

# Policy versus reality within the African anti-human trafficking architecture: The case of Kenyan domestic workers in modern slavery in Saudi Arabia

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## Abstract

*The problem of human trafficking in Kenya remains deeply entrenched. Although multiple regulatory efforts have been adopted to rein in this challenge, it rages on with the recent reports projecting its increase. As a result, the discrepancy between policy and realities and lived human trafficking experiences of domestic workers using the Kenya-Saudi Arabia route is not only glaring but also one that deserves scholarly attention, especially considering recent experiences. This chapter has examined the gap between the policy positions, including emerging and recent ones, and the reality of combating human trafficking. Using mixed methods consisting of doctrinal evaluation of the law and reports, and also interviews, the authors have explored the nature and extent of this discrepancy. The chapter makes a finding that the legal, regulatory and administrative efforts for ensuring the welfare of domestic workers in Saudi Arabia, who are victims of human trafficking and modern slavery, have yet to fully and effectively*

*address the challenge. To address the practical realities that cause or exacerbate this challenge, moving forward, the chapter recommends that the Kenyan government prioritise the ratification of certain treaty laws, demonstrate political goodwill through the implementation of parliamentary reports on the challenge, prioritise the human rights approach to the regulation of aspects of human trafficking, and provide meaningful financial and legal backing to the institutions tasked with combating human trafficking in Kenya.*

**Key words:** *human trafficking; modern slavery; Kenya; Saudi Arabia; intractable; reality*

## 1 Introduction

Human trafficking is an urgent problem in Kenya. Although data shows that the trafficking victims' levels reduced during the COVID-19 pandemic,<sup>1</sup> the cases are again rising. Ranked Tier 2, Kenya is a source, destination and transit point of human trafficking.<sup>2</sup> Despite the dearth of accurate data, government reports indicate that the number of human trafficking cases in Kenya increased by 82,4 per cent in 2021.<sup>3</sup> Labour trafficking increased by 86,6 per cent between 2020 and 2021, accounting for 96 per cent and 98,3 per cent of all human trafficking cases in 2020 and 2021 respectively.<sup>4</sup> Transnational trafficking led at 64,7 per cent.<sup>5</sup> In the same period, women and girls aged 18 to 34 years were the most trafficked, accounting for six out of 10 victims of external trafficking, while children were mostly trafficked in Kenya.<sup>6</sup> The report shows that employment bureaus, agents and brokers facilitate 7 out of 10 human trafficking cases in Kenya, often occurring in cahoots

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1 United Nations Office on Drug and Crime (UNODC) 'Global report on trafficking in persons' (2024) 10.

2 US Department of State Trafficking in Persons (USTIP) 'Trafficking in persons report' (2024) 65.

3 National Crimes Research Centre 'The problem of human trafficking in Kenya' (2022) xvii. Main reasons for trafficking were labour, sexual exploitation and cultural purposes.

4 As above.

5 As above.

6 As above.

with complicit public officials.<sup>7</sup> Similar to the international arena, social media sites including, but not limited to, Facebook, Instagram, Snapchat, Kik, Meetme.com, WhatsApp and dating apps are the main recruitment platforms for human trafficking in Kenya.<sup>8</sup>

Human trafficking arguably is one of the most intractable, violent and dehumanising crimes worldwide. It is highly beneficial to the perpetrators and unintended beneficiaries such as governments that receive foreign remittances from labour migration victims. Kenya, for instance, has Saudi Arabia as the second highest source of diaspora remittances.<sup>9</sup> As this chapter examines the modern slavery and human trafficking issues, simultaneously, it is useful to clarify what each of these terms mean and how they overlap, from the onset. Although international law does not explicitly treat human trafficking and modern slavery as synonymous concepts, the distinction between the two is largely blurred and the terms are often used as interchangeable umbrella terms.<sup>10</sup> For instance, in passing the Trafficking Victims Protection Act of 2000 (TVPA), the United States (US) Congress described human trafficking as ‘a modern form of slavery that involves grave violations of human rights’.<sup>11</sup> However, distinct and interconnected definitions of the two exist. The United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000 (Trafficking Protocol) offers the most widely accepted definition of human trafficking.<sup>12</sup> The Protocol defines human trafficking to comprise

7 National Crimes Research Centre (n 3) xviii. Perpetrators are mostly youths aged 18-34 years with more females in domestic trafficking and males in external trafficking.

8 As above; 8 out of 10 recruitments were done through social media. See also Polaris Project ‘On-ramps, intersections, and exit routes: A 2015-2017 study’ (2018).

9 Central Bank of Kenya ‘Diaspora remittances’, <https://www.centralbank.go.ke/diaspora-remittances/> (accessed 5 July 2025).

10 C Corliss ‘Human trafficking as ‘modern slavery’: The trouble with trafficking as enslavement in international law’ (2020) 3 *South Carolina Law Review* 603-605.

11 Corliss (n 10) 605; see also US Department of State Trafficking in Persons (USTIP) ‘Trafficking in persons report’ (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> (accessed 7 April 2024).

12 Trafficking Protocol adopted 15 November 2000, entered into force 25 December 2003 UNTS 319. This chapter uses the terms ‘trafficking’, ‘human trafficking’ and ‘trafficking in persons’ synonymously and interchangeably.

three distinct elements: one, an action (recruitment, transportation, transfer, harbouring, or receipt of persons); two, a means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); three, a purpose (exploitation). Exploitation includes 'exploitation of prostitution and other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs'.<sup>13</sup> Notably, the Protocol recognises slavery as one of a range of exploitative practices that may constitute the purpose of actions that constitute trafficking.

Other conventions provide broader contexts to understanding slavery as a means of exploitation in human trafficking. One such convention is the 1926 Convention to Suppress the Slave Trade and Slavery (1926 Slavery Convention). The Convention helps to explain the concept of slavery defining slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.<sup>14</sup> Another convention is the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions, and Practices Similar to Slavery. This Convention has introduced further development by recognising the concept of 'a person of servile status' to distinguish a slave who is a victim of slavery from a victim of 'slave-like' institutions and practices such as 'debt bondage, serfdom and servile forms of marriage'.<sup>15</sup> The slave-like institutions and practices embody the notion of modern slavery as an umbrella term that encompasses many forms of exploitation of slaves and victims of slave-like institutions. The forms include forced labour, forced or servile marriage, debt bondage, sexual exploitation, human trafficking, slavery-like practices, and the sale and exploitation of children.<sup>16</sup> In respect to labour, modern slavery has

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13 Art 3(a) Trafficking Protocol (n 12).

14 Convention to Suppress the Slave Trade and Slavery adopted 25 September 1926, entered into force 9 March 1927, amended by Protocol Amending the Slavery Convention adopted 7 December 1953, entered into force 7 July 1955 UNTS 51, art 1(1).

15 AT Gallagher 'Human rights and human trafficking: Quagmire or firm ground? A response to James Hathaway' (2009) 4 *Virginia Journal of International Law* 800-802.

16 International Labour Organisation (ILO) 'Report of the Committee of Experts on the application of conventions and recommendations' (2012) ILC.101/III/1B para 272.

been described as ‘a systematic removal of a person’s freedom to accept or refuse a job, their freedom to leave one employer for another in order to exploit them for personal or commercial gain’.<sup>17</sup>

Yet, there is an increasing recognition by activists and courts that the realities of slavery in today’s age are more tied to exploitation than ownership. For example, Anti-Slavery International explains the use of the word modern slavery as follows: ‘Today slavery is less about people literally owning other people – although that still exists – but more about being exploited and completely controlled by someone else, without being able to leave.’<sup>18</sup> Another example is the judicial determination by the Supreme Court of England which, in 2022, expounded the meaning of modern slavery in regard to labour in the case of *Basfar v Wong* (*Basfar*), thus:<sup>19</sup>

Employment is a voluntary relationship, freely entered into and governed by the terms of a contract ... By contrast, the essence of modern slavery is that it is not freely undertaken. Rather, the work is extracted by coercion and the exercise of control over the victim.

*Basfar* is considered a *locus classicus* for breaking the civil immunity barrier against diplomats who engage in domestic servitude, thereby paving the way for domestic workers in similar exploitation to seek redress.<sup>20</sup>

Besides the shifting of attitudes represented by activists and courts, a scrutiny of the practice of the United Nations (UN) institutions and other actors further reveals the intrinsic interconnectedness of modern

17 Walk Free Foundation ‘Global slavery index (GSI) 2023’ (2023) 3, <https://cdn.walkfree.org/content/uploads/2023/05/17114737/Global-Slavery-Index-2023.pdf> (accessed 22 July 2025).

18 Anti-Slavery International ‘What is modern slavery?’ quoted in G Gyulai ‘Slavery, servitude and forced labour in international law: Should the difference still matter’ (2021) 32 *King’s Law Journal* 253.

19 [2022] UKSC 20 Appeal from *Basfar v Wong* UKEAT/0223/19/BA paras 43 & 51. The case concerned claims of trafficking, forced labour and domestic servitude of Ms Wong, by a member of the Kingdom of Saudi Arabia diplomatic mission in the United Kingdom. The Court held that domestic employment in diplomatic households is a commercial activity that is not protected by diplomatic immunity.

20 R Garcíandia ‘Domestic servitude and diplomatic immunity: The decision of the UK Supreme Court in *Basfar v Wong*’ (2023) 52 *Industrial Law Journal* 451. See also AP Santos ‘Four Filipinas sue diplomat employers in Switzerland for slavery’ *Aljazeera* (Geneva) 24 May 2023, <https://www.aljazeera.com/features/2023/5/24/four-filipinas-sue-diplomat-employers-in-switzerland-for-slavery> (accessed 20 February 2024).

slavery to human trafficking.<sup>21</sup> Similarly, this chapter employs the terms ‘modern slavery’ and ‘human trafficking’ distinctly and interconnectedly. It adopts the definition of human trafficking as defined by the Trafficking Protocol. Also, it adopts the view of modern slavery as an umbrella term that consists various forms of exploitation, including slavery, human trafficking, forced labour and debt bondage.

The chapter seeks to add our voice to the discourse on African anti-human trafficking architecture by establishing the pain points between policy and reality. Through an in-depth evaluation of the factual status inset the case of Kenyan domestic workers in Saudi Arabia, the research expansively examines the anti-trafficking and anti-slavery legal and policy frameworks of the two countries, international regime and the African human rights mechanisms and finds that the legal, regulatory, and administrative efforts for ensuring the welfare of Kenyan migrant domestic workers in Saudi Arabia, who are victims of human trafficking and modern slavery, have yet to fully and effectively address the challenge. Accordingly, the investigation concludes with practical recommendations for both countries, which include prioritising the ratification of certain treaty laws and demonstration of political goodwill.

## **2 Brief background on human trafficking in Africa**

Human trafficking is pervasive across countries, with the United Nations Office on Drugs and Crime (UNODC) detecting the presence of human trafficking victims in 129 countries in 2022, a 25 per cent increase in the detection of victims from 2019.<sup>22</sup> These victims are part of the 50 million people, including women and girls, who made up 54 per cent of people living in modern slavery in 2021.<sup>23</sup> In fact, at the time, about 28 million of those in modern slavery were estimated to be in forced labour.<sup>24</sup> Between 2016 and 2021, the prevalence of modern slavery increased by an additional 10 million people estimated to be engaged.<sup>25</sup>

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21 UNODC (n 1); USTIP 2024 (n 2); USTIP 2019 (n 11); Walk Free Foundation (n 17).

22 UNODC (n 1) 10.

23 Walk Free Foundation (n 17) 24.

24 As above.

25 Walk Free Foundation (n 17) 20.

Africa is a region of origin, transit and destination for trafficking in persons, with the majority of African countries ranked in Tier 2 and Tier 2 watch list and no country in Tier 1.<sup>26</sup> Compared to the rest of the world, Africa is most affected by trafficking with a third of all cross-border trafficking victims involving its citizens.<sup>27</sup> More so, at 64 per cent, Africa has the highest vulnerability to modern slavery globally.<sup>28</sup> In 2021, an estimated 7 million people were living in modern slavery in Africa, and about 4 million of them experienced forced labour fuelled by trafficking.<sup>29</sup> Further, children account for the majority of detected forced labour trafficking victims in sub-Saharan Africa.<sup>30</sup> For example, in 2020, it was estimated that 'there were more child labourers in sub-Saharan Africa than in the rest of the world combined'.<sup>31</sup>

A rather curious trend is that reports indicate that Africa has had the lowest average government response score on modern slavery globally during the same period.<sup>32</sup> Also, African countries are detecting and convicting fewer perpetrators of trafficking compared to the rest of the world. For instance, in 2020, convictions decreased by 22 per cent in sub-Saharan Africa,<sup>33</sup> yet, victims from Africa were increasingly being identified in more destination countries compared to victims from other regions of origin.<sup>34</sup> The statistics are complemented by numerous

26 USTIP 2024 (n 2) 65. According to the United States' Trafficking Victims Protection Act of 2000, as amended (TVPA), Tier 1 countries fully meet the TVPA's minimum standards for the elimination of trafficking; Tier 2 countries do not fully meet the TVPA's minimum standards but are making significant efforts; Tier 2 Watch List countries do not fully meet the TVPA's minimum standards but are making significant efforts; however, the estimated number of victims of severe forms of trafficking is very significant or is significantly increasing and the country's efforts are insufficient; Tier 3 countries do not fully meet the TVPA's minimum standards and are not making significant efforts to do so.

27 UNODC (n 1) 3

28 Walk Free Foundation (n 17) 77-78. The most vulnerable countries worldwide are South Sudan, Somalia, Central African Republic and the DRC.

29 Walk Free Foundation (n 17) 78-79. International Labour Organisation (ILO), Walk Free & International Organisation for Migration (IOM) 'Global estimates of modern slavery forced labour and forced marriage' (2022), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipecc/documents/publication/wcms\\_854733.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_854733.pdf) (accessed 16 December 2024).

30 UNODC 'Global report on trafficking in persons' (2022) XVI. Between 2019 and 2020, the rate of child victims per 100 000 population increased by 43%.

31 Walk Free Foundation (n 17) 78-79; ILO and others (n 29).

32 Walk Free Foundation (n 17) 75.

33 UNODC (n 30) XVI.

34 UNODC (n 30) VIII.



media reports on the state of human trafficking and modern slavery in Africa and against Africans.<sup>35</sup> A 2025 study by Amnesty International that interviewed 72 women former domestic workers who had recently returned to Kenya from Saudi Arabia established that nearly all the women were exploited and abused in domestic servitude.<sup>36</sup> Paradoxically, this status persists despite the fact that the majority of the African countries have ratified and domesticated the Trafficking Protocol.<sup>37</sup>

A myriad of factors compound Africans' vulnerability to trafficking and situations of modern slavery through a complex web of push and pull factors. One of the key push factors is poverty. It is estimated that 35 per cent of sub-Saharan Africans live in poverty, which drive trafficking and forced labour for low-skilled workers such as domestic work.<sup>38</sup> In a study done in Kenya in respect of the trafficking of women from Murang'a county to Saudi Arabia, the respondents attributed ignorance on trafficking and poverty as the highest vulnerability factors.<sup>39</sup> Poverty

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- 35 B Mbutia '60 human trafficking victims rescued, 3 traffickers arrested in Embakasi' *Citizen Digital* (Nairobi) 23 June 2022, <https://www.citizen.digital/news/60-human-trafficking-victims-rescued-2-traffickers-arrested-in-embakasi-n300750> (accessed 8 April 2024). The victims descended from countries in the Horn of Africa region and were on transit through Kenya. C Ombati 'Ethiopian jailed for 31 years over human trafficking' *The Star* (Nairobi) 12 September 2023, <https://www.the-star.co.ke/news/realtime/2023-09-12-ethiopian-jailed-for-31-years-over-human-trafficking/> (accessed 8 April 2024). 12 Ethiopian girls rescued from his house were to be trafficked to other countries. SD Kafeero 'More trafficked Ugandans women 'rescued' in Kenya' *Monitor* (Kampala) 15 September 2018, <https://www.monitor.co.ug/uganda/news/national/more-trafficked-ugandan-women-rescued-in-kenya-1778462> (accessed 12 February 2024).
- 36 Amnesty International 'Lock in, left out: The hidden lives of Kenyan women domestic workers in Saudi Arabia' (2025), <https://www.amnesty.org/en/documents/mde23/9222/2025/en/> (accessed 8 July 2025).
- 37 Trafficking Protocol's depository, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en) (accessed 17 January 2024). Among the 181 states that have ratified the Trafficking Protocol, 50 are from the African continent.
- 38 The World Bank 'Poverty headcount ratio at \$2.15 a day (2023) (% of Population) – Sub-Saharan Africa', <https://data.worldbank.org/indicator/SI.POV.DDAY?locations=ZG> (accessed 15 March 2024). See also ILO and others 'Labour migration in Africa', <https://www.ilo.org/africa/areas-of-work/labour-migration/lang-en/index.htm> (accessed 21 March 2024).
- 39 S Mburu and others 'Nature of human trafficking to Saudi Arabia from Murang'a south sub-county, Kenya' (2022) 9 *Open Access Library Journal* 19, <https://www.scirp.org/journal/paperinformation?paperid=119920> (accessed 17 December 2024).



is also touted as a key driver of child labour in sub-Saharan Africa.<sup>40</sup> Overall, where poverty is an influencing factor, vulnerabilities emerge through debt bondage where migrant workers are placed in servitude to repay recruitment costs that were borne either by the employer or by the recruitment agency.<sup>41</sup> Another push factor is lack of employment opportunities which disproportionately affects the youth. In Kenya, for instance, 19 per cent of the youth are not in employment or education institutions, thereby increasing their vulnerability to being trafficked for labour, especially to the Gulf countries.<sup>42</sup>

Poor governance and political instability produce large numbers of internally displaced persons (IDPs), some of whom end up being trafficked and/or exploited for labour.<sup>43</sup> The conflict in Libya, for instance, has been cited for fostering an environment of heightened human trafficking of IDPs by major organised crime syndicates.<sup>44</sup> Further, corruption and complicity by the political class and law enforcement officers are a major hinderance to efforts to combat human trafficking in many African countries.<sup>45</sup> Such challenges are more compounded when the trafficking involves persons in position of public trust or power. An example of such a case is demonstrated by events leading to a decision by a court in England to sentence to prison a Ugandan judge for modern slavery offences against a domestic worker.<sup>46</sup> The same court had earlier

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40 As above.

41 United Nations Office on Drugs and Crime 'The role of recruitment fees and abusive and fraudulent recruitment practices of recruitment agencies in trafficking in persons' (2015), [https://www.unodc.org/documents/human-trafficking/2015/Recruitment\\_Fees\\_Report-Final22\\_June\\_2015\\_AG\\_Final.pdf](https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final22_June_2015_AG_Final.pdf) (accessed 8 April 2024).

42 Kenya National Bureau of Statistics 'Quarterly labour force report: Quarter 4: October-December 2022' (2023) 8. See also S Smith (ed) 'Assessment report on the human trafficking situation in the coastal region of Kenya' (2018) 20, <https://www.knbs.or.ke/wp-content/uploads/2023/09/Quarterly-Labour-Force-Report-2022-Quarter-4.pdf> (accessed 8 April 2024).

43 Walk Free Foundation (n 17) 79. In 2020, Africa had more than 24 million IDPs. See Africa Centre for Strategic Studies 'African conflicts displace over 40 million people' *ReliefWeb* 22 August 2023, <https://reliefweb.int/report/world/african-conflicts-displace-over-40-million-people> (accessed 21 March 2024).

44 P Bousel 'The war against human traffickers in Libya' *Carnegie Endowment for International Peace* (2023), <https://carnegieendowment.org/sada/90361> (accessed 8 April 2024).

45 US Department of State 'Trafficking in Persons (USTIP) 'Trafficking in persons report' (2022).

46 *R v Lydia Mugabe* 2025 (unreported) (United Kingdom) Summary, <https://www.cps.gov.uk/cps/news/ugandan-judge-sentenced-over-six-years-modern-slavery->

on in 2023 convicted a former deputy-president of the Nigerian senate for conspiracy to exploit a victim by trafficking him to the UK for the purpose of transplanting his kidney.<sup>47</sup> These cases illustrate the extent of diminished political will and political interference with the procedures for implementing laws against human trafficking. It was not surprising, therefore, that the Nigerian political elites engaged the UK government on high level diplomacy to seek clemency for the former senator.<sup>48</sup>

Cultural practices and discrimination on which 'slavery follows racial and ethnic descent lines' are also a key push factor that portends difficulty in combating human trafficking in some African countries.<sup>49</sup> In 2021, the Court of Justice of the Economic Community of West African States (ECOWAS) considered an instance where modern slavery was reinforced by a hereditary cultural practice and found the Republic of Niger in violation for failing to protect a woman and her children from hereditary slavery.<sup>50</sup> In 2025, the African Court on Human and Peoples' Rights (African Court) indicted Tanzania for violating the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) for failing to protect persons with albinism, especially children from cultural stereotypes that fuelled pervasive trafficking and harvesting of their body parts.<sup>51</sup>

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offences (accessed 15 July 2025).

47 *Rex v Obinna Obeta, Ike Ekweremadu and Beatrice Ekweremadu* 2023 (Sentencing Remarks) (unreported), [https://sherloc.unodc.org/cld/en/caselawdoc/traffic\\_kingpersonscrimetype/gbr/2023/rex\\_and\\_obinna\\_obeta\\_ike\\_and\\_beatrice\\_ekweremadu\\_.html](https://sherloc.unodc.org/cld/en/caselawdoc/traffic_kingpersonscrimetype/gbr/2023/rex_and_obinna_obeta_ike_and_beatrice_ekweremadu_.html) (accessed 14 March 2024).

48 S Onogu 'Senate joins in clemency pleas for Ekweremadu' *The Nation* (Lagos) 4 May 2023, <https://thenationonlineng.net/senate-joins-in-clemency-pleas-for-ekweremadu/> (accessed 14 March 2024).

49 Walk Free Foundation (n 17) 79. Eg, in Mali, Mauritania, Niger, Chad and Sudan, people from minority ethnic groups are born into slavery, bought, traded and sold.

50 *Fodi Mohamed & Others v Republic of Niger* (28 June 2021) ECOWAS Court of Justice ECW/CCJ/Jud/19/21. Fodi and her children had been held in hereditary slavery by one family since childhood. See also *Hadijatou Mani Korooua v The Republic of Niger* (27 October 2008) ECOWAS Court of Justice ECW/CCJ/JUD/06/08, <http://www.courtecawas.org/decisions-3/> (accessed 5 March 2024).

51 *Centre for Human Rights CHR Institute for Human Rights and Development in Africa IHRDA & Legal and Human Rights Centre LHRC v United Republic of Tanzania* (5 February 2025) African Court on Human and Peoples' Rights Application 19/2018, <https://www.africancourt.org/cpmt/storage/app/uploads/public/67a/60b/d08/67a60bd08d5ae236146763.pdf> (accessed 12 July 2025). See M Daghar 'Buried alive: Tanzania's albinos pay the price for superstition'

Weak child protection mechanisms also contribute to human trafficking. Reports indicate that due to weak child protection mechanisms, orphanage trafficking continues to drive trafficking of children for sexual and labour exploitation in Africa.<sup>52</sup> A 2019 situational analysis on Kenyan Charitable Children's Institutions (CCIs) established that some CCIs are hubs for child trafficking where children are monetised and exploited for money.<sup>53</sup> Orphanage trafficking in Africa is also driven by the demand for international adoptions, majorly from high-income countries.<sup>54</sup>

Climate change is another factor that plays a key role in encouraging human trafficking. According to the International Rescue Committee's 2023 listing, seven out of ten countries at risk of climate disaster are from Africa.<sup>55</sup> The present and future problem of climate change in Africa is a situation that engenders unprecedented levels of internal displacement and increased vulnerability to human trafficking and modern slavery.<sup>56</sup>

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*Enact Africa* (Web Blog) (2022), <https://enactafrica.org/enact-observer/buried-alive-tanzanias-albinos-pay-the-price-for-superstition> (accessed 8 April 2024).

52 Walk Free Foundation (n 17) 127-128. Orphanage trafficking is described as 'the recruitment of children into residential care institutions for the purpose of profit and exploitation'.

53 Ministry of Labour and Social Protection State Department for Social Protection Department of Children's Services 'Situational analysis report for children's institutions in Murang'a county' (2020) 20, [https://bettercarenetwork.org/sites/default/files/2021-03/18.11\\_SitAn\\_Murang%27a.pdf](https://bettercarenetwork.org/sites/default/files/2021-03/18.11_SitAn_Murang%27a.pdf) (accessed 24 March 2024).

54 D Smolin 'Intercountry adoption as child trafficking' (2004) 2 *Valparaiso University Law Review* 39; Nation 'Historic ruling puts state adoption groups on the spot' *Nation* (Nairobi) 28 June 2020, <https://nation.africa/kenya/news/historic-ruling-puts-state-adoption-groups-on-the-spot--354266> (accessed 8 April 2024). See also T Onyulo 'Baby trafficking is a lucrative business in Kenya' *USA Today* (Nairobi) 28 February 2015,

<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/> (accessed 24 March 2024).

55 '10 countries at risk of climate disaster' *Rescue* 20 March 2023, <https://www.rescue.org/article/10-countries-risk-climate-disaster> (accessed 24 March 2024). The countries are Somalia, DRC, Chad, South Sudan, CAR, Nigeria and Ethiopia.

56 V Clement and others 'Acting on internal climate migration: Groundswell Part II' (2021), <http://hdl.handle.net/10986/36248> (accessed 21 March 2024); O Acland 'In Sierra Leone, climate change worsens human trafficking of the poor' *Aljazeera* (Freetown) 29 January 2024, <https://www.aljazeera.com/features/2024/1/29/in-sierra-leone-climate-change-worsens-human-trafficking-of-the-poor> (accessed 8 April 2024); NN Sorensen 'Climate change, mobility and human trafficking in Ethiopia' *Danish Institute of International Studies* 26 May 2023, <https://www.diiis.dk/en/research/climate-change-mobility-and-human-trafficking-in-ethiopia> (accessed 8 April 2024).

### 3 Kenya-Saudi Arabia connection

It has been observed that several Kenyan domestic workers in Saudi Arabia, particularly female maids, are trafficked and work under domestic servitude conditions.<sup>57</sup> In addition to Amnesty International's study, which established that the majority of Kenyan women domestic workers in Saudi Arabia work under severe abuse analogous to 'chattel' slavery,<sup>58</sup> another study on former Kenyan migrant workers in Gulf Cooperation Council (GCC) countries established that 98.73 per cent of the respondents had experienced some form of forced labour, or could not leave an exploitative employer.<sup>59</sup> In the words of the researchers, 'practically everyone heading to the GCC as a migrant worker from Kenya would become a victim of forced labour at some point'.<sup>60</sup> In other words, even those who are recruited through the government-approved process end up being victims of modern slavery in GCC. The labour exploitation and abuses they are subjected to are among those categorised by the International Labour Organisation (ILO) as forced labour, including long working hours beyond the ILO's minimums, sexual exploitation, physical violence, restrictions on communications, denial of basic needs, confiscation of passports and, in some cases, death.<sup>61</sup> Although the Kenyan government does not release data on abuses and deaths of migrant workers, official and unofficial reports point to a serious problem. For instance, the Kenyan Senate Standing Committee on Labour and Social Welfare (Senate Committee on Labour) reported that between 2020 and 2021, at least 89 Kenyans, the majority being female domestic workers, died in Saudi Arabia under

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57 National Crimes Research Centre (n 3) 33.

58 Amnesty International (n 36). According to Gallegher, 'chattel' slavery is the traditional slavery where the 'owner' has a right to treat the slave as a possession which they can sell or transfer to others; Gallagher (n 15) 800-802.

59 NORC at the University of Chicago and others 'Forced labour among Kenyan migrant workers in the Gulf Cooperation Council (GCC) countries: A prevalence estimation report' (2021) 2, [https://www.norc.org/content/dam/norc-org/pdfs/Kenya-OLR-to-GCC\\_Final-Report.pdf](https://www.norc.org/content/dam/norc-org/pdfs/Kenya-OLR-to-GCC_Final-Report.pdf) (accessed 8 April 2024).

60 As above.

61 Kenya Institute for Public Policy Research and Analysis (KIPPRA) 'Measures to ensure the safety of Kenyan domestic workers in the Middle East' (2023), <https://kippra.or.ke/measures-to-ensure-the-safety-of-kenyan-domestic-workers-in-the-middle-east/> (accessed 30 March 2024); ILO, *ILO Indicators of forced labour* (2012), [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_203832/lang-en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang-en/index.htm) (accessed 30 March 2024).

suspicious circumstances.<sup>62</sup> According to other government sources, a further 62 Kenyans died in Saudi Arabia between January and October 2022.<sup>63</sup> It is estimated that 274 Kenyan workers, mostly women, died in Saudi Arabia between 2020 and 2025.<sup>64</sup> Reports also indicate that some domestic workers escape from their abusive employers, only to fall prey to *dalalas* (middlemen) who traffic and exploit them further.<sup>65</sup> The *dalalas* operate as recruitment agencies and individuals advertising their services on social media targeted at the stranded escaping workers (*kembois*) who are often undocumented as their documents are confiscated by the employers.<sup>66</sup> Left with the choice of *dalalas* or detention in Saudi Arabia prisons, the workers find themselves trapped in a new trafficking web and exploitation.<sup>67</sup>

As of February 2023, there were approximately 10.9 million documented migrant workers in Saudi Arabia, constituting 75 per cent of the country's total workforce.<sup>68</sup> Domestic workers make up 40 per

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62 Kenyan Senate Standing Committee on Labour and Social Welfare 'Report on labour migration, Senate Study visit to the Middle East and policy implications' (2021), <http://www.parliament.go.ke/sites/default/files/2022-04/Labour%20Committee%20Report%20on%20Labour%20Migration.pdf> (accessed 8 April 2024); I Oruko '89 Kenyans die in Saudi Arabia from "cardiac arrest" *The East African* (Nairobi) 24 September 2021, <https://www.theeastafrican.co.ke/tea/news/east-africa/89-kenyans-die-in-saudi-arabia-from-cardiac-arrest-3561300> (accessed 8 April 2024); M Yusuf 'Kenya official calls death of 89 Kenyans in Saudi Arabia "suspicious" *Voice of America* (Nairobi) 24 September 2021, <https://www.voanews.com/a/kenya-saudi-arabia-domestic-workers-deaths/6244368.html> (accessed 31 March 2024).

63 F Kagonye 'Labour CS nominee Florence Bore: How I plan to tackle Saudi deaths' *The Standard* (Nairobi) 2023, <https://www.standardmedia.co.ke/national/article/2001458808/labour-cs-nominee-florence-bore-how-i-plan-to-tackle-saudi-deaths> (accessed 8 April 2024).

64 AL Dahir & J Scheck 'Why maids keep dying in Saudi Arabia' *New York Times* (Nairobi) 16 March 2025, <https://www.nytimes.com/2025/03/16/world/africa/saudi-arabia-kenya-uganda-maids-women.html> (accessed 8 July 2025).

65 The Observers 'Who are the "Dalalas"? The middlemen preying on trapped domestic staff in Saudi Arabia' (2023), <https://observers.france24.com/en/africa/20230227-saudi-arabia-kenyan-domestic-dalalas-kemboi-workers-rights> (accessed 11 December 2023).

66 As above. Kemboi is the name of a world-renowned Kenyan athlete, Ezekiel Kemboi. In this context, the word *kemboi* refers to 'run away from the one's employer'.

67 S Otieno 'The Saudi Arabia chronicles: Inside deadly search for greener pastures' *Nation* (Nairobi) 5 October 2022, <https://nation.africa/kenya/news/the-saudi-arabia-chronicles-inside-deadly-search-for-greener-pastures-4043426> (accessed 8 April 2024).

68 USTIP 2024 (n 2).

cent of the Saudi Arabia's migrant workers.<sup>69</sup> Saudi Arabia's 2022 census indicates Uganda, Kenya and Nigeria as the top three African sending countries of domestic workers.<sup>70</sup> A significant attribute in this context is that Saudi Arabia is notorious for labour trafficking and is widely considered one of the most dangerous places in the world for foreign workers due to widespread abuse and exploitation of migrant workers, especially domestic workers.<sup>71</sup>

Remarkably, Saudi Arabia's supreme law, the Basic Law of Governance, commits the government to facilitate employment 'for every capable person and enact laws that protect both the employee and the employer'.<sup>72</sup> Saudi Arabia has ratified and domesticated the Trafficking Protocol through a legislation that adopts an expanded definition of human trafficking, which includes 'conducting medical experiments and begging (mendicancy) as forms of exploitation'.<sup>73</sup> The Saudi Arabian anti-trafficking law criminalises sex trafficking and labour trafficking and makes it punishable by imprisonment for a period not exceeding 15 years or a maximum fine of 1 million Riyals or both.<sup>74</sup> Also ratified by Saudi Arabia is the ILO Convention 29 on Forced Labour (1930),<sup>75</sup> the ILO Convention 105 on the Abolition of Forced Labour (1957)<sup>76</sup>

69 As above. ILO puts the number at 3 690 719. ILO 'Making decent work a reality for domestic workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No 189)' (2021), <https://www.ilo.org/publications/making-decent-work-reality-domestic-workers-progress-and-prospects-ten> (accessed 8 July 2025).

70 Uganda (127 932); Kenya (91 802); Nigeria (79 547). General Authority for Statistics (Saudi Arabia) 29 October 2024, <https://www.stats.gov.sa/en/w/2?category=127396&tab=436327> (accessed 8 July 2025).

71 Walk Free Foundation (n 17) 25; USTIP 2024 (n 2). See also Amnesty International (n 36); C Kimeu & V Kireki 'Modern day slavery: Kenyan domestic workers tell of abuse in Saudi Arabia' *The Guardian* (Nairobi) 27 September 2022, <https://www.theguardian.com/global-development/2022/sep/27/modern-day-slavery-kenyan-domestic-workers-tell-of-abuse-in-saudi-arabia> (accessed 22 July 2025).

72 Basic Law of Governance Royal Order 90 of 1992 (Saudi Arabia) art 28.

73 Law for Combating Trafficking in Persons, 2009 (Saudi Arabia) art 2, <https://humantraffickingsearch.org/resource/saudi-arabia-anti-trafficking-in-persons-law/> (accessed 28 March 2024).

74 Art 3 Law for Combating Trafficking in Persons (n 73).

75 Adopted 28 June 1930 entry into force 1 May 1932. Saudi ratified on 15 June 1978.

76 Adopted 25 June 1957 entry into force 17 Jan 1959. Saudi ratified on 15 June 1978.



and ILO Protocol to the Forced Labour Convention.<sup>77</sup> Saudi Arabia is also a signatory to the Arab Charter on Human Rights and the Arab Convention against Transnational Organised Crime.<sup>78</sup> These treaties provide protection for workers, especially against human trafficking and forced labour. Regrettably, though, Saudi Arabia's national labour laws exclude domestic workers from these international and national safeguards.<sup>79</sup>

Saudi Arabia also registered a reservation against article 15(2) of the Trafficking Protocol regarding referral of disputes concerning the interpretation of the Protocol to the International Court of Justice (ICJ).<sup>80</sup> Further, Saudi Arabia is yet to ratify key international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Perhaps most significantly in this context, Saudi Arabia has not ratified the ILO Convention on Domestic Workers and ILO Convention on Violence and Harassment in the world of work.<sup>81</sup>

Yet, like many Arab states, Saudi Arabia continues to enforce the *kafala* sponsorship system that requires domestic migrant workers to be under total control of the sponsor 'Kafeel', who is usually the employer or the recruitment agency.<sup>82</sup> In other words, the *kafala* system is a 'set of laws and policies that delegate responsibility for migrant workers to employers, including control over their ability to enter, reside, work, and,

77 ILO P029 – Protocol of 2014 to the Forced Labour Convention, 1930 adopted 11 June 2014, entry into force 9 November 2016. Saudi ratified on 26 May 2021.

78 Arab Charter on Human Rights adopted 23 May 2004; Arab Convention against Transnational Organised Crime adopted 21 December 2010.

79 Walk Free Foundation (n 17) 113; Amnesty International (n 36) 60-77.

80 Trafficking Protocol (n 12).

81 ILO C189 Domestic Workers Convention, 2011 (189) adopted 16 July 2011 entry into force 5 September 2013; ILO Convention 190 Violence and Harassment Convention, 2019 (190) adopted 21 June 2019, entry into force 25 June 2021.

82 M Alobaid 'The Middle Eastern consensus on the *kafala* system' (2021), <https://www.law.upenn.edu/live/blogs/99-the-middle-eastern-consensus-on-the-kafala-system> (accessed 8 April 2024); M Baldwin-Edwards 'Labour immigration and labour markets in the GCC countries: National patterns and trends' (2011) 15 *Kuwait Programme on Development, Governance and Globalisation in the Gulf States. London School of Economics and Political Science*, [https://eprints.lse.ac.uk/55239/1/Baldwin-Edwards\\_2011.pdf](https://eprints.lse.ac.uk/55239/1/Baldwin-Edwards_2011.pdf) (accessed 28 February 2024).



in some cases, exit the host country'.<sup>83</sup> In essence, a worker under *kafala* cannot leave or change jobs before the completion of their contract, or without permission from their employer. Absconding of duty by migrant workers in such a system attracts risks of one becoming an illegal immigrant subject to criminal prosecution and deportation without recourse to access justice.<sup>84</sup> In his exposition of the historical origins of *kafala*, AlShehabi Omar asserts that the sponsorship system was legally institutionalised in the GCC countries by the European imperialists in the twentieth century to manage foreign labour migration in the pearl and oil industry 'on the cheap'.<sup>85</sup> Some scholars, on the other hand, argue that, theoretically, the *kafala* system is not much different from other immigration policies around the world, but criticise it for extreme cruelty that violate the core values of international human rights law.<sup>86</sup>

Enforcing anti-trafficking and forced labour laws is often constrained by the fact that most domestic workers are employed in private residences, which makes it difficult for them to leave their employers' homes to report abuse. Furthermore, deeply entrenched racial and religious discrimination, particularly against female African migrant domestic workers, increases their vulnerability to domestic servitude.<sup>87</sup> The construction of black Africans as inferior is traceable to Arab scholars of the Middle Age who characterised Africans as remotely human and suited to slavery. In the words of Ibn Khaldun, 'the Negro nations are, as a rule, submissive to slavery, because (Negroes) have little that is (essentially) human'.<sup>88</sup> Further drawing on the historical accounts of anti-black racism in the Middle East, Ochonu contends that the

83 'Disempowered, dehumanised, deported: Life under the *kafala* system' in Walk Free Foundation (n 17) 109.

84 As above.

85 O AlShehabi 'Policing labour in empire: The modern origins of the *kafala* labour sponsorship system in the Gulf Arab states' (2019) 1 *British Journal of Middle Eastern Studies*, <https://doi.org/10.1080/13530194.2019.1580183> (accessed 22 July 2025).

86 A Azhari 'The *kafala* "sponsorship" system in Saudi Arabia: A critical analysis from the perspective of international human rights and Islamic law' (2016-2017), <http://eprints.soas.ac.uk/24680/> (accessed 7 December 2023).

87 US Department of State '2019 Trafficking in persons report: Saudi Arabia', <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/saudi-arabia/> (accessed 8 April 2024); Amnesty International (n 36) 64-82.

88 NJ Dawood (ed) *The Muqaddimah: An introduction to history* (2015), <https://doi.org/10.2307/j.ctvwh8dcw>. PAGE 199. The original book was written by Ibn Khaldun in 1377.

Indian Ocean and Trans-Saharan slave trade reproduced and normalised anti-black sociological norms that are institutionalised in contemporary Arab world.<sup>89</sup> In this regard, Kassamali describes *kafala* as racialised servitude of capitalism,<sup>90</sup> while Fernandez theorises *kafala* as 'racialised institutional humiliation' characterised by 'a vast labouring population of right-less non-citizen migrant workers'.<sup>91</sup> It would appear, from this discourse, that *kafala* institutionalises and legitimises the hegemonic racial norms of a post-colonial capitalist labour governance. To this end, Datt's prolegomena posits that *kafala* is sustained by historically constructed notions of black and brown skins as racialised commodities of bondage and enslaved labour.<sup>92</sup>

In response to fierce criticism by the international community, the Saudi Arabian government has in recent years established additional initiatives and reforms to combat human trafficking, leading to an improvement in country ranking from Tier 3 in 2019 to Tier 2 in 2024.<sup>93</sup> However, despite the reforms, Saudi Arabia is yet to entirely abolish the *kafala* system and most reforms exclude domestic workers.<sup>94</sup> The case of *Basfar v Wong* discussed above illustrates the expanse of the culture of abuse and exploitation of domestic workers in Saudi Arabia.<sup>95</sup>

Yet, despite the advancement of international law that considers slavery and slave-like practices as both a *jus cogens* and an obligation *erga omnes*,<sup>96</sup> the situation is difficult to arrest due to the modern complex networks that facilitate it. For instance, the Saudi Arabian domestic slavery is facilitated by workers from Africa and other regions who are

89 ME Ochonu 'Slavery, theology, and anti-blackness in the Arab world' (2015) 5 *Research Africa Reviews* 10-19.

90 S Kassamali 'The *kafala* system as racialised servitude' (2021) *Racial Formations in Africa and the Middle East: A Transregional Approach* 102.

91 B Fernandez 'Racialised institutional humiliation through the *kafala*' (2021) 19 *Journal of Ethnic and Migration Studies* 43-45.

92 SA Datt 'Born to work: An in-depth inquiry on the commodification of Indian labour – A historical analysis of the Indian indentureship and current discourses of migrant labour under the *kafala* system' in S Dei, J George & S Hilowle (eds) *Cartographies of race and social difference. Critical studies of education* (2018) 49.

93 USTIP 2024 (n 2) 65; US Department of State (n 87).

94 Walk Free Foundation (n 17) 113; Amnesty International (n 36) for a comprehensive contextual analysis of Saudi Arabia's current legal and policy framework on domestic workers.

95 *Basfar v Wong* (n 19).

96 J Allain 'Slavery and its obligations *erga omnes*' (2019) 36 *Australian Year Book of International Law Online* 83-124.

trafficked to and within Saudi Arabia by an array of perpetrators that include recruitment agencies in both Saudi Arabia and sending countries, organised criminal gangs and online platforms.<sup>97</sup>

These complexities operate in a context of preference for Saudi Arabia. The first is by low-skilled domestic workers who prefer Saudi Arabia over other GCC countries.<sup>98</sup> The expansive focus on the areas for recruitment, which include the hospitality industry, domestic and construction work, implies that the scope of risks of trafficking are heightened owing to the large number of targets.<sup>99</sup> Current data on the actual number of Kenyan domestic workers in Saudi Arabia is hazy, but government sources indicate that they amount to well over 300 000.<sup>100</sup> Second is Kenya's preference of Saudi-Arabia for strategic reasons. Saudi Arabia has a significant macro-economic importance to Kenya as the second largest source of foreign remittances.<sup>101</sup> Currently, labour migration is a key government agenda expected to address Kenya's high rates of unemployment and, hence, the number of Kenyans migrating to Saudi Arabia is expected to increase.<sup>102</sup>

The insights from the Kenya-Saudi Arabia connection underscore the intractable persistence of human trafficking and modern slavery that transcends factual realities and fragmented policy reforms. It is a call for both legal and non-legal remediation. Legal remedies should be centred on the absolute abolition of *kafala* sponsorship by ratification and implementation of the identified treaties, especially the ILO Convention on Domestic Workers and the Convention on Violence and Harassment in the world of work. In light of the historical racial perspectives that illuminates contemporary *kafala* practices, it is incumbent on Saudi Arabia to employ legal and non-legal strategies to deconstruct the

97 US Department of State Trafficking in Persons (USTIP) 'Trafficking in persons report' (2023).

98 Kenyan National Crimes Research Centre (n 3) XXI.

99 Kenya Institute for Public Policy Research and Analysis (KIPPRA) (n 61).

100 In 2025, the Prime Cabinet Secretary of Kenya estimated that there are over 300 000 Kenyans working in Saudi Arabia. 'Musalia Mudavadi: We have over 300 000 Kenyans working in Saudi' *Citizen TV Kenya* (Facebook video) Interview with the Prime Cabinet Secretary, Citizen TV, 20 May 2024, <https://www.facebook.com/watch/?v=687166340590610> (accessed 13 July 2025).

101 Central Bank of Kenya (n 9).

102 Office of the President of Kenya 'President Ruto: Job creation key government agenda' (21 July 2023), <https://www.president.go.ke/president-ruto-job-creation-key-government-agenda/> (accessed 8 April 2024).

citizens' values and world views to be reconstructed within a human dignity value system.

#### 4 Kenyan legal architecture for tackling human trafficking and the efficacy of labour migration

##### 4.1 International and regional legal frameworks

Kenya has an extensive legal and institutional framework against human trafficking and slavery. Articles 2(5) and (6) of the Constitution of the Republic Kenya 2010 (Constitution) permit direct applicability of the general principles of international law in addition to treaties and conventions ratified by Kenya.<sup>103</sup> These could be treaties related to human trafficking. Just as elsewhere, the Trafficking Protocol, to which Kenya acceded in 2005, imposes three main obligations upon ratifying states in Africa: the obligation to prohibit and prosecute human trafficking through effective legislation; the obligation to protect the victims of human trafficking; and the obligation to prevent human trafficking from occurring in a country's capacity as a state of origin, transit or destination.<sup>104</sup> Further, Kenya has ratified the ILO Forced Labour Convention which imposes a duty on state parties to criminalise forced and compulsory labour,<sup>105</sup> the ILO Convention on Migration for Employment (Revised),<sup>106</sup> and the Migrant Workers (Supplementary Provisions) Convention.<sup>107</sup>

<sup>103</sup> Arts 5-6 Constitution of the Republic of Kenya, 2010.

<sup>104</sup> T Obokata 'Human trafficking in Africa: Opportunities and challenges for the African Court of Justice and Human Rights' in CC Jalloh, KM Clarke & VO Nmechielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 546. States of origin, like the majority of the African states, the core obligation is to address 'push factors' such as poverty, armed conflict, gender discrimination, cultural and religious practices to prevent citizens from being trafficked.

<sup>105</sup> Art 25 Forced Labour Convention (n 75) ratified by Kenya on 13 June 1964.

<sup>106</sup> ILO C097 Migration for Employment Convention (Revised), 1949 (97) adopted 1 July 1949, entry into force 22 January 1952 ratified by Kenya on 30 November 1965.

<sup>107</sup> As Above; ILO C143 Migrant Workers (Supplementary Provisions) Convention, 1975 (143) adopted 24 June 1975, entry into force 9 December 1978 ratified by Kenya on 9 April 1979.

Kenya has also ratified human rights instruments that impose various obligations regarding human trafficking and modern slavery. These include ICCPR,<sup>108</sup> ICESCR,<sup>109</sup> the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),<sup>110</sup> and the Convention on the Rights of the Child (CRC).<sup>111</sup> These frameworks prohibit 'slavery', 'servitude' and 'forced or compulsory labour' and provide complementary state obligations relating to prevention of human trafficking.<sup>112</sup> Both the UN Human Rights Council and the Special Rapporteur on Trafficking in Persons have affirmed that 'the right to an effective remedy is a fundamental human right of all persons, including the victims of trafficking'.<sup>113</sup>

Kenya has also ratified several regional and sub-regional human rights frameworks, including the African Charter, which proscribes 'all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment'.<sup>114</sup> This proscription is reinforced further by additional human rights instruments addressing specific problems facing the rights of the children and women in Africa. The African Children's Charter obligates state parties to prevent all forms of child trafficking by all persons as well as parents and guardians.<sup>115</sup> For its part, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) requires state parties to take firm actions against trafficking in

108 International Covenant on Civil and Political Rights (ICCPR) adopted 16 December 1966, entry into force 3 January 1976 999 UNTS 171 art 8.

109 International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966, entry into force 3 January 1976 993 UNTS 3 art 7.

110 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted 18 December 1979, entry into force 3 September 1981 1249 UNTS 13 art 6.

111 Convention on the Rights of the Child (CRC) adopted 20 November 1989, entry into force 2 September 1990 1577 UNTS 3 arts 34 & 35.

112 A Gallagher 'Using international human rights law to better protect victims of human trafficking: The prohibitions on slavery, servitude, forced labour and debt bondage' in LN Sadat & MP Scarf (eds) *The theory and practice of international criminal law: Essays in honour of M Cherif Bassiouni* (2008) 397-430.

113 Obokata (n 104) 542.

114 African Charter on Human and Peoples' Rights adopted 27 June 1981, entry into force 21 October 1986 1520 UNTS 217 ratified by Kenya on 23 January 1992 art 5.

115 African Charter on the Rights and Welfare of the Child adopted 11 July 1990, entry into force 29 November 1999 CAB/LEG/24.9/49 ratified by Kenya 25 July 2000 art 29 on prohibitions on sale, trafficking and abduction of children.

women, including prosecuting perpetrators and protecting women who are at risk of being trafficked.<sup>116</sup> With regard to persons with disabilities, especially people with albinism, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa obligates state parties to implement measures to protect them, especially children, from trafficking and child labour.<sup>117</sup> There also is the African Union Convention on Cross-Border Cooperation which stipulates the areas of cooperation to include 'security, crime prevention, and socio-economic development'.<sup>118</sup>

The African Union (AU) anti-trafficking framework is enforced through judicial organs, which include the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on Rights and Welfare of the Child (African Children's Committee).<sup>119</sup> A merger between the African Court and the Court of Justice of the African Union to form the African Court of Justice and Human Rights (the new Court) is poised to strengthen the institutional framework for addressing human trafficking in Africa.<sup>120</sup> Through the Malabo Protocol, the new African Court will adjudicate on both state responsibility and individual criminal responsibility in human trafficking. Obokata argues that this jurisdiction will allow the new court to develop regional standards that reflect 'African culture, morality and sensitivity', and facilitate proactive regional cooperation against human trafficking.<sup>121</sup> Obokata's claim is underscored by the track record of the African Commission on Human and Peoples' Rights (African Commission)<sup>122</sup>

116 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) adopted 1 July 2003, entry into force 25 November 2005 ratified by Kenya on 6 October 2010 art 4(2)(g).

117 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (CRPD) adopted 29 January 2018, entry into force 17 June 2020 ratified by Kenya on 15 November 2021 art 28(4)(g) & (h).

118 African Union Convention on Cross-Border Cooperation, 2014 adopted 27 June 2014, entry into force 5 July 2019 ratified by Kenya on 7 May 2024 art 3.

119 African Union 'Judicial, human rights and legal organs', <https://au.int/en/legal-organs> (accessed 17 July 2025).

120 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) 2014 art 14. Under art 11, the Court requires 15 ratifications of the Protocol to enter into force. The Protocol was adopted on 27 June 2014 and is yet to come into force.

121 Obokata (n 104) 547; art 22 Malabo Protocol.

122 *Centre for Human Rights CHR, Institute for Human Rights and Development in Africa IHRDA & Legal and Human Rights Centre LHRC v United Republic of Tanzania* African Court on Human and Peoples' Rights (5 January 2025)



and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).<sup>123</sup>

Besides these treaty laws, Kenya is bound by the AU's law instruments on trafficking, which include the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children;<sup>124</sup> the African Common Position on Migration and Development;<sup>125</sup> and the Africa Youth Charter.<sup>126</sup> Complementing the AU's framework is the regulatory measures adopted by Intergovernmental Authority on Development (IGAD) to combat human trafficking, including plans of action and policies.<sup>127</sup> The East Africa Community (EAC), of which Kenya is a partner State, has also developed policies including a draft Counter-Trafficking in Persons law which is pending presidential

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Application 19/2018 (2025), <https://www.africancourt.org/cpmt/storage/app/uploads/public/67a/60b/d08/67a60bd08d5ae236146763.pdf> (accessed 12 July 2025). Tanzania was found to have violated the African Charter and the African Children's Charter for failing to protect persons with albinism, especially children from customs stereotypes that exposed them to trafficking and harvesting of their body parts.

- 123 *Minority Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, No 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*). The African Children's Committee considered the subjection to slavery and abuse of two children born from a mother who was a slave under a customary practice in which slavery follows ethnic descent, and found Mauritania in violation of a multitude of provisions of the African Children's Charter, including art 15 on child labour. See also *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*, No 3/Com/001/2012, decided 15 April 2014 (*Senegalese Talibés*). The African Children's Committee held Senegal in violation of art 29 of the African Children's Charter for failing to protect *talibés* (learners of the Qur'an) from being trafficked and exploited for begging by the *marabouts* (Quranic teachers).
- 124 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (2006) recommends anti-trafficking actions akin to the provisions of the Trafficking Protocol.
- 125 Executive Council Decision 'Concerns Migrant Vulnerabilities such as Migrant Women Being More Vulnerable to Trafficking in Instances of Domestic Work and Sexual Exploitation' (2006) (EX.CL/Dec.305 (IX)) (Kenya).
- 126 African Youth Charter, 2006 adopted 2 July 2006 entry into force 8 August 2009 art 23, commends states to take policy actions to protect youth specifically girls and women from trafficking, modern slavery and forced labour; provide rehabilitation of young women and girls who have been victims of the crimes.
- 127 IGAD Migration Action Plan (MAP) 2024-2028, IGAD Migration Policy and other resources at <https://igad.int/resources/> (accessed 17 July 2025). Members of IGAD are Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda.



assent.<sup>128</sup> Through the constitutional mandate that makes these international and regional commitments parts of Kenyan law, Kenya has a firm obligation to address modern slavery.

Yet, despite the adoption of the above international and regional instruments, reports point that Kenya, like other African countries, has not fully criminalised all forms of modern slavery.<sup>129</sup> Furthermore, Kenya is yet to ratify certain key instruments that address certain aspects of labour migration and domestic workers, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>130</sup> the ILO Domestic Workers Convention,<sup>131</sup> the ILO Violence and Harassment Convention,<sup>132</sup> the ILO Protocol to Forced Labour Convention, and the Private Employment Agencies Convention.<sup>133</sup> Pending such ratification, Kenyan courts have decried a missed opportunity for direct applicability of the instruments' binding standards for compliance pursuant to section 2(5) of the Constitution.<sup>134</sup>

## 4.2 Constitutional and legislative frameworks

Chapter 4 of the Constitution of the Republic of Kenya, 2010 employs a comprehensive Bill of Rights that pays homage to international and regional human rights standards on fundamental rights including, equality of all humans, non-discrimination and human dignity.<sup>135</sup> Specifically, the Constitution prohibits 'slavery, servitude and forced labour'.<sup>136</sup> Article 25(b) of the Constitution further provides that

128 The East African Community Counter-Trafficking in Persons Bill, 2016 is waiting to be assented to by the EAC Heads of State in line with art 63 of the EAC Treaty.

129 Walk Free Foundation (n 17).

130 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted 18 November 1990, entry into force 1 July 2003 220 UNTS 3.

131 ILO Domestic Workers Convention (n 81).

132 ILO Violence and Harassment Convention (n 81).

133 ILO Protocol to Forced Labour Convention (n 77) and ILO C181 – Private Employment Agencies Convention, 1997 (181) adopted 19 June 1997, entry into force 10 May 2000.

134 *Kifano v Loivin Limited & 4 Others* Petition E143 of 2022 [2024] KEELRC 13536 (KLR) Judgment 27 November 2024 para 9, <https://new.kenyalaw.org/akn/ke/judgment/keelrc/2024/13536/eng@2024-11-27> (accessed 22 July 2025). The Court could only cite ILO Violence and Harassment Convention as a persuasive rather than binding instrument.

135 Arts 27 & 28 Constitution of the Republic of Kenya 2010.

136 Art 30 Constitution of the Republic of Kenya 2010.

freedom from slavery and servitude is a non-derogable right.<sup>137</sup> In respect of the rights guarantee, the Constitution affirms the fundamental duty of the state to ‘observe, respect, protect, promote and fulfil the rights and fundamental freedoms’ of all Kenyans through ‘legislative, policy and other measures.’<sup>138</sup> The African Children’s Committee has emphasised that the prohibition on slavery and slavery-like practices has the status of customary international law and *jus cogens* norms.<sup>139</sup> As such, states, in this context Kenya, have an absolute mandate to take actions against all forms of slavery and no justification is acceptable.

### 4.3 Legislative frameworks

Furthermore, Kenya employs several statutes to regulate human trafficking from various angles. The first angle is the governance of aspects of human trafficking generally. The law regulating this is the Counter Trafficking in Persons (CTIP) Act (Revised Edition 2023) which defines trafficking in persons in similar terms with the Trafficking Protocol and penalises it with imprisonment of up to 30 years or a fine of 30 million Kenyan shillings, or both.<sup>140</sup> The CTIP Act also criminalises the of trafficking children in the guise of adoption, guardianship and foster care arrangements.<sup>141</sup> The Act further proscribes aiding and abetting trafficking-related activities such as the promotion of trafficking, and interference with travel documents.<sup>142</sup> Trafficking through job recruitment agencies is punishable by imprisonment for at least 20 years and or a fine of not less than 20 million shillings.<sup>143</sup> The Act takes an approach that exonerates victims of trafficking from criminal liability for offences related to ‘being in Kenya illegally or for any criminal act that was a direct result of being trafficked.’<sup>144</sup> The legislative step has received

137 The paramountcy of prohibition on slavery as a non-derogable *erga omnes* obligation was established by the International Court of justice in *Barcelona Traction Light and Power Company Limited (Belgium v Spain)* Judgment, 5 February 1970 (1970) ICJ Rep 3 32, <https://www.icj-cij.org/case/50> (accessed 12 July 2025).

138 Art 21 Constitution of the Republic of Kenya 2010.

139 *Mauritanian Enslaved Brothers* (n 123) para 80.

140 Sec 3 Counter Trafficking in Persons Act 12 of 2020 (Kenya).

141 Sec 4 Counter Trafficking in Persons Act 12 of 2020.

142 Secs 4-8 Counter Trafficking in Persons Act 12 of 2020.

143 Sec 5 Counter Trafficking in Persons Act 12 of 2020.

144 Sec 14 Counter Trafficking in Persons Act 12 of 2020.

practical implementation by Kenyan courts which have progressively affirmed the expansiveness of the continuum of trafficking offences.<sup>145</sup>

The second angle is regulation of employment and employment relations. This is regulated by the Employment Act 2007 (Revised Edition 2023). The Act prohibits forced labour stating that '[n]o person shall use or assist any other person in recruiting, trafficking or using forced labour'.<sup>146</sup> Furthermore, the Employment Act requires foreign employment contracts to be attested by a labour officer after confirming that the employee's consent was obtained in the absence of 'fraud, coercion or undue influence, and any mistake of fact, or misrepresentation which might have induced the employee to enter into the contract'.<sup>147</sup> Failure to have a foreign contract attested by a labour officer and or inducing an employee to engage in a foreign contract is punishable by a fine of up to a maximum of 200 000 Kenya shillings and or imprisonment of not more than six months.<sup>148</sup> Also, the Act requires recruitment agencies recruiting for foreign jurisdictions to deposit a security bond.<sup>149</sup> The requirements for a security bond and attestation of contracts are meant to minimise trafficking vulnerabilities through the scrutiny of the workers understanding of the recruitment process and the contract. The Labour Institutions Act (Revised Edition 2023) further strengthens the anti-trafficking efforts through mandatory requirement for vetting and registration of job recruitment agencies.<sup>150</sup> In *Kifano v Loivin Limited & 4 Others (Kifano v Loivin)*,<sup>151</sup> the Kenyan Labour and Employment Court employed these provisions to hold liable a private employment agency and its operator for trafficking Kifano to Saudi Arabia where she was exploited in domestic servitude.<sup>152</sup>

145 *Muhammad Asif v Republic* Criminal Appeal 82 of 2017 [2017] KEHC 3701 (KLR); Kenya Judicial Bench Book on Labour Trafficking (2022).

146 Sec 4(1) Employment Act 11 of 2007 (Kenya).

147 Secs 83 & 84 Employment Act 11 of 2007.

148 Sec 86 Employment Act 11 of 2007.

149 Sec 84 Employment Act 11 of 2007; Legal Notice 28 of 2014, *Kenya Gazette* Vol CXVI 33, 14 March 2014 (Employment (General) Rules (as amended)), Rule 36. On the format of foreign contracts (Sixth Schedule) and security bond (Seventh Schedule).

150 Secs 54C-56 Labour Institutions Act 12 of 2007 (Kenya).

151 *Kifano v Loivin* (n 134).

152 *Kifano v Loivin* (n 134) paras 81-88. The agency was unregistered, it did not follow the law on attestation of foreign contracts and had not deposited a security bond.

The third angle is victim protection. This is mainly regulated through the Victims Protection Act 2014. The main aim of the law is to safeguard the safety and welfare of trafficking victims during case proceedings through information, privacy and support services including medical assistance, temporary shelter, medical care, psychosocial support, reparation and compensation.<sup>153</sup> The Kenyan government has also put in place several policies and administrative institutions to manage different aspects of human trafficking, including a victims assistance fund.<sup>154</sup> Other human trafficking interventions include government collaboration with civil society and development partners to enhance effectiveness of law reinforcement.

#### **4.4 Public policy positions**

Kenya has also put in place certain public policies and policy statements and positions to regulate evolving human trafficking challenges facing the domestic workers who migrate to Saudi Arabia.

The Kenya Diaspora Policy 2024 recognises the constitutional obligation of the government to, among others, 'protect the rights and promote the welfare and interest of the Kenyan diaspora, facilitate diaspora savings, investments, remittances and technology transfer, and facilitate placement of Kenyans in the international jobs market'.<sup>155</sup> The National Policy on Labour Migration is focused on coordinating and promoting labour migration on the same terms as the Diaspora Policy.<sup>156</sup> Further efforts to improve labour migration include the recent creation of a State Department for Diaspora Affairs with a mandate to

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153 Victims Protection Act 17 of 2014 (Kenya).

154 Legal Notice 168 of 2020, Vol CXXII No 177, 2 October 2020, (Counter Trafficking in Persons (National Assistance Trust Fund for Victims of Trafficking in Persons) Regulations, 2019); Counter Trafficking in Persons (General) Regulations 2019; Standard Operating Procedures for Investigating and Prosecuting Trafficking in Persons cases. Institutions include Counter Trafficking in Persons Advisory Committee; and the State Department for Diaspora Affairs.

155 Sessional Paper 1 of 2025, Kenya Diaspora Policy 2024, <https://mfa.go.ke/wp-content/uploads/2024/05/Draft-Diaspora-Policy-2024-23.05.2024.pdf> (accessed 26 August 2024).

156 Sessional Paper 5 of 2023, The National Policy on Labour Migration 2023 (Kenya), <https://repository.kippira.or.ke/items/69d5ed95-6822-4315-9de6-fbda884279c9> (accessed 14 July 2024).

champion the welfare of Kenyans in diaspora,<sup>157</sup> and the establishment of the National Employment Authority (NEA) to register and regulate recruitment agencies.<sup>158</sup>

There are also policy positions on temporary suspensions and bans in face of adverse reports. The Senate Committee on Labour visited the Middle East in April 2021 and affirmed media reports on the prevalence of abuse and exploitation of Kenyan domestic workers. The Committee outlined several priority recommendations, among them the suspension of labour migration of domestic workers to Saudi Arabia, until the executive arm of the government of Kenya had satisfied a plethora of basic minimums.<sup>159</sup> Subsequently, the Senate approved the Standing Committee's report and passed a resolution for suspension of migration of domestic workers to Saudi Arabia until measures had been taken to safeguard their welfare.<sup>160</sup>

Further, ministerial steps fortified policy positions that enhance protection of the welfare of domestic workers. Following increased distress calls and deaths of Kenyan domestic workers in Saudi Arabia in 2021, the Ministry of Foreign and Diaspora Affairs advised a temporary ban on labour migration of domestic workers to Saudi Arabia.<sup>161</sup> In his explanation of the urgency for a temporary suspension, the principal secretary at the ministry described the situation thus: 'The statistics indicate the dire reality that we face. It warrants bold and decisive action to curb further suffering of Kenyan domestic workers in Saudi Arabia.'<sup>162</sup>

157 State Department for Diaspora Affairs, <https://diaspora.go.ke/index> (accessed 14 July 2025).

158 National Employment Authority, <https://www.nea.go.ke/> (accessed 14 July 2025).

159 Kenyan Senate Standing Committee Report on Labour and Social Welfare (n 62) 27-29. The basic minimums include: establish status of Kenyan in Saudi Arabia prisons and repatriating them; establish status of current workers; investigate deaths of Kenyan workers in Saudi Arabia; establish safe houses and effective consular services; fresh vetting and review regulation of private employment agencies.

160 As above; 13th Parliament 'Votes and proceedings' 24 November 2022, <http://www.parliament.go.ke/sites/default/files/2022-11/Votes%20and%20Proceedings%20%20Thursday%2024.11.2022.pdf> (accessed 8 April 2024).

161 E Mutai 'Ban Kenyans from going to Saudi Arabia as domestic workers: Ministry' *The East African* (Nairobi) 24 September 2021, <https://www.theeastafrican.co.ke/tea/business-tech/ban-kenyans-from-going-to-saudi-arabia-as-domestic-workers-3561278> (accessed 30 March 2024).

162 As above.

Such bold and seemingly positive steps have so far been riddled with implementation challenges, which hinge on a lack of political goodwill. First, there is a significant lack of political goodwill by the executive arm of government to implement key reports and recommendations on improving the welfare of migrant domestic workers. For example, the Senate Committee on Labour's report recommending the suspension of migration of domestic workers to Saudi Arabia until effective measures had been taken to safeguard their welfare remains unimplemented to date.

Second, there have been conflicting government positions presenting a rather unadmirable policy quagmire. Ostensibly influenced by increasing remittances from Saudi Arabia, the Cabinet Secretary for the Ministry of Labour and Social Welfare in response to the call for suspension of migration declared that Kenya cannot absorb all new workers and there are 'many social-economic benefits we (the Kenyans) gather from this migration'.<sup>163</sup> In what is seen as government acquiesce to migrant workers abuse in favour of remittances, the cabinet secretary then insisted that many Kenyans in Saudi Arabia were happy with their jobs and only a small percentage of them were abused.<sup>164</sup>

#### **4.5 International agreements**

Kenya, as a source and transit country, has also signed bilateral labour agreements with Saudi Arabia, as a host country, which specify the standards of protecting the welfare of domestic workers and to ward off possibilities of human trafficking and modern slavery.

The first bilateral labour agreement (BLA) on labour migration of domestic workers between Kenya and Saudi Arabia was adopted in 2016 following Kenya's ban of domestic workers labour migration to the gulf country in 2014.<sup>165</sup> Under the BLA, Kenya was obligated to guarantee that departing workers had proper documentation and were medically fit. For its part, Saudi Arabia was to 'safeguard the welfare and rights of employers and domestic workers in Saudi Arabia in accordance with the

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<sup>163</sup> KIPPRA (n 61).

<sup>164</sup> As above.

<sup>165</sup> 13th Parliament 'Votes and proceedings' 24 November 2022, <http://www.parliament.go.ke/sites/default/files/2022-11/Votes%20and%20Proceedings%20-%20Thursday%2024.11.2022.pdf> (accessed 8 April 2024).

applicable laws, rules and regulations'.<sup>166</sup> The BLA provided for a Joint Technical Committee composed of members from both countries that would meet annually.<sup>167</sup>

The text of the BLA and its implementation reveal certain gaps. First, the text demonstrates a fundamental imbalance in favour of Saudi Arabia employers. The 'applicable laws, rules and regulations' include the system of *kafala* sponsorship, which by its very nature negates labour rights of the migrant domestic workers. Second, the Joint Technical Committee was never constituted and its meetings never took place until the BLA expired.<sup>168</sup> Third, the BLA did not provide for critical safeguards, such as a minimum wage and channels of recourse for aggrieved workers.<sup>169</sup> The BLA also provided for unequal timelines for notice of termination of employment, with domestic workers required to give two months' notice to the employer, while the employer would provide 30 days' notice.<sup>170</sup> This situation caused the Senate Committee on Labour to lament the absence of an effective BLA, citing it as a critical gap in Kenya's framework for protecting migrant workers in the Middle East, as follows: 'Labour migration to key labour destinations in the middle East has been ongoing in the absence of formal agreements or memorandum of understanding. Further, where they exist, the agreement falls short of taking care of the interests of the workers.'<sup>171</sup>

Consequently, the Senate Committee on Labour concluded that the failure by the Kenyan government to develop a comprehensive legal framework on labour migration and BLA was to blame for the diminishing welfare of labour migrants in Saudi Arabia. This prompted the government to sign subsequent BLAs with Saudi Arabia, the most recent being in 2024. However, information about these BLAs, including the 2024 BLA, is shrouded in secrecy, thereby making it difficult to examine the level of protection it provides to domestic

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166 As above.

167 Kenyan Commission on Administrative Justice 'Ombudsman on Systemic Investigation into the Plight of Kenyan Migrant Domestic Workers in the Kingdom of Saudi Arabia' (2022), <http://library.ombudsman.go.ke:8080/jspui/handle/caj/237> (accessed 30 March 2024).

168 Kenyan Commission on Administrative Justice (n 167) 39-41.

169 Kenyan Commission on Administrative Justice (n 167) 40.

170 As above.

171 Kenyan Senate Standing Committee on Labour and Social Welfare (n 62) 27.



workers and compliance to international standards.<sup>172</sup> Meanwhile, the executive continues to aggressively promote labour migration to stave off unemployment, receive increased remittances from Saudi Arabia, all the while neglecting its duty to protect its citizens from violent domestic servitude.<sup>173</sup>

#### 4.6 Other regulatory activities and steps

Private employment agencies (PEAs) have for years been identified as a weak link in the struggle against trafficking of domestic workers to GCC countries.<sup>174</sup> That is so because PEAs can facilitate trafficking through deceptive contracts on the nature of job on offer and amount of wages that a worker would receive upon arrival at destination, as was demonstrated in *Kifano*.<sup>175</sup> PEAs are criticised for promoting debt bondage by charging high recruitment fees, not disclosing repayment plans (often involving partial or no pay until the debt is cleared), and confiscating workers' passports.<sup>176</sup> Observers report that in the worst cases of debt bondage, the Saudi Arabia employers 'sell' the workers on the black market or online to recover their money.<sup>177</sup>

Kenya has employed some remedial regulatory measures, including vetting domestic workers recruitment agencies and listing them on the

172 Amnesty International (n 36) 26. The government did not respond to Amnesty's request for BLA 2022 and the authors' request for a copy of the BLA 2024 was denied by a senior officer at State Department for Diaspora Affairs on 1 July 2025.

173 As above; E Kibii 'Worked to death: Lack of a policy framework fails Kenyan migrants in the Gulf' *The Elephant* (Web Blog) 13 January 2023, <https://www.theelephant.info/analysis/2023/01/13/worked-to-death-lack-of-a-policy-framework-fails-kenyan-migrants-in-the-gulf/> (accessed 30 March 2024).

174 Kenyan Senate Standing Committee on Labour and Social Welfare (n 62).

175 *Kifano v Loivin* (n 134); R Odhiambo 'Impact of recruitment process in promoting right based employment: A case of Kenya private recruitment agencies' MA dissertation, University of Nairobi, 2021, [http://erepository.uonbi.ac.ke/bitstream/handle/11295/161023/Odhiambo\\_Impact%20of%20Recruitment%20Process%20in%20Promoting%20Right%20Based%20Overseas%20Employment%20-%2020a%20Case%20of%20Kenya%20Private%20Recruitment%20Agencies.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/161023/Odhiambo_Impact%20of%20Recruitment%20Process%20in%20Promoting%20Right%20Based%20Overseas%20Employment%20-%2020a%20Case%20of%20Kenya%20Private%20Recruitment%20Agencies.pdf?sequence=1) (accessed 8 April 2024).

176 As above; S Otieno 'Clock ticks on Diana Chepkemai, the young Kenyan woman trapped in Saudi Arabia' *Nation* (Nairobi) 4 September 2022, <https://nation.africa/kenya/news/clock-ticks-on-diana-chepkemai-the-young-kenyan-woman-trapped-in-saudi-arabia-3936274> (accessed 8 April 2024).

177 S Bakht 'Maids trafficked and sold to wealthy Saudis on black market' *Time Africa* (Riyadh) 27 December 2022, <https://timeafricamagazine.com/maids-trafficked-and-sold-to-wealthy-saudis-on-black-market/> (accessed 8 April 2024).

NEA website.<sup>178</sup> The agencies are also required to deposit a security bond that would be used to repatriate migrant workers in case of distress.<sup>179</sup> The regulatory activities, however, are not without challenges. An assessment by the ILO found that although NEA is expected to oversight PEAs and foster collaborations among different government agencies on issues of labour migration, it lacks the requisite legal and financial backing to bell the PEAs cat.<sup>180</sup> For instance, Kenya has over 900 registered PEAs approved to recruit for foreign markets, but only about 65 per cent have active licences and reports indicate that several unregistered agencies and those with expired licences continue to recruit for foreign markets as NEA watch helplessly.<sup>181</sup> NEA's inability to contain the rogue agencies is exacerbated by the ineffective penalties for non-compliance with registration requirements, which is imprisonment for three months or less and/or a fine not exceeding 50 000 Kenya Shillings.<sup>182</sup> This penalty is too low, enabling unregistered agencies to thrive unabated accounting for majority of human trafficking cases to Saudi Arabia and other foreign destinations.<sup>183</sup> In the absence of adequate monitoring and regulatory framework on licenced agencies, some of them also engage in trafficking to boost their profits.<sup>184</sup>

Another related challenge is the complicity of public officers. Complicit public officers are said to operate complex cartels through ownership of recruitment agencies and/or compromising law enforcement. This is illustrated by the experience of the Cabinet Secretary of Foreign and Diaspora Affairs when he visited Saudi Arabia in 2023 to establish the 'root cause' of the Kenyan migrant workers' problems. The Cabinet Secretary shared his frustrations, stating that '[t]he problems facing some of our people start back home in Kenya. The system is flawed and corrupt and unless it's fixed, nothing will change, there is massive corruption in the way Kenyans are prepared before they

178 National Employment Authority Integrated Management System, <https://neaims.go.ke/> (accessed 6 January 2024).

179 Sec 84 Employment Act 11 of 2007 (Kenya).

180 ILO 'An assessment of labour migration and mobility governance in the IGAD region: Country report for Kenya' (2019), [www.ilo.org/wcmsp5/groups/public/-/-africa/-/-ro-abidjan/-/-sro-addis\\_ababa/documents/publication/publication\\_wcms\\_743315.pdf](http://www.ilo.org/wcmsp5/groups/public/-/-africa/-/-ro-abidjan/-/-sro-addis_ababa/documents/publication/publication_wcms_743315.pdf) (accessed 8 April 2024).

181 KIPPRA (n 61); USTIP 2023 (n 97) 79; Odhiambo (n 175).

182 Sec 61 Labour Institutions Act 12 of 2007 (Kenya).

183 Kenyan National Crime Research Centre (n 3) xiv.

184 Odhiambo (n 175).

leave to be domestic workers in Saudi Arabia and follow up of Kenyans when they arrive.’<sup>185</sup>

In the words of the cabinet secretary, ‘it is essential to break the cartels and streamline the agencies, some of which are owned by prominent Kenyans’.<sup>186</sup> The National Crime Research Centre has corroborated the claim affirming the role that corrupt public officers play in facilitating human trafficking.<sup>187</sup> Furthermore, industry players, including non-governmental organisations (NGOs) and trade unions, report that senior public officers, including members of parliament and Ministry of Labour officials own some of the rogue PEAs.<sup>188</sup> It is for these reasons that PEA cartels are alleged to be so powerful that they have hindered Parliament’s efforts to enact a labour migration legislation to address the challenges.<sup>189</sup>

The cartel-like behaviours have also succeeded in circumventing the requirement of attestation of foreign employment contracts. Our interview with a senior labour officer and an official of PEAs association established that the requirement for attestation of foreign contracts by the labour officers is not always observed and trafficking of domestic workers is mainly aided by corrupt immigration and security officers at the points of exit from the country, especially Jomo Kenyatta International airport at Nairobi and Moi International airport at Mombasa.<sup>190</sup> The site of vulnerability becomes more complex as the protector works predator leading to workers being trafficked even to countries to which Kenya has

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185 ‘CS Alfred Mutua: Problems facing migrant workers in Saudi Arabia start in Kenya’ *Citizen* 3 November 2022, <https://www.citizen.digital/news/cs-alfred-mutua-problems-facing-migrant-workers-in-saudi-arabia-start-in-kenya-n308747> (accessed 25 March 2024).

186 As above.

187 National Crime Research Centre (n 3) 46-112.

188 W Atieno ‘Lobby points fingers at MPs in Saudi jobs scandal’ *Nation* (Nairobi) 29 June 2020, <https://nation.africa/kenya/counties/lobby-points-fingers-at-mps-in-saudi-jobs-scandal-1036008> (accessed 8 April 2024).

189 The Labour Migration Management Bill 16 of 2024 is pending in Parliament. B Otieno ‘Atwoli: Cane evil foreigners, ban recruitment agencies’ *The Star* (Nairobi) 15 February 2020, <https://www.the-star.co.ke/counties/coast/2020-02-15-atwoli-cane-evil-foreigners-ban-recruitment-agencies/> (accessed 8 April 2024).

190 Interview with Franck Lenarum, senior labour officer at the International Labour Affairs Division at the Ministry of Labour and Social Protection; and Eliab Muriithi, owner of a PEA and assistant secretary-general of Association of Skilled Migrant Agencies of Kenya (ASMAK) on 28 March 2024 at Nairobi; *Kifano v Loivin* (n 134).

formerly suspended labour migration of domestic workers because of extreme abuse.<sup>191</sup>

The PEAs have also faulted NEA for maintaining an ineffective bureaucratic licensing process, especially the requirement for annual renewal which is a shorter period than a two years' standard contract of a migrant worker.<sup>192</sup> With approval, they posit that while they have a responsibility to recruit within the law, it is the government's obligation to safeguard the welfare of domestic workers in Saudi Arabia.<sup>193</sup>

Despite the challenges, as illustrated in *Kifano*, Kenyan courts have progressively affirmed the constitutional rights of migrant domestic workers against economic interests of PEAs. In 2013, PEAs challenged the legality of the government's directive to suspend deployment of domestic workers to Middle East countries following reports of abuse and exploitation. In upholding the suspension, the High Court relied on article 129 of the Constitution of the Republic of Kenya, 2010 to find that the government's obligation to protect its citizens from inhuman and degrading treatment overrides the economic benefits PEAs derive from the labour migration business.<sup>194</sup>

#### 4.7 Complementary administrative mechanisms

The government of Kenya has established some mechanisms through which domestic workers in distress in Saudi Arabia can call for help through the Ministry of Labour's official web portal, NEA's toll-free line, among others online and call facilities provided by the State Department for Diaspora Affairs. However, the Commission on Administrative Justice and other observers lament the unavailability of rescue shelters,

191 As above; M Kynaston 'Lebanon: Kenyan migrant workers camp outside consulate demanding to return home' *Middle East Eye* (Beirut) 14 January 2022, <https://www.middleeasteye.net/news/lebanon-kenyan-migrant-workers-camp-outside-consulate> (accessed 8 April 2024); Maid in hell (2020) (The Why, YouTube), <https://www.youtube.com/watch?v=jX8-QFb4cEg> (accessed 5 April 2024).

192 Kenyan Commission on Administrative Justice (n 167) 45-48.

193 As above.

194 *Khobesh Agencies Limited & 32 Others v Minister of Foreign Affairs & International Relations & 4 Others* Judicial Review 262 of 2012 [2013] KEHC 6058 (KLR). Art 129 (2) of the Constitution of the Republic of Kenya reads: 'Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.'

emergency healthcare services and meaningful consular assistance to victims of abuse in Saudi Arabia.<sup>195</sup>

## **5 Final observations**

Based on the discussion of legal and policy steps and the realities, the authors have made six key final observations.

First, as it stands in Kenya, the welfare of domestic workers in Saudi Arabia plays second fiddle to those of remittances. As a result, legal and practical efforts to protect them is still a far cry amidst evidence of some perfunctory legal, policy, regulatory and administrative efforts by the government.

Second, the foregoing interrogation of legal framework and practical experiences confirms that Saudi Arabia's Kafala sponsorship system underpins historical racialised sociological norms that espouses the worst form of modern slavery and human rights violations in the world. On the other hand, at the heart of the Kenyan domestic workers servitude in Saudi Arabia is a composite systemic negligence and neglect by a government that is well versed with the situation, but ambitious for foreign remittances at the expense of its citizens safety and well-being.

Third, there is a case against the government of Kenya for neglecting its duty to protect Kenyan migrant domestic workers from human trafficking and the negative ramifications on their welfare in Saudi Arabia. This plays out in two main ways. One is falling below the set of constitutional expectations for effectuating policies and structures, including the failure to negotiate a protective BLA with Saudi Arabia. The acquiescence has created a fertile breeding ground for human trafficking by the private recruitment agencies and corrupt public officers in the migrant workers value chain. Two is by neglecting to demand full accountability from the Saudi Arabia government for the labour exploitation, human rights abuses and deaths of trafficked workers.

Fourth, the pervasiveness of the Kenyan government's dereliction of duty and negligence is an affront to the Kenya's core obligations under the Trafficking Protocol and other international human rights instruments.

Fifth, the analysis of the African architecture in the context of the Kenya-Saudi Arabia case proves that policy is good but a blunt weapon

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195 Kenyan Commission on Administrative Justice (n 167).

for addressing human trafficking and modern slavery. These observations draw one to the conclusion that the situation calls for the global African community to deconstruct the expanse of this intractable problem and reimagine supplementary and alternative perspectives, not just for providing another layer of recommendations, but to provide new insights on the problem, which are not foreseen by the current policy initiatives so as to improve the quality of problem structuring and response.

Lastly, despite the multifaceted legal and policy frameworks on human trafficking adopted by some African states at an international level, African human rights mechanisms, sub-regional economic communities, to curb human trafficking, the reality on the ground presents a serious disjuncture. In light of the recent experiences, the next parts make practical recommendations for reinforcing the legal approaches to tackling human trafficking.

## 6 Recommendations

To better the existing efforts and overcome the identified gaps, we recommend that:

- (a) Kenya should prioritise the ratification and implementation the ILO Protocol to Forced Labour Convention, the ILO Domestic Workers Convention, the ILO Convention on Violence and Harassment and the Private Employment Agencies Convention. Doing so will enable the provisions of these treaties to become directly applicable as binding standards for compliance pursuant to section 2(5) of the Constitution of the Republic of Kenya, 2010.
- (b) The Kenyan Parliament should prioritise enacting a labour migration legislation with provisions that effectively address the legal, policy and institutional gaps that engender trafficking and servitude of Kenyan migrant domestic workers.
- (c) The Executive should demonstrate goodwill in implementation of reports and administrative measures recommended by other arms of government such as the Kenyan Parliament. For example, the Executive can prioritise the implementation of the Senate Committee on Labour's report.
- (d) Implementing agencies such as government ministries, NGOs and courts should prioritise a human rights approach to the regulation of aspects of labour migration. Such an approach will mediate the

seeming conflict between the welfare of the domestic workers, on one hand, and the national government's interest in remittances from workers in Saudi Arabia and other GCC countries.

- (e) The government should prioritise the financial and legal strengthening of critical institutions such as NEA which play a key role of regulating human trafficking from the perspective of employment relationships. The consular offices should also be adequately resourced with capacity to handle requests for repatriation fully and effectively. Doing so will help attenuate cases of human trafficking in an expedited manner.