010.

that a right in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁸¹

The constitution also provides for application and interpretation of the bill of rights. It directs that the application and interpretation of the bill of rights shall be by a court, tribunal or other authority. These bodies are tasked with promoting the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.⁸²

While the Constitution provides for safeguards for the people of Kenya as a whole, Article 14 (4) can be seen as promotive of child trafficking. This is because it provides that children of unknown nationality under ten years of age are presumed citizens. This provides a problematic situation with regards to child trafficking. There have been reported cases of children being smuggled into the country through this avenue.⁸³

The Children Act of 2001, Cap 141.

Evidently, the issue of human trafficking is seen to affect children on a large scale.⁸⁴ As the main law protecting the rights of children in the country, the Children's Act provides for protection from child trafficking. It provides that a child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person.⁸⁵

The punishment set out in the Act for perpetrators of human trafficking are exceedingly lenient. The Act provides the punishment for this offence as a summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine. This penalty is not proportionate to the magnitude of the crime.

Sexual Offences Act, 2006, Cap 62 (a).

⁸¹ Article 24, *Constitution of Kenya*, 2010.

⁸² Article 20 (4) (a), *Constitution of Kenya*, 2010.

⁸³ Okere, Chairperson, Gender Violence and Girl Child Network in Migori County.

⁸⁴ Preamble, United Nations, *United Nations, Palermo Protocol*, 2000.

⁸⁵ Section 13, *The Children's Act of 2001*, Cap 141.

It was prudent to include this Act among the legal mechanisms to be analysed as a significant part of this study. This is because it covers the plight of both women and children in relation to human trafficking. It also delves into a much deeper issue which is trafficking for sexual exploitation setting sanctions against it and providing recourse and punishment for such cases within Kenyan law, covering external jurisdictions as well.

The Act provides that perpetrators include persons who arrange or facilitate travel within or across Kenyan borders by another person with the intent commit a sexual offence against them.⁸⁶ It amerces a penalty upon conviction, of imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both. While the punishment is commensurate to the crime, a lacuna in implementation is the main source of the problem. There is a wide gap in prosecution of sexual crimes as is evidenced by this kind of exploitation especially around the Coast.

Besides that, the Sexual Offences Act also provides sanctions and punitive measures to be undertaken in the specific cases of child trafficking. It provides that intentionally organizing travel arrangements for a child for sexual exploitation is tantamount to an offence of child trafficking. This offence attracts a penalty of 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.⁸⁷

The Victim Protection Act No. 17 of 2014.

In relation to trafficking in persons, this Act was created with the main aim of providing protection of victims of such crimes. It seeks to provide them with better information and support services to provide for reparation, compensation, special protection for vulnerable victims, and other connected purposes. It specifically provides for special protection for victims in the *Counter Trafficking in Persons Act, (No.8), 2010*.⁸⁸ The issue however, is that there are no government structures that have been put in place in pursuit if this goal. This has led to the lack of prosecution of cases as victims might fear for their own safety.

Counter-Trafficking in Persons Act of 2010.

⁸⁶ Section 18, *Sexual Offences Act, 2006*, Cap 62 a.

⁸⁷ Section 13, *Sexual Offences Act, Cap 62 (a)*, 2006.

⁸⁸ Section 5, *Victim Protection Act No.17, 2014*.

Due to the fact that Kenya had been cited as a source of origin, transit and destination for the purposes of human trafficking, the state created a Counter-Trafficking in Persons Act pursuant to the *United Nations, Palermo Protocol*.⁸⁹

This Act was created with the main aim 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. It focuses especially on women and children; to provide for the prosecution of offences relating to trafficking in persons and for connected purposes.⁹⁰

Towards the end of implementation, the Act provides for the establishment of an Advisory Committee.⁹¹ The primary function of the Committee is to advise relevant areas of government on activities aimed at combating trafficking and the implementation of preventive, protective and rehabilitative programs for trafficked persons.⁹² The advisory committee is in charge of coming up with and implementing the national plan of action.

The Counter Trafficking in Persons Act consequentially resulted in amendments to sections of the Penal Code, the Sexual Offences Act 2006 and The Children Act 2001 that touch on trafficking.⁹³ The Act became operational in 2012.

THE PALERMO PROTOCOL

United Nations, Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (*United Nations, Palermo Protocol*), 2000.

This protocol entered into force on 25th December 2003.⁹⁴ Kenya acceded to this protocol on the 05th of January 2005. This means that Kenya accepted the offer or the opportunity to become a party to this treaty that had already been negotiated and signed by other states. It has the same legal effect as ratification in that it is binding. This protocol bears the standing definition of the scope

⁸⁹ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (*United Nations, Palermo Protocol*), 2000.

⁹⁰ Long Title, Counter Trafficking in Persons Act 2010.

⁹¹ Section 19, Counter Trafficking in persons Act 2010.

⁹² Section 20, *The Counter Trafficking in Persons Act, (No.8), 2010*.

⁹³ Second Schedule, *The Counter Trafficking in Persons Act, (No.8), 2010*

⁹⁴ Article 17, *United Nations, Palermo Protocol*, 2000.

of the crime of trafficking in persons.⁹⁵The standing definition as provided for by this treaty is as follows:

*"Trafficking in persons" shall mean 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs... The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.*⁹⁶

The protocol has a special focus on the plight of children and women.⁹⁷ This is due to the fact that trafficking in persons around the world has been seen as an issue affecting women and children on a large scale. The rights of children (defined as being a person under 18 years of age)⁹⁸ are considered specially, as it provides that the state parties shall take into account the special needs of children.⁹⁹

Focusing on human rights in general, the protocol provides that party states have the onus to facilitate the safe return of trafficked individuals, with due regard to their safety without undue or unreasonable delay.¹⁰⁰ Kenya is yet to come up with a governmental institution that directly deals with the protection and repatriation of trafficking victims. The protocol requires that the state provides for the safe repatriation of trafficking victims, including those without documentation¹⁰¹ without any prejudice to any right afforded to victims of trafficking in persons by any law of the receiving state.¹⁰²

⁹⁵ Article 3, *United Nations, Palermo Protocol*, 2000.

⁹⁶ Article 3, *United Nations, Palermo Protocol*, 2000.

⁹⁷ Preamble, *United Nations, Palermo Protocol*, 2000.

⁹⁸ Article 3 (d), *United Nations, Palermo Protocol*, 2000.

⁹⁹ Article 6 (4), *United Nations, Palermo Protocol*, 2000.

¹⁰⁰ Article 8, *United Nations, Palermo Protocol*, 2000.

¹⁰¹ Article 8 (4), *United Nations, Palermo Protocol*, 2000.

¹⁰² Article 8 (5), *United Nations, Palermo Protocol*, 2000.

The protocol also requires that the party states consider and provide for temporary or permanent residence in countries of transit or destination for trafficking victims in exchange for testimony against alleged traffickers, or on humanitarian and compassionate grounds.¹⁰³ This is yet to be implemented in Kenya as well.

Parties to this protocol are also tasked with providing for proportional criminal penalties by criminalizing the act of human trafficking.¹⁰⁴ While Kenya has adequate provisions of the law criminalizing trafficking in persons, the problem comes in implementation of these legislations.

As a measure to stop trafficking in its tracks this protocol also requires that party states engage in information exchange and training practices in accordance with domestic laws to ensure travel documents are well scrutinized and relevant stakeholders are properly trained.¹⁰⁵ This seems to be a major issue in the country. Stake holders in charge of immigration are poorly trained. As a result of these, many cases have gone unprosecuted.

THE NATIONAL PLAN OF ACTION AND INTERNATIONAL TREATIES

The National plan of Action for combating Human Trafficking and Strategic Framework (2013-2017).

Consequences of trafficking in Kenya present themselves in various forms. These include; child labour, domestic labour, street begging, child sexual exploitation, prostitution, child sex tourism and servitude among others.¹⁰⁶

Kenya's National Plan of Action (NPA) for Combating Human Trafficking 2013-2017 was developed with the main goal of implementing 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. (The *United Nations, Palermo Protocol*).¹⁰⁷ The main aim in formulating this plan of action was to create a national atmosphere of co-operation between national, regional and international stakeholders.¹⁰⁸

¹⁰³ Article 6 (3), *United Nations, Palermo Protocol*, 2000.

¹⁰⁴ Article 5, *United Nations, Palermo Protocol*, 2000.

¹⁰⁵ Article 10 (1) (c), *United Nations, Palermo Protocol*, 2000.

¹⁰⁶ Kaunga J, '*Study on Child Labour-Kenya*', International Labour Organisation, 2008, 34. See also: The degradation of work, trafficking in persons from a labour perspective: The Kenyan experience.

¹⁰⁷ Article 3, *United Nations, Palermo Protocol*, 2000.

¹⁰⁸ National Plan of Action of Kenya, Strategic Plan, 1.

The plan has adopted an approach that involves three measures. First, prevention of human trafficking, second is the protection of the victims and lastly, the prosecution of perpetrators through implementation of the legal mechanisms put in place.¹⁰⁹ These are concomitant of the approaches taken up by countries across the world, specifically party states to this protocol, to this end.¹¹⁰

Kenya has also signed and ratified the following international instruments, pursuant to combatting trafficking in persons:

United Nations Convention on the Rights of the Child (UNCRC)¹¹¹

Kenya ratified this treaty in 1990. The convention requires that state parties take appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or trafficking in children for any purpose or in any form.¹¹² The first real implementation of this treaty in Kenyan legislation was seen in 2001 where Kenya adopted the definition of a child from this treaty. While ratification meant that Kenya was ready to implement legislation that would address the treaty as a whole, developments were dilatory and inadequate. There was no evidence of the state applying preventive measures against trafficking before 2001 and even then, before 2013, the penalties against this crime were not proportionate to the magnitude of the crime.

Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No. 182)

This convention was ratified by Kenya in 2001. It requires that state parties implement effective measures to ensure the prohibition and elimination of the worst forms of child labour “as a matter of urgency”. Among the measures prohibited are the sale and trafficking in children. State parties are also encourage to enjoin in putting in place programmes to combat trafficking in children. In doing so, states are to identify and reach out to children at increased risk, especially among female

¹⁰⁹ National Plan of Action 2013-2017.

¹¹⁰ Preamble, *United Nations, Palermo Protocol*, 2000.

¹¹¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

¹¹² Article 35, *United Nations Convention on the Rights of the Child*, 1989.

children.¹¹³ Child labour has been seen in Kenya as one of the most adverse consequences of trafficking

Convention on the Elimination of all forms of discrimination Against Women.¹¹⁴

It is evident that the issue of human trafficking largely affects women and children around the world. This treaty dictates that state parties should take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women”.¹¹⁵

The Rome Statute.¹¹⁶

This instrument established and vested power in the International Criminal Court, which addresses the issue of human trafficking in the context of enslavement, which forms part of the definition of crimes against humanity.¹¹⁷

The Hague Convention on the Rights of Children on Inter-Country Adoption, May 1993.¹¹⁸

Kenya acceded to this Convention with effect from 1st June, 2007. This instrument provides that the states, recognize the rights of the child. It further mandates that each state should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin. Implementation of this requirement especially within Kenya will be a large step towards dealing with the problem of child trafficking and child labour.

While this treaty recognizes that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin, it promotes regulated adoptions. Unregulated adoptions especially of children from Somalia has created a large trafficking problem especially in the northern counties of Kenya.¹¹⁹

¹¹³ Article 7 (1), Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No. 182), 1999.

¹¹⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

¹¹⁵ Article 6, *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, 1979.

¹¹⁶ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

¹¹⁷ Article 7, *Rome Statute of the International Criminal Court*, 2002.

¹¹⁸ Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 33.

¹¹⁹ Miruka K and Oluoch N “*Child traffickers using church*”, 1 November 2011 <http://www.standardmedia.co.ke/InsidePage.php?id=2000046003&cid=658>.

This treaty mandates state parties to take measures to ensure that inter country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.¹²⁰

CONCLUSION

Kenya has criminalized the trafficking of children and adults for sexual exploitation through the legislations mentioned above. These legislations seem to prescribe penalties that are sufficiently stringent. Kenya Counter Trafficking in Persons Act, 2010, In Article 3(5) accords hefty penalties on persons found guilty of human trafficking. The person is liable for imprisonment for a term not less than 30years or to a fine of not less than Ksh.30 million or both and upon subsequent conviction, to imprisonment for life. The Sexual Offenses Act also amerces harsh penalties with regards to trafficking in persons. However, despite there being such harsh penalties upon prosecution and conviction, the legislations, seem to have a few loopholes that allow for trafficking in persons. An example is in chapter 3 of the constitution which provides that a child of under eight years and of an unknown nationality found in Kenyan is to be considered a citizen. This has arguably provided a leeway for children being smuggled into the country at this young age.¹²¹

With regard to trafficking in persons, Kenya needs to implement fully the current legislations put in place to deal with this issue. The legislations also need to properly address the areas of prevention, protection and prosecution. While the current legislations are indicative of efforts to prevent human trafficking, an issue arises in implementation. There is laxity among stake-holders responsible for implementing the legislations and prosecuting the crimes.

¹²⁰ Preamble, *The Hague Convention on the Rights of Children on Inter-Country Adoption May 1993*.

¹²¹ M Kenan and O Nick, 'Child traffickers using church', 1 November 2011 <http://www.standardmedia.co.ke/>

CHAPTER FOUR

DEVELOPMENT AND IMPLEMENTATION OF HUMAN TRAFFICKING LEGISLATION IN KENYA.

INTRODUCTION

Human trafficking has been a reported problem in East Africa for several years. However, there have been very few research studies that are indicative of this phenomenon. There is, in particular a scarcity in investigative research in the individual countries that are involved.

THE HISTORY OF HUMAN TRAFFICKING IN KENYA.

In 1996, Kenya was marked as having a 43.1% rate of child labour and trafficking.¹²² This was evidenced by the migration of children from rural areas in the country to more urban areas for purposes of employment.¹²³ In 2001, there was an influx of reported cases of mistreatment of international domestic employees, some of whom were Kenyan. An example that particularly stood out was that of two Kenyan employees in the United States of America. The two, Alice Benjo and Mary Chumo, were "kept as modern day slaves" at the house of their employer in the States, an employee at the Kenyan Embassy in Washington. They had been employed by Elizabeth Belsoi, a Kenyan citizen, in the suburb of Bowie. According to a lawsuit filed in the year 2000, they had working days of not less than 18 hours and were not allowed to use the phone for communication or to leave the home. Belsoi denied the charges through her lawyer, who claimed she fully complied with the employment agreement. The lawsuit was settled out of court for an undisclosed sum.¹²⁴

Thereafter, in 2002, a report on child prostitution provided that people took in destitute children but instead of taking care of their needs, they hired them or pedalled them out for prostitution.¹²⁵ This was prevalent around the coast. A number of children from adverse homes and other provinces as well were found in brothels.¹²⁶ This is usually prevalent among pastoral communities

¹²² International Labour Organisation (ILO) News, Geneva, 10 June 1996 www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_008058/lang--en/index.htm

¹²³ Kaunga J, 'Study on Child Labour-Kenya', International Labour Organisation, 2008, 30.

¹²⁴ Armour S, 'Part 1: Some foreign household workers enslaved' USA Today, 11/21/2001 <www.usatoday.com/money/general/2001/11/19/cover.htm> 16 November 2016

¹²⁵ Ochieng Z, News from Africa, August 2002 www.newsfromafrica.org/newsfromafrica/articles/art_854.html 9 December 2016.

¹²⁶ Zachary Ochieng, 'News from Africa', August 2002 www.newsfromafrica.org/newsfromafrica/articles/art_854.html 9 December 2016.

in the counties in northern Kenya. According to this report, the girl children were married off by their parents to much older men who were also responsible for keeping the girls from school and travelling with them away from their homes as well. It was suggested that this was done in order to pay the school fees of their male siblings.¹²⁷

The year 2004 brought with it what was arguably, the biggest human trafficking scandal in Kenya. In this situation, Mr. Gilbert Deya, a Kenyan born evangelical pastor based in London purported to inspire miraculous conceptions among infertile and post-menopausal women through prayer.¹²⁸ The story gained traction after it was reported that the women who had sought recourse from pastor Deya had allegedly been witnessed travelling to Kenya with Mrs. Deya and returning with a baby.¹²⁹ Further scrutiny through DNA testing on the Deya family revealed that of the fifteen children that the couple claimed as their own, only six were their biological offspring. This provoked an order for the extradition of Mr. Deya by Home Secretary Jacqui Smith which failed in 2007 due to the United Kingdom's requirement that Mr. Deya be extradited to a prison of acceptable standards. Recent occurrences have had the extradition reviewed.¹³⁰

In 2005, Country Reports on Human Rights Practices provided a report indicating that Kenya is a source, transit and destination country for trafficked children.¹³¹ In this report, Kenyan children were reportedly being trafficked to South Africa. The report also featured instances of internal trafficking of children into involuntary domestic employment, which including working in urban centres as hawkers, day labourers, and as prostitutes. Children were also trafficked from Burundi and Rwanda to coastal areas of Kenya for purposes of sexual exploitation.¹³²

¹²⁷ Zachary Ochieng, News from Africa, August 2002 www.newsfromafrica.org/newsfromafrica/articles/art_854.html Accessed on 16 November 2016. See also, Kaunga J, 'Study on Child Labour-Kenya', International Labour Organisation, 2008.

¹²⁸ Mwangi G, 'Deya Babies are Victims of Trafficking', The Nation, Kenya, 29 August 2004. <www.religionnewsblog.com/8585/deya-babies-are-victims-of-trafficking> 16 November 2016.

¹²⁹ Dubuis A, 'We found the Trafficked Miracle Babies who disappeared in Ten Years Ago in Kenya', 24 March 2016, <<https://news.vice.com/article/we-found-the-trafficked-miracle-babies-who-disappeared-ten-years-ago-in-kenya>> 16 November 2016.

¹³⁰ Dubuis A, 'Gilbert Deya: Preacher in 'miracle babies' case fights to stay in Britain', The Standard UK, 21 October 2016, <www.standard.co.uk/news/world/gilbert-deya-preacher-in-miracle-babies-case-fights-to-stay-in-britain-a3375626.html> 16 November 2016

¹³¹ U.S. Department of Labor Bureau of International Labor Affairs, 2005 <www.dol.gov/ilab/media/reports/iclp/tda2004/kenya.htm> 17 November 2016

¹³² U.S. Department of Labor Bureau of International Labor Affairs, 2005 <www.dol.gov/ilab/media/reports/iclp/tda2004/kenya.htm> 17 November 2016

In 2006, it was noted by the Director of Public Prosecutions, Keriako Tobiko that the lack of a counter trafficking legislation posed a big problem towards the prosecution of offenders of the said crime.¹³³ He proposed that the government formulate a comprehensive framework that would regulate human trafficking in Kenya.

RECENT DEVELOPMENTS IN LEGISLATION.

In 2010, The Counter Trafficking in Persons Act was created subject to the provisions of the *United Nations, Palermo Protocol*. It was created in a bid to provide for the prevention of trafficking, protection of trafficking victims and the prosecution of perpetrators of trafficking crimes. In 2010, a private institution known as the Awareness against Human Trafficking organization (HAART), was founded.¹³⁴

The HAART was created with the aims of prevention of trafficking through awareness, protection of victims of human trafficking, prosecution of trafficking offenders and seeing to it that there was an adherence to policy and cooperation with other likeminded organizations.¹³⁵

The HAART database provides that the areas most affected by human trafficking are around the Western parts of Kenya, Nairobi and its environs and the Coastal region as shown in figure 1.0 in the indexes.¹³⁶ This organization has also gone a long way in providing an insight on the current situation on trafficking in Kenya and guidelines on how to support victims.¹³⁷

The African Network for the Prevention and Protection of Child Abuse and Neglect (ANPCANN) is another institution that has looked to the plight of the situation of human trafficking in Kenya. It has undertaken to engage local communities in the fight against human trafficking.¹³⁸ In 2007, the institution commenced an anti-child trafficking project dealing with mainly East African

¹³³ Unicef, 'Law needed to fight human trafficking, says Tobiko', 30 April 2006 < http://www.eastandard.net/hm_news/news.php?articleid=1143951784 > 2 February 2017.

¹³⁴ Awareness against Human Trafficking, <<http://haartkenya.org/about/>> 17 November 2016.

¹³⁵ Awareness against Human Trafficking, <<http://haartkenya.org/about/>> 17 November 2016.

¹³⁶ Human Trafficking in Kenya: Analysis of data obtained from victims, HAART Kenya, August 2015, 10.

¹³⁷ Awareness against Human Trafficking, <<http://haartkenya.org/research/>> 17 November 2016.

¹³⁸ Zimmerman C, 'The Health Risks and Consequences of Trafficking in Women and Adolescents', London School of Hygiene & Tropical Medicine, 2003, 34. See also, The African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) Regional Office Annual Report, 2012, 18.

countries such as Ethiopia, Kenya, Tanzania and Uganda. Particularly in Kenya, the programme targets three border points at Moyale, Busia and Loitoktok.¹³⁹

The 2013 Trafficking in Persons report, ranked Kenya as tier 2 on the watch list for the third consecutive year.¹⁴⁰ This means that it does not fully comply with the United States of America (U.S.A) trafficking Victims Protection Act minimum standards but are making significant efforts to do so.¹⁴¹ Unless the country demonstrates sufficient effort to mitigate human trafficking and its effects through the proper implementation of the domestic laws, it risks being ranked as a tier 3 country which could bring with it sanctions on non-trade and non-humanitarian assistance.¹⁴² This kind of ranking is indicative of the insufficient level of urgency with which the government undertakes to demonstrate effort in ensuring full compliance with the provision of the Counter-trafficking in Persons Act, 2010. It is therefore critical for the Government to make significant efforts and demonstrate funding for activities aimed at combating trafficking in persons.

The Kenyan government has taken strides towards implementation of the Counter Trafficking in Persons Act 2010. The Act established a Counter Trafficking in Persons Advisory committee¹⁴³ which was launched on 8th July 2014 and is now operational.

The functions of the committee include the following: To advise the minister on inter-agency activities aimed at combating trafficking and the implementation of preventive, protective and rehabilitative programmes for trafficked persons.

The committee is also tasked with advising the Minister on the following: Formulation of a comprehensive and integrated program to prevent and suppress the trafficking in persons; Coordination of policies and programmes of the agencies to effectively address the issues and problems attendant to trafficking in persons; Coordination of the dissemination of information on the law and the issues relating to trafficking in persons through concerned agencies and non-governmental organizations; Formulation of programmes for the reintegration of both locally and

¹³⁹ The National plan of Action for combating Human Trafficking and Strategic Framework (2013-2017), 3. See also Figure 1.0.

¹⁴⁰United States Department of State: Diplomacy in Action, Trafficking in Persons Report, 4 June 2008.

¹⁴¹United States Department of State, 2014 Trafficking in Persons Report - Kenya, 20 June 2014, <<http://www.refworld.org/docid/53aab9e214.html>> 12 January 2017

¹⁴² United States Department of State: Diplomacy in Action, Tier Placement <<https://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm>> 12 January 2017.

¹⁴³ Section 19, *Counter Trafficking in Persons Act, (No.8), 2010.*

internationally trafficked persons; Monitoring and evaluation of the progress of Kenya with respect to prevention, protection and prosecution efforts relating to trafficking in persons; Consultation and advocacy with Government departments and agencies and non-governmental organizations, to advance the purposes of this Act; Compilation and documentation of data and information on cases of trafficking in persons for purposes of policy formulation and program direction; Development of mechanisms to ensure the timely, coordinated, and effective response to cases of trafficking in persons; Measures to enhance cooperative efforts and mutual assistance between Kenya and other countries through bilateral and multilateral arrangements to prevent and suppress international trafficking in persons; Measures necessary to rehabilitate victims of trafficking in persons and in particular the implementation of rehabilitative programmes including education and protective programmes for the victims of trafficking in persons; provision of counselling services and temporary shelter to victims of trafficking in persons; and establishment of centres and programmes for intervention at various levels of the community; and mechanisms to screen persons entering or leaving Kenya to determine if they are victims of trafficking in persons.¹⁴⁴ Establishment of and support community based initiatives that address trafficking in persons; Implementation of effective pre-employment orientation seminars and pre-departure counselling programmes to applicants for overseas employment.¹⁴⁵

In June 2012, the ministry of foreign affairs imposed a ban on labour recruitment agencies affiliated with the Middle East. This was due to an influx of cases of mistreatment of Kenyan domestic employees in Saudi Arabia.¹⁴⁶ The ban had the goal of allowing for vetting of all such agencies. The intended outcome was to prevent Kenyans from experiencing abuse in the Middle East, However, the ban may have increased the vulnerabilities of Kenyan domestic workers abroad, as unscrupulous agencies illegally recruited Kenyan women and girls directly from villages. The victims have, in the past been sent to Saudi Arabia and other countries in the Middle East through Tanzania or Uganda.¹⁴⁷

¹⁴⁴ Section 20 *Counter Trafficking in Persons Act, (No.8), 2010*.

¹⁴⁵ Section 20, *Counter Trafficking in Persons Act, (No.8), 2010*.

¹⁴⁶ Bocha G, 'Firms urge Kenya to lift ban on hiring of workers abroad', Daily Nation, 24 June 2012, <<http://www.nation.co.ke/news/Firms-urge-Kenya-to-lift-ban-on-hiring-of-workers-abroad/1056-1434566-ve5v5s/index.html>> 1 December 2016.

¹⁴⁷ United States Department of State, 2014 Trafficking in Persons Report - Kenya, 20 June 2014, <<http://www.refworld.org/docid/53aab9e214.html>> 12 January 2017.

During the reporting period, the Ministry of Labour reported its inspection of 389 labour recruitment agencies of a total estimated 500 active agencies.¹⁴⁸ The Ministry of Foreign Affairs conducted public outreach via media interviews to sensitize Kenyans to the issue of trafficking and to ensure recruitment agencies were aware of their obligations under Kenya's anti-trafficking law. Bribery of government officials by recruitment agencies reportedly hindered efforts to stop fraudulent recruitment.

THE NATIONAL PLAN

With the goal of fulfilling the duties accorded to it by the Counter Trafficking in Persons Act, the advisory committee established the National plan of Action which was a four year plan running between 2013 and 2017. The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017 was developed with the 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. (The *United Nations, Palermo Protocol*).¹⁴⁹ The goal in constructing this plan was to promote cooperation between different stakeholders and lay the groundwork for closer cooperation with other countries in the region and beyond.¹⁵⁰

The National Plan of Action proposes an approach dealing with Prevention of human trafficking in Kenya, Protection of the victims of human trafficking and Prosecution of the crimes.¹⁵¹

Prevention.

Globally, prevention of human trafficking is a key aspect considered in the race towards the monitoring and combatting of human trafficking. The Strategic Priorities of the advisory committee for prevention include: Building the capacity of criminal justice practitioners, raising public awareness through campaigns and reducing fraudulent employment opportunities by monitoring and assessing employment agencies.¹⁵²

¹⁴⁸ United States Department of State, 2014 Trafficking in Persons Report - Kenya, 20 June 2014, <<http://www.refworld.org/docid/53aab9e214.html>> 12 January 2017.

¹⁴⁹ Article 5, *United Nations, Palermo Protocol*, 2000.

¹⁵⁰ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 2.

¹⁵¹ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 2.

¹⁵² The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 7.

Protection

The National plan for protection adopts an approach that deals with rescue, rehabilitation and reintegration. The Strategic Priorities for protection that the plan has adopted include:

1) Direct assistance: promoting awareness and sensitization of the public by developing, printing and disseminating national guidelines for identification of victims, conducting a national mapping exercise identifying all existing support services available to trafficked persons.¹⁵³

2) Capacity Building: Through providing education for service providers and other relevant stakeholders by carrying out training needs assessments for stakeholders and concerned persons. The training is to be on methods of combating human trafficking and deploying experts in vulnerable areas or hotspots to identify possible victims and perpetrators of trafficking.¹⁵⁴

Prosecution

Prosecution is an imperative element for Kenya's fight against trafficking. The Strategic Priorities for prosecution of human trafficking crimes are;

1) Formulating and implementing a legislative framework and developing regulations to operationalize the *Counter Trafficking in Persons Act, (No.8), 2010* and lobbying for their adoption and amendment of *Counter Trafficking in Persons Act, (No.8), 2010*.¹⁵⁵

2) Operationalization of the Counter Trafficking in Persons Act through improving the skills of prosecutors and judicial officers to operationalize the Counter Trafficking in Persons legislation.¹⁵⁶

3) Creation of a data base on Case law and research by developing and compiling a human trafficking case law on rulings and judgements on issues related to trafficking in persons.¹⁵⁷

Apart from prevention, protection and prosecution, the national plan also aims at looking into the following cross cutting issues: The Strategic Priorities for the cross cutting issues are:

1) Data and Research: This involves facilitating availability of data to meet reporting obligations and case management, collaboration with institutions such as the Kenya National Bureau of

¹⁵³ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 8.

¹⁵⁴ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 9.

¹⁵⁵ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 9.

¹⁵⁶ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 10.

¹⁵⁷ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 9.

Statistics to have indicators of trafficking included in household surveys and conducting primary and secondary research on trafficking in persons in Kenya.¹⁵⁸

2) Collection of Data by Protective and Victim Service Providers by developing a standardised system for collecting data of potential victims and perpetrators of trafficking and facilitating collection, storage and sharing of data.¹⁵⁹

3) International Cooperation implemented by facilitation of the development of international cooperation mechanisms including joint legal assistance and investigation and developing arrangements to reciprocate the same in order to enhance international cooperation mechanisms on counter trafficking.¹⁶⁰

4) Operationalization of the Advisory Committee: Following the implementation of the Counter Trafficking in Persons through and ensuring resource mobilization to enable the Advisory Committee deliver on its mandate, report and advise the Cabinet Secretary on inter agency activities. Ensuring implementation of regional and international instruments on trafficking in persons, development of standardized training manuals and benchmarking on efforts of combating human trafficking.¹⁶¹

CONCLUSION

From the analysis above, there is evidence of a marked improvement in dealing with human trafficking in the country. Coming from a point prior to 2010 where there was no set legislation directly dealing with the offence of trafficking in persons to having a national plan of action. The findings in this chapter allude to the fact that the main problem lies in operationalizing the current legislations provided for in chapter three above. The national plan of action that was been put in place in 2013 is set to give a final report in 2017 on the progress of dealing with human trafficking in the country.

¹⁵⁸ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 10.

¹⁵⁹ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 10.

¹⁶⁰ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 10.

¹⁶¹ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 11.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION.

Recommendations for Kenya:

“Knowledge makes a man unfit to be a slave” - Fredrick Douglas.

Prosecution of Human Trafficking Perpetrators, Protection of Victims and Prevention of Human Trafficking

Prosecution of offenders

On the issue of prosecution, 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. Sections 14, 15, and 17 of the Sexual Offenses Act of 2006 prohibit the facilitation of child sex tourism, child prostitution, and forced prostitution, and prescribe penalties of six to 20 years' imprisonment – penalties that are sufficiently stringent and commensurate with those prescribed for other serious offenses. However, prosecutors rarely pursue cases under these provisions of the act

These sections of the law should be uplifted and implemented with utmost importance as it has been noted that too many cases are going unprosecuted as is evidenced by the lack of a case database.¹⁶² It is prudent that a national database be created in order to keep track of victims of trafficking in persons. This will also help in tracking the efforts of the judiciary.

Protection of victims

In terms of protection of victims, it has been reported that victims of human trafficking in Kenya, particularly children, are afraid to come forth to report their status.¹⁶³ The national and international legislation provided for in chapter three above require that the state applies measures to protect victims. There are some private institutions provided in chapter four above that deal with protection of victims. There is a need for the establishment of a governmental organization catering specifically to the needs and the protection of these children and trafficked persons.

¹⁶² United States Department of State, 2014, Trafficking in Persons Report - Kenya, 20 June 2014, available at: <<http://www.refworld.org/docid/53aab9e214.html>> 12 January 2017.

¹⁶³ Awareness against Human Trafficking, <<http://haartkenya.org/reearch/>> 17 November 2016.

Prevention of human trafficking

On the issue of prevention of trafficking in persons in Kenya, the most important factor that could promote prevention is sensitization of the masses. The Advisory Committee established by the Counter Trafficking in Persons Act, received a one-day training by United Nations Office on Drugs and Crime (UNODC) and The CRADLE Children Foundation in September 2014.¹⁶⁴ This is hardly sufficient training of such high standing stakeholders. The UNODC has developed curriculum for Training of Trainers to police officers investigators and prosecutors.¹⁶⁵

There is an urgent need for stakeholders, especially those in the business of providing migration services such as police officers, border personnel and other concerned parties to go through rigorous training in order to be better amassed with resources and skills to deal with the issue from the sources.

CONCLUSION

Kenya has been placed in the tier 2 watch list with regards to matters concerning human trafficking. The tier 2 watch list comprises of countries whose governments do not fully comply with the Trafficking Victims Protection Act (TVPA) of the United States' minimum standards, but are making significant efforts to bring themselves into compliance with those standards and the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.¹⁶⁶

There exists a lacuna on information on the succinct identification and investigation of human trafficking due to lack of knowledge on the legal definition of the term .It is therefore important to promote understanding as to the understanding of the definition of human trafficking and the identification of trafficking victims.

¹⁶⁴ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 1.

¹⁶⁵ The National Plan of Action (NPA) for Combating Human Trafficking 2013-2017, 1

¹⁶⁶United States Department of State: Diplomacy in Action, Tier Placement <
<https://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm>> Accessed on 12/01/2017.

The problem emerging clearly from this study is not, in fact, that Kenya has a lack of laws, but rather, the lack of understanding of the issue of human trafficking. This has led to the lack of awareness among the relevant stakeholders responsible for dealing and combating the crime of trafficking in persons in Kenya. As a result, a situation where there are few marked efforts to combat trafficking has arisen. The major issue is that the legislations described in chapter three above are not adequately being implemented.

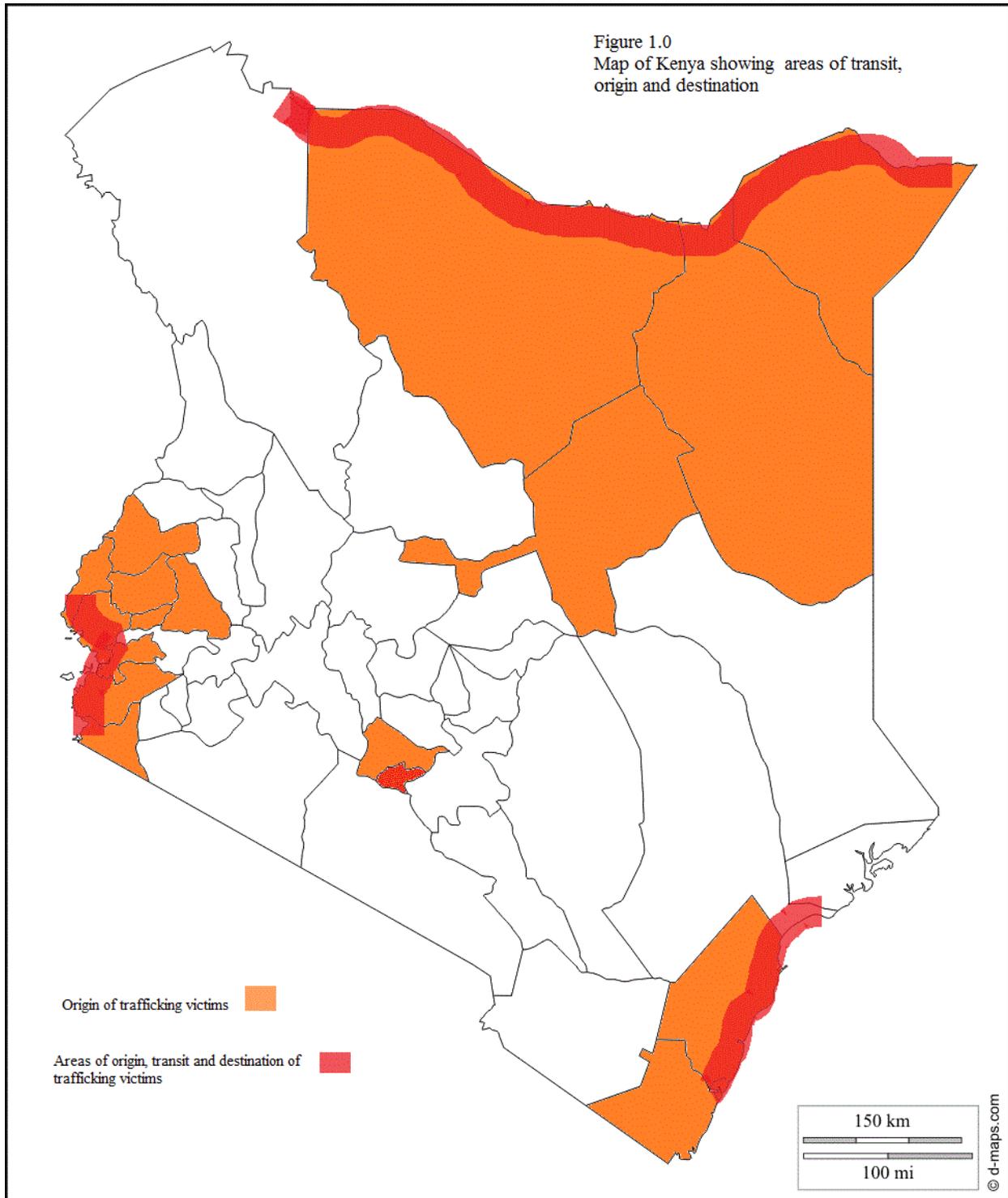
There is also a need for the Kenyan government to work closely with the private sector, especially in the transport and hospitality industry. The private sector should be provided with a curriculum for training and sensitizing their employees with regard to human trafficking. This will go a long way in ensuring that all bases are covered with regards to sensitization.

The solution of this problem lies in the sensitization of all relevant stakeholders, who include members of the public. Once there is an understanding of the proper definition of trafficking in persons and a framework for identifying trafficking victims, the threats that are caused by human trafficking will be reduced and as such, the issue can be combatted.¹⁶⁷

¹⁶⁷ Shelley, *Human Trafficking: A Global Perspective*, 75.

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Figure 1.0



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