

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS**

**RESPONSE TO THE CALL BY THE UN SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN**

**ON**

**NON- PUNISHMENT PRINCIPLE**

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1. **Introduction**

The Kenya National Commission on Human Rights (“KNCHR” or “The Commission”) is an independent national human rights institution created under article 59 of the Constitution of Kenya,2010 and operationalized under the Kenya National Commission on Human Rights Act, 2011. The Commission is an accredited status ‘A’ institution by the Global Alliance of National Human Rights Institutions (GANHRI) for its compliance with the Paris Principles. The Commission also enjoys an affiliate status with the African Commission on Human and Peoples’ Rights (ACHPR). The KNCHR is the principal organ of State in ensuring compliance with obligations under treaties and conventions relating to human rights. KNCHR serves as a member of the Kenya’s National Advisory committee on Counter Trafficking (AC-CTiP) and the National Coordination Mechanisms (NCM) on migration.

1. **Non- Punishment Principle in Trafficking in Persons in Kenya**

Kenya continues to serve as the source, transit and destination point in the human trafficking cycle due to its Geo-political position within the East and Horn of Africa region as well as its humanitarian position as one of the countries providing asylum to thousands of refugees from the neighboring countries. The most common instances where Kenya serves as a source of trafficking is where illegally operating private employment agencies recruit vulnerable unemployed youths from Kenya and traffic them to other countries with promises of high paying skilled and non-skilled jobs. As a transit county, victims of trafficking from Uganda are ferried to Kenya then trafficked to other countries for exploitation and the other common trend is where migrants from Horn of Africa countries are ferried to Kenya then trafficked to the Southern part of Africa with promises of better employment opportunities.

Kenya has put in place various initiatives to combat the transnational crime of trafficking in persons. The initiatives range from legislative, policy and administrative measures. In terms of legislative measures, Kenya has enacted the Counter-Trafficking in Persons Act, 2010(No. 8 of 2010) and Kenya Citizenship and Immigration Act, 2011(No. 12 of 2011) as well as ratification of the United Nations Convention Against Transnational Organized Crime particularly the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Administratively, Kenya has embraced a multi-agency approach through the National Referral Mechanism (NRM) in dealing with cases of trafficking in persons where both state and non-state actors have created a platform in which there is close coordination, collaboration and partnership in information sharing, investigation, training and capacity building; all geared towards combating trafficking in persons and ensuring protection of the victims of trafficking.

With the existing legal framework, there has been a positive record in arrest and prosecution of perpetrators of trafficking in persons. This trend has significantly been boosted by the existing inter-agency coordination especially between agencies from border management, law enforcement, policy formulation and the judiciary. It must however be noted that in certain circumstances, misinterpretation and misapplication of the existing laws has led to circumstances in which perpetrators are charged under immigration or refugee laws which prescribe lesser punitive measures or wrongful prosecution of victims of trafficking.

1. **Role of KNCHR**

The Kenya National Commission on Human Rights has been part of the joint efforts in combating the human trafficking menace while at the same time ensuring that the victims of trafficking are treated in accordance with the provisions of the law and their human dignity upheld. As a member of the Advisory Committee established under the Counter Trafficking in Persons Act, the Commission plays a critical role both at the policy level as well as the operational level through its primary mandate of advising on human rights and supporting actual access to services of victims of Trafficking. A good example is the intervention by KNCHR where a mediation in a court petition resulted to parties filing in a consent and actual assistance for the victims of trafficking who had been stranded in Kenya due to prolonged court process. Moreover, as a secretariat member of the National Coordination mechanisms on migration, KNCHR ensures that mainstreaming of a human rights-based approach in migration management is realized through different strategies like influencing policy formulating, coordination of activities on implementing the Global compact on migration (GCM) and the relevant reporting on compliance.

Under the Better Migration Management (BMM) project, the KNCHR has undertaken various strategic sensitization forums and referral partners’ workshops purposely to create platforms where the critical partners exchange ideas on how best the deal with cases of trafficking in persons while at the same time sharing experiences on best practices in combating the vice. Key among the partners are the security agencies, the judiciary, the prosecution and border management agencies for their critical role in handling cases of trafficking in persons. The approach focuses on essential topical issues including the legal framework on counter trafficking in persons, forms of trafficking in persons, triggers of human trafficking, identification of victims of trafficking, handling of victims of trafficking in persons as well as underscoring the importance of joint coordination in tackling cases of trafficking in persons. Other key stakeholders offering training to various actors include the UNODC office in Gigiri, the International Rescue Committee and the Department of Immigration Services.

The continued engagement, though still hampered by lack of adequate resources has seen positive results being registered in terms of arrest, prosecution and conviction of traffickers as well as the rescue and protection of victims of trafficking through a human rights-based approach that ensures respect for their dignity and non-punishment. There are however some instances where lack of information or ignorance of the law on the part of certain actors results in denial of justice for the victims of trafficking.

**Positive Impact**

The continued stakeholder’s collaboration and capacity enhancement workshops has resulted in a number of good practice initiatives being undertaken such as;

* Strengthened collaboration between the Government ministries, civil society organizations and migrants on awareness creation and supporting the KNCHR study on status of migrants in detention places.
* Judicial and prosecution officers are able to flag out suspected cases of trafficking in persons and liaise with the relevant agencies to enjoin with a view to ensuring that justice is served i.e. punish the perpetrators and protect the victims.
* Law enforcement agencies are able to reach out to KNCHR and other expertise agencies to guide them whenever they encounter suspected cases of trafficking in persons.
* Law enforcement agencies can put forward requests for training needs purposely to be empowered to effectively handle cases of trafficking in persons.
* Law enforcement agencies in collaboration with the judiciary are able to identify and differentiate between asylum cases and trafficking cases.
* The courts are able to issue revised judgements overturning initial punitive decisions upon realization that the convicts are victims of trafficking and not illegal migrants.
1. **Forms of Non-Punishment of Victims**
2. **Deprivation of citizenship**

There have been no reported cases of deprivation of citizenship of victims of trafficking in Kenya.

1. **Detention**

Victims of trafficking are often detained in preliminary stages before it is established that they are indeed victims and not illegal immigrants. This scenario is witnessed where there is a language barrier between the victims and the law enforcement agencies, refusal by the victims either because of threats or coercion by the perpetrators to state the truth with regard to their status as victims of trafficking, lack of special holding centres or shelters for accommodating victims of trafficking hence leaving the law enforcement agencies with little options to secure alternative shelter and lastly, it occurs in situations where the law enforcement personnel are ignorant of the actual legal processes in which victims of trafficking are supposed to be assisted. KNCHR has over the period observed that detention of victims always occurs at the preliminary stages and once it has been ascertained that the detainees are victims of trafficking, other actors are brought on board to support the victims in accordance with the law. The findings of the *KNCHR’s Survey report on status of migrants in detention places, 2020* showcases the need for Kenya to deliberate on alternatives to migrants’ detention as one strategy towards ensuring that the victims of trafficking do not end up in detention places for migration related offences.

1. **Forced Returns**

In the recent years, no major cases of forced return for the victims of trafficking have been reported. We however cannot rule out the possibility of victims being returned forcefully under the pre-text of illegal immigrants especially where they refused to cooperate or ignorantly declined to state the truth regarding their migrant status. Aside from the provisions of the Counter Trafficking in Persons Act of 2012, the Kenya Citizenship and Immigration Act prescribes a specific custodial sentence and subsequent deportation of illegal migrants upon conviction. Therefore, where it is not established that particular migrants are actually victims of trafficking or bonafide asylum seekers, the common charge is usually illegal presence which automatically translates into the custodial sentence and then deportation.

 **Case Study on Forced Return**

In **Criminal case No. 1603/2020, Kitale CMC Court** in Trans Nzoia County KNCHR was enjoined in a case in which 10 migrants from Ethiopia had been arraigned court on charges of unlawful presence under the Kenya Citizenship and Immigration Act. KNCHR officers interviewed the 10 migrants and discovered that they were either asylum seekers or victims of human trafficking and therefore requested the court to have the National Refugee Agencies interview the migrants and ascertain if indeed they were asylum seekers or not. UNHCR came on board and upon interviewing the migrants, it was discovered that the ten were actually asylum seekers who had left their country for fear of persecution on the grounds of their perceived political persuasion. As such, the court issued orders to have the 10 relocated to the nearby refugee camp at Kakuma, Turkana County. This is a case which would have resulted in refoulement of the 10 migrants but for the court’s progressive direction and the quick response by KNCHR and UNHCR, the migrants right to seek asylum was upheld.

1. **Administrative and Criminal Sanctions**

The sanctions are anchored in the existing laws and policies. These majorly target the perpetrators of trafficking in persons as opposed to the victims of trafficking.

There is in place some sections of the law that expressly protect victims from punishment. For instance, section 14 of the Counter-Trafficking in Persons Act provides for immunity for victims. The provision states that, “Notwithstanding the provisions of any other law, a victim of trafficking in persons shall not be criminally liable for any offence related to being in Kenya illegally or for any criminal act that was a direct result of being trafficked.”

More however needs to be done to even the existing law. For instance, in terms of penalties, trafficking for sexual exploitation attracts a penalty of 30 years imprisonment or a fine of not less than 30 million shillings ($296,300), or both under the Counter-Trafficking in Persons Act. This punishment is lenient compared to that prescribed under the Sexual Offences Act, 2006 for the offences of ‘rape’ and ‘child prostitution’.

Due to the criminalization of prostitution and sex work in the country’s penal code, women victims and girls are more susceptible to punishment under the law where early screening is not carried out during raids in establishments by law enforcement agents.

1. **General Challenges**
* Weak legal framework on regulation of private recruitment agencies hence resulting in illegal operations of private recruitment agencies which promote conducive environment for Kenya to serve as source country for trafficking of persons.
* Failure to strengthen existing institutions such as the Counter trafficking secretariat, the National human rights institutions, the national employment agency and the national coordination on migration, with adequate resources and staffing.
* Lack of regular information sharing between the key actors especially in instances where certain information is classified as confidential hence limiting access by other actors who would have otherwise used it to influence legislative and policy changes. This also impacts on collation of data and reporting on anti-trafficking efforts and cases of victims of trafficking.
* Lack of adequate protective shelters to host foreign national victims
* Some law enforcement agencies get easily compromised to abet trafficking of persons due to the huge monetary benefits involved
* Ignorance by some officials who handle trafficking cases under immigration and labour laws instead of the counter-trafficking law. The former attracts less punitive sentences.
* Vulnerability of the victims makes them susceptible to being trafficked and become non-cooperative in aiding investigative agencies to pursue the perpetrators.
* Insufficient resources for victim’s protections results in indirect punishment and further exploitation of victims.
1. **Recommendations**
* Call for ratification of the ILO Convention No. 181 on Private Recruitment agencies to regulate the activities of the Private recruitment agencies in Kenya and the receiving countries, implementation of the Global Compact on migration to promote safe, orderly and regular migration and the formulation of the Kenyan Migration policy which will provide policy guidance in the sector.
* Call for the ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Notably, this is one of the recommendations that gained the support of Kenya in the Universal Periodic Review (UPR) review process, 2020.
* Call for the ratification of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness
* Implementation of the Victim Protection Act, 2014 which would enhance protection especially for women and girls
* The need to ground the National Coordination Mechanism in the law for enhanced coordination of migration related aspects in Kenya.
* Strengthening of National Human Rights Institutions to be able to effectively monitor, document and report on all aspects of governance and violations in the sector.
* Strengthen the relevant existing institutions through adequate resources allocation both finances and staffing.
* Need for strengthened partnerships between the various actors nationally through the National coordination mechanism and Ministry of Labour and Social Protection, regionally and internationally for ease of information sharing and complementarity in the fight against trafficking
* Continuous training and capacity enhancement of referral partners and other critical stakeholders at all levels so as to be able to effectively screen and handle cases of trafficking especially for the vulnerable groups.
* Need to advocate for more funding towards the National Assistance Trust Fund for Assisting Victims of Trafficking to facilitate the protection, dignified repatriation and re-integration of both young and adult victims.
* Strict application of the laws on trafficking in persons by the courts especially imposition of stiffer penalties as stipulated in the Acts to ensure punishment of the perpetrators and deterrence of the potential perpetrators.

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