INFORMATION BOOKLET ON
COUNTER TRAFFICKING IN PERSONS
ACT, 2010

www.rckkenya.org

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Working together with Government departments and agencies and non-governmental organizations, to advance the purposes of this Act;

Developing mechanisms to ensure the timely, coordinated, and effective response to cases of trafficking in persons;

Enhancing international cooperation with other countries through bilateral and multilateral arrangements to prevent and suppress international trafficking in persons, such as pre-employment orientation seminars and pre-departure counselling programmes to applicants for overseas employment (i), (n);

Measures necessary to rehabilitate victims of trafficking in persons such as counselling services and temporary shelter, or through reintegration, both locally and internationally (j), (d);

Establishing mechanisms to screen persons entering or leaving Kenya to determine if they are victims of trafficking in persons;

Such other functions necessary for the implementation of the act.

The Advisory Committee shall submit an annual report on policies, programmes, and activities to the Minister and to the National Assembly (Section 21).

The Advisory Committee consist of (Section 19):

The Permanent Secretary, in the Ministry responsible for matters relating to immigration;

The Permanent Secretary, in the Ministry responsible for matters relating to foreign affairs;

The Permanent Secretary, in the Ministry responsible for matters relating to gender and children;

The Permanent Secretary, in the Ministry responsible for matters relating to labour;

The Attorney General;

The Commissioner of Police;

A representative of the Kenya National Commission for Human Rights;

Two representatives from civil society nominated by the respective civil societies dealing with issues relating to women and children with proven record of involvement in the prevention and suppression of trafficking in persons;

One person nominated by the Central Organization of Trade Unions;

One person nominated by the Federation of Kenya Employers

Such other members as may be co-opted by the Advisory Committee.

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Acknowledgement

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In this regard, RCK would like to thank Lucy Kiama and Leila Muriithia, respectively the Executive Director and the Senior Program Officer of the organization, for their guidance and input. Furthermore, RCK acknowledges the contribution of RCK staff, namely Rufus Karanja, Oscar Muriuki, Francesco Cattaneo, Andrew Maina, Edmund Lang’at and Stefania Tranfo for the development and review of this document.

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Section 26: Other Penalties

(1) NON-CITIZENS who have been convicted of an offense under this Act are to be deported immediately after completing their sentence, and will not be allowed to re-enter Kenya.

(2) GOVERNMENT EMPLOYEES AND OFFICIALS are liable to imprisonment or a fine, if they knowingly issue or approve the issuance of travel documents or other documents to any person who fails to go through the proper procedures and requirements instructed by the law, with the intention of assisting in the commission of an offense.

(3) If the OFFENDER had adopted, fostered, or had a child in guardianship who is the subject of an offense under this act, the court will rescind the adoption, fostering, or guardianship. The child will be dealt with in accordance with the Children Act, 2001.

F. ADMINISTRATION OF THE ACT

Advisory Committee

1. As prescribed in section 20, the Advisory Committee shall advice the Minister on:

   ▶ Formulating a comprehensive and integrated programme to prevent and suppress the trafficking in persons as well as effectively coordinating with other relevant agencies (a) (b);

   ▶ Disseminating information on trafficking in persons through concerned agencies and non-governmental organizations, public information campaigns and community based initiatives (c), (i), (m);

   ▶ Monitoring and evaluating the progress of Kenya with respect to prevention protection and prosecution efforts relating to trafficking in persons and establish an effective data collection for cases of trafficking to guide policy and program formulation (e), (g);
Kenya plays a significant role in contributing to mixed migration in the Horn of Africa most notably being a source, transit, and destination country for trafficking. According to the US State Department’s Trafficking in Persons Report 2013, every year a considerable and unknown number of people, especially women and children, are forced or deceived with promises of a better life to forced labour that lead to a long list of human rights violations for the victims, and personal gain for the people who favour the process. Despite being a signatory party of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), Kenya still does not fully comply with the minimum standards for the elimination of trafficking. The vulnerability and the lack of education on human trafficking from the victims’ side, the hidden nature of the crime and its similarities with smuggling, make it difficult to recognize the offence, prosecute the perpetrators and assist the victims. To this end, this booklet aims to provide information on trafficking to law enforcement officers, court users as well as individuals to recognize trafficking in persons and ensure the proper assistance to the victims. The booklet will also act as a reference tool for experts in the field of human rights and forced migration to enhance their understanding prevention; protection and prosecution of matters relating to trafficking in persons together with relevant agencies and the Government of Kenya. The booklet provides distinction between trafficking in persons and smuggling, and provides references for offences related to the trafficking and the role of actors as prescribed by The Counter Trafficking in Persons Act, 2010.

Introduction

Kenya plays a significant role in contributing to mixed migration in the Horn of Africa most notably being a source, transit, and destination country for trafficking. According to the US State Department’s Trafficking in Persons Report 2013, every year a considerable and unknown number of people, especially women and children, are forced or deceived with promises of a better life to forced labour that lead to a long list of human rights violations for the victims, and personal gain for the people who favour the process. Despite being a signatory party of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), Kenya still does not fully comply with the minimum standards for the elimination of trafficking. The vulnerability and the lack of education on human trafficking from the victims’ side, the hidden nature of the crime and its similarities with smuggling, make it difficult to recognize the offence, prosecute the perpetrators and assist the victims. To this end, this booklet aims to provide information on trafficking to law enforcement officers, court users as well as individuals to recognize trafficking in persons and ensure the proper assistance to the victims. The booklet will also act as a reference tool for experts in the field of human rights and forced migration to enhance their understanding prevention; protection and prosecution of matters relating to trafficking in persons together with relevant agencies and the Government of Kenya. The booklet provides distinction between trafficking in persons and smuggling, and provides references for offences related to the trafficking and the role of actors as prescribed by The Counter Trafficking in Persons Act, 2010.
A. WHAT IS HUMAN TRAFFICKING?

Trafficking has three main elements:

1. Unlawful act
2. Coercive Means
3. Exploitation

E. OFFENSES AND PENALTIES

The Counter Trafficking in Person Act, 2010

<table>
<thead>
<tr>
<th>OFFENSE</th>
<th>PENALTY</th>
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<tbody>
<tr>
<td>Section 3: Trafficking in persons</td>
<td>-Imprisonment for a term of not less than 30 years; or -Fine of not less than 30 million shillings; or -Both and upon subsequent conviction, life imprisonment.</td>
</tr>
<tr>
<td>Trafficking another person, for the purpose of exploitation Financing, controlling, aiding or abetting trafficking.</td>
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<tr>
<td>Section 4: Acts that promote child trafficking</td>
<td>-Imprisonment for a term not less than 30 years; or -A fine of 20 million shillings; or -Both and upon subsequent conviction, life imprisonment.</td>
</tr>
<tr>
<td>Initiating or attempting to initiate adoption, fostering or guardianship proceedings for the purpose of child trafficking.</td>
<td></td>
</tr>
<tr>
<td>Section 5: Promotion of trafficking in persons</td>
<td>-Imprisonment for a term not less than 20 years; or -A fine of 20 million shillings; -Both, and upon subsequent conviction, life imprisonment.</td>
</tr>
<tr>
<td>Willingly and knowingly leasing premises for the purpose of promoting trafficking of persons; or Publishing, exporting or importing, any material for purposes of promoting trafficking in persons; or Owning, managing, running, or financing any job recruitment agency for the purposes of promoting trafficking in persons; or By any other means promoting trafficking in person.</td>
<td></td>
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<tr>
<td>Section 6: Acquisition of travel documents by fraud or misrepresentation</td>
<td>-Imprisonment for a term no less than 10 years; or -A fine of 10 million shillings; -Both, and upon subsequent conviction, imprisonment for a term of not less than 10 years without the option of a fine.</td>
</tr>
<tr>
<td>Knowingly misrepresenting any fact with the aim of facilitating the acquisition of travel document or fraudulently obtaining any document from the Government agencies, with the intention of aiding in an offence of trafficking in persons.</td>
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</tr>
<tr>
<td>Section 7: Facilitating entry into or exit out of the country</td>
<td>-Imprisonment for a term no less than 30 years; or -A fine of 30 million shillings; or -Both, and upon subsequent conviction, imprisonment for a term of not less than 30 years without the option of a fine.</td>
</tr>
<tr>
<td>Facilitating, aiding or supporting the exit or entry of persons from or to the country at international or local airports, territorial boundaries and seaports for the purpose of promoting trafficking of persons.</td>
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**D. CONSTITUTIONAL BACKGROUND**

**Constitutional Foundations Of Counter Trafficking In Persons Act 2010**

 Trafficking in persons constitutes both a criminal offence and a human rights violation. In Kenya three documents are important for the discussion on trafficking in persons,

1. **The Counter Trafficking in Persons Act 2010** - it criminalizes the vice and gives remedies for the victims,

2. **The Constitution of Kenya 2010** - in particular the Bill of Rights (Chapter IV), where the inherent violations that a victim of trafficking undergoes are derived.

3. **The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children** (the Protocol) - The purposes of the Protocol are to prevent and combat trafficking in persons, paying particular attention to women and children, since they form a large majority of the victims; to protect and assist the victims and to promote cooperation among States Parties in order to meet those objectives. Kenya is party to the Protocol and by virtue of Art. 2 (6) of the Constitution are bound to its terms and it forms part of the Laws of Kenya.

**RIGHTS OF VICTIMS OF TRAFFICKING - THE COUNTER TRAFFICKING IN PERSONS ACT 2010**

Right to IMMUNITY FROM PROSECUTION to

- An offence related to being in Kenya illegally or
- For criminal act that was a direct result of being trafficked (Section 14).
- Right to privacy (Section 11)
- Right to remain in Kenya until legal proceedings are concluded (Section 15)
- Right to be addressed in a language the person understands (Section 15)
- Right to support services indiscriminate of nationality (Section 15)
- Return to and from Kenya;
- Resettlement;
- Re-integration;
- Appropriate shelter and other basic needs;
- Psychosocial support;
- Appropriate medical assistance;
- Legal assistance or legal information including information on the relevant judicial and administrative proceedings; or any other necessary assistance that a victim may require
- Exemption from the payment of court fees when offence constitutes civil action for damages (Section 16)
- The right be repatriated to the place of origin of the victim (Section 18)

**Human Trafficking**

**Coercive Means:**

- Threat or use of force or other forms of coercion
- Abduction
- Fraud
- Deception
- Abuse of power or of vulnerability of the victim
- Giving payments or benefits to obtain consent from the victim
- Giving or receiving payments or benefits to obtain consent by a person in control of the victim

**Exploitation:**

- Slavery
- Practices similar to slavery
- Involuntary servitude
- Removal of organs or body parts
- Participation in armed conflicts
- Forced labour
- Child labour
- Sexual exploitation
- Child marriage
- Force marriage
- Or other forms of EXPLOITATION

**Unlawful Acts:**

- Recruiting
- Transporting
- Transferring
- Harbouring
- Receiving
B. ARE THERE DIFFERENCES BETWEEN TRAFFICKING AND SMUGGLING?

<table>
<thead>
<tr>
<th>Smuggling</th>
<th>Trafficking</th>
</tr>
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<tbody>
<tr>
<td>Primarily an offence against state</td>
<td>Primarily an offence against the person</td>
</tr>
<tr>
<td>Smuggled persons are liable for prosecution in Kenya, but could gain immunity if they testify against the smuggler</td>
<td>Victims of trafficking cannot be charged for illegal presence in Kenya</td>
</tr>
<tr>
<td>Smuggled persons enter the country illegally</td>
<td>Victims of trafficking do not necessarily enter the country internationally</td>
</tr>
<tr>
<td>Requires movement across an international border</td>
<td>There is lack of consent for movement, or, if there is consent, this was through deception or other means to gain control</td>
</tr>
<tr>
<td>There is no exploitation</td>
<td>There is exploitation</td>
</tr>
<tr>
<td>Cannot occur without movement</td>
<td>Can occur without any movement</td>
</tr>
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IS IT TRAFFICKING OR SMUGGLING?

This is a case of human trafficking.

HOW DO WE KNOW WHETHER IT’S TRAFFICKING ON SMUGGLING?

This is because consent from Kenyan youth is secured through fraud. They think that they are going to do an advertised job and end up in domestic service. It is also trafficking because there is an element of exploitation.

WHAT LEGAL REGIME APPLIES?

The Counter-trafficking in Persons Act, 2010 is the legal regime applicable here. It should be used to arrest those ‘job agencies’ involved in this type of work for recruiting for the purposes of exploitation.

(IV) International Human Trafficking Sending Kenyan Youth To Middle East

A cartel lures Kenyans by placing advertisements of well-paying job opportunities in Middle East countries in local newspapers. Desperate young men and women apply for the jobs, pay travel and contract processing fees only to end up as domestic workers and labourers suffering different kind of abuses. The racketeers alternatively use their local agents to convince jobless youths to sign up for jobs abroad without following the required procedure. (source: Daily Nation – 25/03/12)
IS IT TRAFFICKING OR SMUGGLING?
This is a case of smuggling as there is no indication that the foreigners were being exploited or were being transported for the purposes of exploitation.

HOW DO WE KNOW WHETHER IT’S TRAFFICKING OR SMUGGLING?
The Kenya Citizenship and Immigration Act, 2011 applies as s.2(1) describes Human Smuggling and s.53(1) (j) creates the offence of unlawful presence and stay in Kenya. However these foreigners can be granted immunity if they decide to testify against the smugglers as stated in s.53(4).

WHAT LEGAL REGIME APPLIES?
In this case the smuggled foreigners should be charged for illegal entry and/or presence in Kenya. However should they choose to testify against the smuggler(s), they can be granted immunity from prosecution.

(III) Foreigners Arrested As They Tried To Smuggle Their Way Into Tanzania
64 illegal immigrants who were serving a three month jail term in Kwale have been deported. The group consisted of 61 Ethiopians, 2 Somalis and a Nigerian. Coast Senior Principal Immigration Officer said the foreigners were arrested as they tried to smuggle their way into Tanzania, their final destination was South Africa. (source: Standard Media 25/01/14)
C. CASE STUDIES

(I) 19 Ethiopians Arrested At Kombani In Kwale County For Smuggling

Investigations are ongoing to determine their hosts and destination country. The police stated that most aliens are headed to South Africa, and the ‘issue [of people smuggling] had decreased but is emerging again’ The Ethiopians will be charged for being in the country illegally. (source: The Star – 5/03/14)

IS IT TRAFFICKING OR SMUGGLING?

This is a case of smuggling as there is no indication that the Ethiopians were being exploited or were being transported for the purposes of exploitation.

WHAT LEGAL REGIME APPLIES AND WHY?

The Kenya Citizenship and Immigration Act, 2011 applies as s.2(1) describes Human Smuggling and s.53(1) (j) creates the offence of unlawful presence and stay in Kenya. However these Ethiopians can be granted immunity if they decide to testify against the smugglers as stated in s.53(4).

WHAT IS TO BE DONE TO THE VICTIMS/PERPETRATORS

In this case the smuggled Ethiopians should be charged for illegal entry and/or presence in Kenya. However should they choose to testify against the smuggler(s), they can be granted immunity from prosecution.

(II) Police In Kajiado Are Investigating An Alleged Multi-million Shilling Human Trafficking Racket

Police have cracked down on a human trafficking syndicate which ferried disabled persons from Tanzania to use them as beggars in Nairobi. Police said they arrested 32 Tanzanian disabled persons in Huruma estate on Monday night after they were sneak in at the Kenya- Tanzania border to be used as professional beggars in Nairobi. Police said they busted the cartel and arrested two men suspected to be behind the begging industry racket. “We are informed that they had been brought here for alms purpose but we intend to charge them in court with being in Kenya illegally. We will also charge the hosts of the crippled men and women,” He said. The disabled persons were smuggled into the country in the pretext that their welfare will be looked into and that they would benefit from alms. They included men, women and children. Police said they arrested two other people who were hosting them. (source: Standard Media - 10/12/13)

IS IT TRAFFICKING OR SMUGGLING?

This is a trafficking case. Tanzanian citizens were told that they were coming to Kenya to receive assistance. But, as the story states, they were reduced to begging for alms which is a form of exploitation.

SHOULD THE TANZANIAN CITIZENS HAVE BEEN ARRESTED?

No, they should not have been arrested. Their situation is regulated by the Counter Trafficking in Persons Act, 2010 and not the Kenya Citizenship and Immigration Act, 2011. S.14 of the Counter Trafficking Act states that victims of trafficking are not to be arrested for illegal entry and/or illegal presence in Kenya.

WHAT CARE ARE THE TANZANIAN CITIZENS ENTITLED TO?

s. 15 of the Counter-Trafficking in Persons Act provides a wide range of support for these victims of trafficking. They include repatriation to Tanzania, resettlement, appropriate shelter and other basic needs & psychosocial support.