

OPINION ARTICLE

'A COMPARATIVE ANALYSIS OF AFRICA'S LABOUR EXPERIENCE WITH GULF REGION STATES: ARE WE STILL SLAVES? THE KENYA CASE'

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In war the strong make slaves of the weak, and in peace the rich make slaves of the poor. We must work to live, and they give us such mean wages that we die. We toil for them all day long, and they heap up gold in their coffers, and our children fade away before their time, and the faces of those we love become hard and evil. We tread out the grapes and another drinks the wine. We sow the corn, and our own board is empty. We have chains, though no eye beholds them: and are slaves, though men call us free.

Oscar Wilde, *The Young King* (1892).¹

I. Introduction

I.1 Background

Social changes necessitate economic changes. In Africa, many countries are suffering from poverty, violence and chronic hunger which compels them to travel to the Middle East for employment as evidenced in the Global Slavery Index Africa Regional Report.² United Arab Emirates (UAE), due to its booming economy and oil based trade has always been a 'magnet for labour migration'. Its progress towards achieving a GDP of approximately US \$383.8 billion, is partly attributable to contract labour of approximately 7.3 million migrant workers.³ In view of this benefit and many others, Human Rights Watch (HRW) urges that, UAE 'should afford migrant workers enforceable legal rights and effective safeguards against exploitation and abuse, as international law requires'.⁴

Noteworthy, there is a growing macro-economic importance of remittances from Gulf Countries. This underscores the disregard to ban deployment of domestic workers to GCC. This is often under the limb of low-skilled domestic labourers such as construction workers, cleaners, domestic workers and labourers.⁵ Undeniably, as HRW observes, '[s]ome workers in UAE [Middle East] have good and responsible employers, satisfactory working conditions, receive their wages in full and on time'.⁶

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¹ Harmes, S. (2000). *The Young King and Other Stories*. Pearson Education Limited. p. 7.

² Human Rights Watch. (2014). *'I Already Bought You'*. Human Rights Watch. Retrieved 14 September 2022, from <https://www.hrw.org/report/2014/10/22/i-already-bought-you/abuse-and-exploitation-female-migrant-domestic-workers>. [Accessed on 14 September 2022].

³ Ibid.

⁴ Ibid.

⁵ Relief Web, (2019). *Ethiopia's new migration policy: a positive step but continued scrutiny needed*. Walk Free Foundation. Retrieved from <https://reliefweb.int/report/ethiopia/ethiopia-s-new-migration-policy-positive-step-continued-scrutiny-needed>. [Accessed on 14 September 2022].

⁶ HRW 2014, supra note 2.

Nonetheless, Human Rights Watch found that, employers in UAE and recruiting agents abuse migrant workers.⁷

In 2020, there were 2.8 Million women working as maids in the Middle East.⁸ More than 50% of them reported having their passports confiscated on arrival.⁹ They were overworked, underpaid, physically abused and their contracts unilaterally revised.¹⁰ They were also bound to their employers by a system known as '*Kafala*', where the employers sponsors employees Visa and regulates the freedom of employees from changing employer.¹¹ This system gives the employers great power over the employees because, '[i]t entitles them to revoke the sponsorship at will. This automatically removes the right of a worker to remain in UAE'.¹² Council on Foreign Relations has described this system as giving 'private citizens and companies almost total control over migrant workers employment and immigration status'.¹³ In some cases, the agents and employers often have full control of the contracts; substituting them with new ones, resulting to them (employees) working under harsh clauses.

In 2016, 110 dead domestic workers were deported to their countries.¹⁴ In May 2022, the body of Beatrice Waruguru arrived at Jomo Kenyatta International Airport from Saudi Arabia, a year after she had been reported dead.¹⁵ As a house help, she had left in February 2021 and was reported dead in December 2021. Recently, a family from Bomet went on air requesting the government to bring back their daughter, Diana Chepkemoi.¹⁶ Diana sent a video recording to her kin demonstrating the extent and depth of burns in her body.¹⁷ In July 2022, Labour Cabinet Secretary Chelugui appearing before the Labour and Social Welfare Committee to explain the circumstances leading to the death of Melvin Kang'ereha in Saudi, told the parliament that '93 Kenyans have been killed while working in the Middle East in the last three years'.¹⁸

In 2012, the government of Kenya issued a temporary ban on the migration.¹⁹ The ban was however lifted, without any negotiations or resolution. One may ask why such a ban would be lifted. In the last 4 decades, Saudi donated 15 Billion USD to the Kenyan government.²⁰ Kenya has a major unemployment

⁷ Ibid.

⁸ BBC, 2019. '*I wanted to die.*' *The hell of Kafala Jobs in the Middle East.* [Video] Available at: <https://www.youtube.com/watch?v=6CPCZAU47YQ&t=7s> [Accessed 7 September 2022].

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Human Rights Watch. (2022). *World Report 2022: Rights Trends in United Arab Emirates.* Human Rights Watch. Retrieved from <https://www.hrw.org/world-report/2022/country-chapters/ united-arab-emirates>. [Accessed on 14 September 2022].

¹³ Kibii, E. (2022). *Poor Kenyans Sold Into Modern-Day Slavery in the Middle East.* The Elephant. Retrieved 14 September 2022, from <https://www.theelephant.info/features/2022/06/10/poor-kenyans-sold-into-modern-day-slavery-in-the-middle-east/>. [Accessed on 14 September 2022].

¹⁴ Froilan Malit, J. and A.A.Y. (2020) *Kenyan migration to the Gulf countries: Balancing economic interests and worker protection*, *migrationpolicy.org*. Available at: <https://www.migrationpolicy.org/article/kenyan-migration-gulf-countries-balancing-economic-interests-and-worker-protection> (Accessed: November 24, 2022).

¹⁵ Kibii, 2022, supra note 12.

¹⁶ Ebru TV, 2022. *Diana Chepkemoi arrives at JKIA.* [Video] Available at: <https://www.youtube.com/watch?v=cv03hZ6yUI4> [Accessed 10 September 2022].

¹⁷ Ibid.

¹⁸ Kibii, 2022, supra note 12.

¹⁹ Froilan Malit, 2020, supra note 13.

²⁰ BBC 2019, supra note 8.

challenge. The Gulf States have rescued (Kenya) by providing significant employment options.²¹ Banning the deployment of workers is thus not only catastrophic to our economy but also a dangerous endeavor for any developing African state.

Ironically, UAE initiated the Abu Dhabi Dialogue in 2008 aiming at achieving an agreed regional framework establishing a framework for regulating labour migration.²² Significantly, it has made contributions towards the UN Global Initiative to Fight Human Trafficking.²³ In 2014, it was elected to the Governing Board of the International Labour Organisation.²⁴ An initiative supported by a large majority of ILO members, sought to approve a new protocol providing protections against forced labour. 'Neither the UAE nor any other Gulf state voted in support of the protocol's adoption. The UAE abstained'.²⁵ UAE voted in support of the ILO convention on domestic workers which came into force in 2013, yet it never ratified it.²⁶

UAE and Middle East states' national labour laws falls short of international labour laws standards. The failure to ratify the ILO Domestic Workers Convention and the Forced Labour Protocol has always left domestic workers 'to the mercy of unscrupulous employers and agents'.²⁷ Without reformed national laws in UAE, ratifying the international laws, Gulf Countries will always walk scot free, despite their heinous human rights abuse.

I.2 Problem Statement

In Gulf regions (GCC states), domestic workers are 'explicitly excluded from the UAE's [GCC] labour laws and from basic protections that the law and other labour policies afford to most other workers'.²⁸ There is not a legal protection in place for their employment. The constitution of Kenya provides for the socio-economic rights of its citizens - state-supported entitlements (*Mitu-Bell Welfare Society v Kenya Airports Authority & Others*).²⁹ The Employment (Amendment) Act No. 15 of 2022 provides for the terms and conditions surrounding any domestic employment contracts. Kenya has ratified international labor laws through article 2(5) of the 2010 Constitution.³⁰ Nonetheless, no legislation refers directly to labor exportation and welfare of migrant workers.

A lack of coordination among the key players exposes the migrant workers to the well organized criminal markets. These markets exploit the socio-economic vulnerabilities of the migrants. Ideally, *de jure*, it is within the constitutional right of the migrants to receive protection from the state.³¹ Yet, practically, once workers are deployed to Gulf countries, the labour-sending countries have little or no power to oversee compliance of contractual obligations by GCC states.

²¹ (2020) *YouTube*. YouTube. Available at: <https://www.youtube.com/watch?v=jX8-QFb4cEg> (Accessed: November 24, 2022).

²² HRW 2022, supra note 11.

²³ Ibid.

²⁴ Ilo.org. (2022). Retrieved 15 September 2022, from https://www.ilo.org/wcmsp5/groups/public/--africa/--ro-abidjan/documents/genericdocument/wcms_242066.pdf.

²⁵ HRW (2022), supra note 11.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ [2021] *eKLR*, (*Mitu-Bell case*), para. 147.

³⁰ Art. 2(5) of the Constitution of Kenya 2010.

³¹ Idem, footnote 28, *Mitu-Bell case*.

Therefore, the dilemma for African states is ‘how to prioritize its economic interests through bilateral trade relations while also guaranteeing protection for its citizens abroad’.³²

I.3 Research Questions

Does Africa have a legal framework capable of protecting its migrant workers in Gulf regions?

Who should be held accountable for injured and deceased migrant workers?

Can individual states be held liable to compensate their migrant workers in case of injuries and abuse in host Countries? If yes, how could this be implemented?

How should African states approach the question of labour bondage while protecting their economic interests in the Gulf region?

I.4 Literature Review

According to Raveinstien’s theory, it is an individual rational choice that influences mobility of people from one place to another depending on the repelling and attracting factors.³³ Ideally, the oppressed are the primary authors of human rights.³⁴ Therefore, Human Rights are constructed and reconstructed by people’s understanding of what they are justly entitled to. The duo fails to take cognizance of the Interest theory; that it matters not, what the people lament for to be a definition of their rights. It does not matter whether, they voluntarily or involuntarily ‘consent’ to the violations. What matters is that, the principal function of human rights is to protect, and promote certain rights.³⁵ These include the inherent right to life³⁶, as well as right to human dignity.³⁷

Mukobi, assesses the plight of Kenyan Domestic workers in Saudi Arabia. His study focuses on the nexus between ‘access to justice and protection of rights’.³⁸ He finds that, Saudi Arabia is not a signatory of many international conventions and that makes it hard for Kenyans to access justice.³⁹ In a nutshell, he investigates the obstacles to accessing justice. Among other factors, the *kafala* system is an obstacle to accessing justice.⁴⁰ Our research concurs with his work but advances a solution based approach not only for Kenya but Africa as a whole. Unlike his work which focuses on Saudi Arabia, our research work focuses on Gulf region countries at large.

³² Malit and Youha, F. (2016). *Kenyan Migration to the Gulf Countries: Balancing Economic Interests and Worker Protection*. The Online Journal of migration policy institute. Retrieved from <https://www.migrationpolicy.org/article/kenyan-migration-gulf-countries-balancing-economic-interests-and-worker-protection>. [Accessed on 14 February 2022].

³³ Ravenstein, E. (1885). The Laws of Migration. *Journal of the Statistical Society of London*, 48(2), 167. <https://doi.org/10.2307/2979181>.

³⁴ Baxi, U. (1998). *Voices of Suffering and The Future of Human Rights* [Ebook]. University of Iowa. (8th ed., pp. 125-170). Retrieved 29 September 2022, from https://www.academia.edu/8134847/_1998_Voices_of_Suffering_and_the_Future_of_Human_Rights_Transnational_Law_and_Contemporary_Problems_Fall_1998_pp_125_169.

³⁵ Kramer, M. (2013). Some Doubts about Alternatives to the Interest Theory of Rights. *Ethics*, 123(2), 245-263. <https://doi.org/10.1086/668705>.

³⁶ Art 26, Constitution of Kenya 2010.

³⁷ Ibid, art 28.

³⁸ Mukobi, B. (2021). *Access to Justice for Kenyan Emigrant Workers: The Plight of Kenyan Domestic Workers in Saudi Arabia* (Graduate). University of Nairobi. p. v.

³⁹ Ibid.

⁴⁰ Ibid, p. 69.

Malit and Youha examines the Kenyan government critical role in ensuring its citizens in GCC states are protected. They analyze emergent contemporary issues with regard to migration into Gulf countries and specifically to Saudi Arabia.⁴¹ They suggest that, Kenya has labour governance issues and should take lessons from Asian labour-sending countries which have advanced labour governance strategies.⁴² However, we examine the situation at a time when Kenya has made insurmountable progress towards establishing a bilateral agreement with the Saudi government. Unlike their work, we therefore tend to use Kenya as a quintessential example for African states in their bid to find a solution.

Keane and McGeehan in their research on enforcing migrant workers' rights in the UAE, suggest that there is 'bonded labour/slavery' in UAE.⁴³ They argue that, '[p]ractices governing the recruitment of migrant workers and subsequent employment procedures signal a cycle of debt bondage that has not been officially acknowledged'.⁴⁴ Agreeing with their argument: slavery is a crime against humanity and remains so regardless of the form it takes. Kenya among many African states, is a victim of such 'bonded labour'. We thus proceed to suggest a panacea for African states.

Mburu in the thesis, examines the Human Rights challenges that Kenyan migrants face in the GCC states.⁴⁵ She attempts to provide viable interventions to solve these challenges. Agreeably, this paper also looks into the issue of human rights challenges faced by migrant workers. However, the emphasis is on African state's migrant workers and not limited to Kenya workers only.

In *Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs & International Relations & 4 others*,⁴⁶ Ondunga J. held that, 'I direct the respondents to urgently take measures to engage the government of the Republic of Saudi Arabia with a view to ensuring that the latter puts in place appropriate mechanisms for the protection of Kenyans working for gain in that country'. In the recent past, this has been achieved, we focus our attention to the measures that will play in terms of implementation.

1.5 Justification

Migration is akin to modern world societal changes. In sociology, Everett Lee in conceptualizing his Push and pull theory of migration, suggested that: on the one hand, push factors are those that cause people to migrate to destination countries and they include; poverty, lack of livelihood and population growth surpassing available resources.⁴⁷ All these factors are a persistent crisis we are yet to resolve in our modern African societies. On the other hand, pull factors are attractive diamonds. For instance, more job opportunities. The combination of push and pull factors compels migration currents.⁴⁸ Due to these

⁴¹ Malit and Youha 2016, supra note 31, p. 2.

⁴² Ibid.

⁴³ Keane D. and McGeehan N. (2008). Enforcing Migrant Workers' Rights in the United Arab Emirates. *International Journal on Minority and Group Rights*, 15, 81-115. p. 24.

⁴⁴ Ibid.

⁴⁵ Mburu, A. (2020). *Human Rights Challenges for Migrant Workers: A Case of Returning Kenyans from the Gulf Region* (Post-Graduate). University of Nairobi. p. 6.

⁴⁶ [2013], (*Khobesh case*), para. 37.

⁴⁷ Epgp.inflibnet.ac.in. (2022). Retrieved 24 September 2022, from http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000453PO/P001844/M029737/ET/1525155291P_S MU 15Lee Migration Theory Push and pullModule15Paper10Ed.pdf. [Accessed on 14 September, 2022].

⁴⁸ Ibid.

unresolved economic factors, migration is a continuous phenomenon in Africa. Besides, Ravenstein says that migration is due to economic causes, which are literally commensurate with economic developments.⁴⁹

I.6 Theoretical Framework.

Social Contract Theory

Man forfeited his freedoms and rights to the state in promise that the state would reciprocate this by providing him security and order. This would satisfy the inherent desire of man to have self-protection and self-preservation.⁵⁰ Since in the state of nature life was solitary, poor, pitiful, brutish and short,⁵¹ the surrendering of the rights to the state created legal order by reciprocating the forfeiture with guaranteed protection of life, property and other human liberties.⁵²

In essence, this places responsibility upon the state to take care of its citizens. From a human rights perspective, the state has a positive duty to provide security for its citizens.⁵³ The rationale as to [why] citizens of a state subject themselves to the government [is] for the fulfilment of the promise of 'preservation of their safety'.⁵⁴ Labour workers who are deployed in UAE countries do not get the benefits of these protections even though they forfeited their rights and freedoms to the state.

In support of social contract theory, Karmen notes that, a state should be held blameworthy in that the gains of victims should be compelled from the justice systems and agencies that failed to protect their subjects.⁵⁵ New legal order suggests that, new laws must ensure standards of fair treatment that respects the dignity of the injured.⁵⁶ Meaning that, a state has to respect dignity of an injured person if it fails to protect injury to such dignity. This theory has been internalized in our jurisprudence: in *Charles Murigu Muriithi & 2 others v Attorney General*,⁵⁷ it was stated that: '[t]he state has a duty to maintain law and order including the protection of life and property'.

Makau Mutua Human rights metaphor of SVS

In his three-dimensional compound metaphor - 'the Savages-Victims-Saviors (SVS)', Makau Mutua says that: 'human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other'.⁵⁸ We liken the first dimension of the prism - savage to the GCC states. And much like it, is Kenya, and African states which have been playing innocent in the situation of their citizens' human rights abuse. 'States become savage when they choke off and oust civil

⁴⁹ Amaral, E. (2020). *Theories of Migration* [Ebook]. Texas A&M University. Retrieved 23 September 2022, from <http://www.ernestoamaral.com/docs/soci647-20fall/Lecture02.pdf>. p. 4.

⁵⁰ Manzoor, E. (2013). Summary of Social Contract Theory by Hobbes, Locke and Rousseau. *SSRN Electronic Journal*, 1-7. p. 2.

⁵¹ Ibid, p. 1.

⁵² Ibid, p. 2.

⁵³ Art. 21(1), Constitution of Kenya, supra note 29. See also, *Mitu-Bell Case* para. 148.

⁵⁴ Gough, J. (1946). *The Second Treatise on Civil Government (1689)*, John Locke. <https://www.norton.com>. Retrieved 24 September 2022, from https://www.norton.com/college/history/archive/resources/documents/ch04_03.htm.

⁵⁵ Karmen A, *Crime Victims an introduction to Victimology*, 10th ed, Cengage, Boston, 2018. p. 238.

⁵⁶ Ibid.

⁵⁷ [2019] eKLR.

⁵⁸ Mutua, M. (2001). Savages, Victims, and Saviors: The Metaphor of Human Rights. *Harvard International Law Journal*, vol. 42, 201-209. p. 201-2.

society'.⁵⁹ The savage dimension narrows down to two prongs: the 'good' state and the 'evil' state. The former 'controls its demonic proclivities by cleansing itself with, and internalizing human rights'.⁶⁰ Kenya has a range of domestic and international laws on protection of human rights abuse, yet when domestic workers abuse in GCC occurs, a state official says '[i]t is only a small percentage of Kenyans who are suffering, while more than 100, 000 Kenyans were under favourable conditions'.⁶¹ The later, 'evil' state is the GCC which expresses itself through, discrimination, refusal to sign and ratify civilized nations' laws, 'an illiberal, anti-democratic, or authoritarian culture'.⁶² This savagery is aggravated by the savage cultures and traditions, for instance, the *kafala system*.

The second dimension depicts victimhood. Simply put, '[a] human being whose 'dignity and worth' have been violated by the savage is the victim'.⁶³ The victim looks like the prodigal son going back to his father, 'powerless, helpless innocent whose naturalist attributes have been negated by the primitive and offensive actions of the state'.⁶⁴ The victims are the African domestic workers exploited and abused in GCC.

The third dimension is the 'good angel', - the savior. This is the redeemer 'who protects, vindicates, civilizes, restrains, and safeguards'.⁶⁵ In addition, he 'promises freedom from the tyrannies of the state, tradition, and culture'.⁶⁶ The savior is also the freedom to make a better society. In a beautified human rights story, the savior is the 'United Nations, Western Governments, INGOs and western Charities as the rescuers'.⁶⁷ Nonetheless, in reality, the savior [is] 'ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy'.⁶⁸ For instance, if Kenya and the rest of African countries sending labourers can develop a culture the like that of Philippine and Sri Lanka, non-negotiable minimum standard requirements, it will rescue the workers - savior. If GCC countries embrace the norms and culture to ratify human rights protection laws like the ILO convention on domestic workers, workers will be rescued.

Universality of Human Rights

The central idea behind the Universal Declaration of Human Rights is the universality of human rights. Regardless of whoever they are or where they are, human beings 'are endowed with equal human rights simply by virtue of being human'.⁶⁹ Neatly webbed with universality are the aspects of 'interdependence, indivisibility, equality and dignity'.⁷⁰ In the UNDHR preamble, it is declared that, '[t]he General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms [...]'.⁷¹ This simply demonstrates that, human rights in Rome are human right in Athens.

⁵⁹ Ibid, p. 202-3.

⁶⁰ Ibid.

⁶¹ Kibii, 2022, supra note 12.

⁶² Makau, 2001, supra note 55, p. 203.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid, p. 204.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Makau, 2001, supra note 55, p. 204.

⁶⁹ UNHR, U. (2001). *Universality and Diversity*. OHCHR. Retrieved 24 September 2022, from <https://www.ohchr.org/en/instruments-mechanisms/instruments/universal-declaration-cultural-diversity>.

⁷⁰ Ibid.

⁷¹ Preamble of the *United Nations Declaration of Human rights, 1948*.

Nevertheless, normative ideals like political endorsement of human rights, the legal implementation and deviation of some countries towards human rights particularism, makes human rights appear particular.⁷² For instance, the actions of Saudi Arabia, such as – differential treatment of Ethiopian and Kenyan workers, failure of establishment of protective laws among others are signs of human rights particularism. So, '[e]ven though human rights recognize per definition all human beings as equal, not all humans equally recognize human rights'.⁷³ Morally, human rights are 'obligations single human beings are liable to'.⁷⁴ In political perspective however, human rights are 'obligations political representatives in charge of the public order are liable to'.⁷⁵ This justifies why a state through its political representatives should be made liable in this context and not the direct abusers, GCC employers.

Conclusively, it is human nature that makes human rights universal.⁷⁶ This nature justifies the special human rights we claim as human beings. 'The universal term 'man' already conceals the assertion that all people have an essential quality in common, and that it is the same quality. This is considered as dominant over all other heterogeneous qualities that the statement appears to be justified that people are 'equal' despite their apparent diversity'.⁷⁷

I.7 Methodology

This work is based on desktop research which shall be interpretive in nature. It shall analyze, international instruments, constitutional provisions, court decisions, domestic laws of different African countries and the literature in relation to labour laws. It shall go ahead to suggest a solution to the gap left by the above laws on domestic workers abuse. Contentiously, there is scarcity of court decisions and concrete literature in this emergent issue. This paper however, intends to apply the international and domestic common law concepts, and comparative jurisprudence in an attempt to provide a solution to African labour-sending countries.

I.8 Limitations

Currently, courts have not made decisions on the issue of domestic workers abuse in UAE countries. This is attributable to the nascent age of this developing issue of domestic workers abuse in host countries. Neither at the international, regional nor domestic level do we have a legal framework that provides for protection of migrant workers in terms of remedies. Many GCC countries have not ratified international and regional instruments on protection of domestic workers. Even though Kenya has recently made some progress towards protection of migrant workers, we are yet to see the compliance and implementation of those protections.

⁷² Walter, L. Theories of Universal Human Rights and the Individual's Perspective. *Politikon: IAPSS Political Science Journal*, 25, 120-141. p. 121.

⁷³ Menke, Christoph. 2007. "From the dignity of man to human dignity: The subject of rights. In *Values and norms in the age of globalization*" ed. Ewa Czerwinska-Schupps, 83-94. Frankfurt, Main: Lang. p. 72.

⁷⁴ Walter, supra note 63, p. 125.

⁷⁵ Ibid, p. 125.

⁷⁶ Ibid, p. 124.

⁷⁷ Ibid.

II. Does Kenya/African states owe a duty of care to protect migrant workers?

Under article 21(1) of the Constitution of Kenya,⁷⁸ the state has a fundamental duty to protect, observe, respect, promote and fulfill the rights of and fundamental freedoms in the Bill of Rights. In *Khobesh case*,⁷⁹ the High Court held that, ‘for the Government to knowingly permit its citizens to leave the country either voluntarily or forcefully to face cruel, inhuman and degrading treatment abroad would be an abdication on the part of the Government’.

In the South African Constitutional Court in *Kaunda and Others v President of the Republic of South Africa*,⁸⁰ it was stated that, ‘government will act positively to protect its citizens against human rights abuses’. In *Minister of Home Affairs and Others v Emmanuel Tsebe and Others*⁸¹, as quoted in *Khobesh* para 34:

‘if a state hands over a person to another state in which his rights as a person enshrined in our constitution are certain to be violated, we shall have failed to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman and degrading treatment [...] all of which are rights our constitution confers on everyone’.

In *Florence Amuga Omukanda and another v Attorney General & others*,⁸² the court held that ‘[...] the state has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of the law and order [...]’. This sacred obligation does not take away the state’s responsibility in the case of a migrant citizen. Thus, Kenya can rightfully be said to be in violation of article 6 of ICCPR General Comment no. 36⁸³ where the committee states that ‘the deprivation of the right to life includes the intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission’.

In the *COVAW case*, the court found that the state ‘owes[d] a duty to the victims of 2007-2008 Post-Election Violence to investigate the violations of their rights, prosecute the perpetrators, and provide appropriate remedies to victims’, simply for failure to prevent the injuries.⁸⁴ Lindgren writes that: ‘what becomes wrongful is not only the intentional infliction of harm, or negligent failure to avoid harm, but also a failure to meet an active and affirmative duty to protect public interest’.⁸⁵ In our context, Kenya has not only failed to avoid harm but has failed in her affirmative duty to protect public interests. So did all the African states.

⁷⁸ Article 21(1) The Constitution of Kenya, 2010, supra note 29.

⁷⁹ *Khobesh case 2013*, supra note 43, para. 33.

⁸⁰ [2004] ZACC.

⁸¹ [2012] ZACC.

⁸² [2016] eKLR, para. 60.

⁸³ Art. 6 of General comment no. 36, Human Rights Committee, 2019, of the International Convention of Civil and Political Rights (1966).

⁸⁴ *Coalition on Violence against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* [2020] eKLR.

⁸⁵ Lindgren, J. (1970). Liability without Fault: Logic and Potential of a Developing Concept. *University of Buffalo School of Law*, 4, 1201-1215. p. 1206.

II.1 Tort of Negligence

The tort of negligence requires that besides identifying a perpetrator, there must be a duty of care owed to someone. The duty must have been breached, and the breach must have caused damages.⁸⁶ And further, there must be proximity and foreseeability.⁸⁷ Only after all these requirements are met, does an award of damages fall due.

In Africa, and Kenya particularly, we apply common law in compensation claims. In the case of *Kiema Mutuku v Kenya Cargo Hauling Service Ltd*,⁸⁸ and in *Attorney General v Law Society of Kenya & Another*,⁸⁹ the court held that for a claim based on negligence, the complainant must prove negligence and damages. The problem in following this model strictly, is that the abusers [gulf employers] can be identified, but there is no jurisdiction to try them unless the state is held liable.

In light of the *Khobesh* decision, it is evident that a state owes a duty of care to protect its citizens. This was the rationale behind the June 22, 2012 suspension of recruitment and export of domestic workers into the Middle East.⁹⁰ Thus, if a state can impose a ban to protect its citizens, it means it is mindful of the duty it owes them. It follows that, where it fails in providing this duty, it should be liable. We therefore argue that, finding a state liable to protect citizens, and not liable enough to compensate those whose rights have been violated 'but for' its failure to protect, is tantamount to violation of human rights ideologies and the Bill of Rights in the Constitution of Kenya.

II.2 States' duty of care test

The states' duty to care for its citizens is owed to the public at large. Therefore, for a claim to succeed on grounds of violation of constitutional rights, 'it must be demonstrated that there existed a special relationship [proximity] between the victim and the police on the basis of which assurance of police protection' as it was stated in *Charles Murigu Muriithi & 2 others v Attorney General*.⁹¹ The state must have foreseen the danger of the injury.

In qualifying in the test, the state had prior information of the high probability of likelihood of victimization in GCC states. It could foresee the danger of operating without concrete bilateral agreements. They have a relationship with these workers in accrediting the agencies that take deploy them. It is at the state's embassy in the GCC that these workers seek refuge and protection. The privity of this relationship is that, the Ministry of Foreign Affairs is responsible for issues of migrant workers. Therefore, 'the state may be held liable where violations of the rights protected and guaranteed in the Bill of Rights are proved even when those violations are occasioned by non-state actors [GCC employers] provided that the duty of care is properly activated'.⁹²

⁸⁶ Elliot, C. & Quinn (2009). *Tort Law* (7th ed.) Pearson Longman. p. 82.

⁸⁷ *Ibid*, p. 96.

⁸⁸ [1991] eKLR.

⁸⁹ [2017] eKLR.

⁹⁰ *Khobesh case*, 2013, supra note 43, para. 4.

⁹¹ [2019] eKLR, [*Charles Murigu Case*], see also, Elliot 2009, supra note 82, p. 24.

⁹² *Charles Murigu Case*, 2009, supra note 87.

II.3 Does the migrant workers have a claim of remedy? Making the state liable?

As mentioned earlier, the tort of negligence requires an identified perpetrator. Yet, the state may be liable where it is demonstrated ‘that the resulting damage could have been prevented through exercise of due diligence by the [state]’.⁹³ The Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras*⁹⁴ it was stated that:

‘[t]he state is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the state apparatus acts in such a way that the violation goes unpunished and victim’s full enjoyment of such rights is not restored [...] the state has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the state allows private persons or groups to act freely and with impunity to the detriment of the rights of the right recognized by the Convention’.

Though the state is not the direct perpetrator, it is a beneficiary of its omissions since it is gaining remittances and income through the legal vacuum of labour trade. In *WJ & another v Astarikoh Henry Amkoah & 9 others*,⁹⁵ Mumbi Ngugi, J. in awarding damages held the state vicariously liable ‘through the TSC, which has [had] failed to adequately exercise its duty of care to the petitioners’. In the context, Luban suggests that, the state as ‘[a] corporation is liable for the criminal misdeeds of its agents acting within the actual or apparent scope of their employment [...] to benefit the corporation, even though [...] contrary to corporate policy’.⁹⁶ The ministry of foreign affairs has failed to honour their duty, the state thus becomes vicariously liable by implication of the ministry’s duty to take care of migrant workers. Consequently, a remedy is thus owed to the injured by the state.

II.4 Should the state act swiftly?

In holding a state liable, you hold its citizens liable. In *Michael Rubia v Attorney General*⁹⁷, it was determined that, the trend is to avoid punitive damages claimed under public law. The rationale is to avoid burdening the tax payer. Similarly, in *COVAW case*,⁹⁸ the Judge denied petitioners exemplary damages. To avoid such instances, the state should be investing in making sure the gaps causing these claims are filled.

III. Economic gains blinding african states: [kenya] from a good bargain

Like many African labour-sending countries, Kenya fears to demand adequate minimum standards for contractual terms with the Gulf countries. ‘[m]ost African countries have a weak negotiating position in bilateral discussions with the governments of Gulf countries, given the economic and political power dynamics’.⁹⁹ Similarly, due to financial benefits that African countries receive from GCC, they are shy

⁹³ Ibid. See also, *Mitu-Bell Case* para. 148.

⁹⁴ [1998].

⁹⁵ [2015] *eKLR*, para. 161.

⁹⁶ Luban, D. (2011). State Criminality and the Ambition of International Criminal Law. In T. Isaac, *Accountability for Collective Wrongdoing* (pp. 61-91). Cambridge. p. 79.

⁹⁷ [2020] *eKLR*, para. 170

⁹⁸ *COVAW case*, 2020 supra note 80, para. 170.

⁹⁹ Bisong, A. (2021). *Regional solutions: Regulating recruitment and protection of African migrant workers in the Gulf and the Middle East*. ECDPM. Retrieved 24 September 2022, from

to press hard on their needs.¹⁰⁰ Economic dynamics become the bait. For instance, the Kenyan government seems to embrace trade relationship with GCC countries in a bid to multiply its income. This is all done at the expense of zealously fighting for its citizens' rights.¹⁰¹

In the long run, it becomes difficult for these countries to command stronger provisions in the bilateral agreements. HRW has noted that there is 'insufficient cooperation between the UAE and [African] labour-sending countries'.¹⁰² Some countries have overcome this fear. For instance, Philippines and Sri Lanka, refuses their domestic workers to travel to UAE, except upon evidence that UAE employers and recruitment agencies have complied with minimum salaries and working conditions requirements.¹⁰³

IV. Comparative jurisprudence in relation to migrant workers abuse

IV.1 The Philippines

The Philippines, unlike a majority of African states, has aggressively fought for the rights of its migrant workers. As of 2020, there were 2,221,448 Filipinos in the Middle East region.¹⁰⁴ In November 2021, the Philippines issued a ban on migrant labor from their country citing issues *inter alia* poor wages, and dehumanizing treatment.¹⁰⁵ Following a series of negotiations, on the one hand, the Philippines insisted on a better work environment for its citizens and the abolishment of the *Kafala* system. On the other hand, the Middle Eastern countries explicitly stated its unwillingness to comply.¹⁰⁶ Nonetheless, through establishment of a vibrant Department of Labour and Employment (DOLE), which is charged with overseeing recruitment and employment of domestic workers, their workers are now protected.¹⁰⁷

Despite the rigidity of the host states, the Philippines was able to secure an agreement with the Middle East. The agreement states the ideal working conditions for its citizens. They include *inter alia* timely dispensation of salaries through electronic means, abolishment of *Kafala* system, implementation of a blacklist and whitelist for recruiting agencies, and investigation and prosecution of all forms of slavery.¹⁰⁸

Most African states shy away from radical measures to protect their citizens' rights as they commiserate with the risk of losing economic gains. Nevertheless, the Philippines has proved that this is the way out for African states being in the same shoe.

<https://ecdpm.org/publications/regional-solutions-regulating-recruitment-protection-african-migrant-workers-gulf-middle-east/>. p. 3.

¹⁰⁰ Malit, 2016, supra note 31, p. 19, see also, Mukobi, 2021, supra note 35 p. 73.

¹⁰¹ Mukobi, 2021, supra note 35, p. 73.

¹⁰² HRW, 2022, supra note 11.

¹⁰³ Ibid.

¹⁰⁴ *Population of Overseas Filipinos in the Middle East and North Africa*. Dfa.gov.ph. (2022). Retrieved 15 September 2022, from <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/25776-population-of-overseas-filipinos-in-the-middle-east-and-north-africa>.

¹⁰⁵ Ibid.

¹⁰⁶ Arad, M. (2022). Philippines lifting OFW deployment ban to Saudi Arabia in November [Blog]. Retrieved 15 September 2022, from <https://www.rappler.com/nation/overseas-filipinos/philippines-lift-ofw-deployment-ban-saudi-arabia-november-2022/>.

¹⁰⁷ Sayres, N. (2005). *An analysis of the situation of Filipino domestic workers* [Ebook]. ILO. Retrieved 24 September 2022, from https://ilo.primo.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1293916810002676. p. 27.

¹⁰⁸ Sayres, 2005, supra note 123, p. 27.

IV.2 Ethiopia

Like Kenya, Ethiopia placed a formal ban on low skilled migration to the Middle East in 2013.¹⁰⁹ The number of migrant workers was growing exponentially over the years. For instance, in the Middle East, the number of female Ethiopian migrant workers has grown from 1202 in 2000, to 187, 939 by 2012.¹¹⁰ The ban was however lifted in 2018.¹¹¹ An interview with the returnees, from the Middle East, reiterated the same consistent chorus; ‘confiscation of passports and travel documents, alteration of the employment contracts, ill treatment from the employers as well as deceit from the migration agencies’.¹¹²

In 2020, Ethiopia launched program – FAIRWAY, through the International labor organization, to provide support to Ethiopian migrant returnees.¹¹³ Under this framework, the returnees receive support through cash transfers of 120 dollars. This enables them to reintegrate economically into their society.¹¹⁴ In May 2021, 691 Ethiopian returnees had received their first cash transfers. This goes in hand with the theory of social contract.

Ironically, in 2022, there was an estimated number of 750,000 Ethiopians residing in the Middle East.¹¹⁵ It is noteworthy, that this increased figure was recorded after the state started the program, and successfully ferried home hundreds of thousands of the migrants.¹¹⁶

Ethiopia’s case is proof that permanent and absolute ban on migration in relation to domestic workers is [and cannot be] a remedy to the predicament. Assuming a state enjoyed an admirable economic tranquility, the push and pull factors would still force a population to migrate.

IV.3 The new Kenya – silver lining

In 2022, there has been a strong media uproar following an upsurge in the cases of violations in the Middle East. A day never passes without a case of death or mistreatment of migrant workers in the Middle East. In September 2022, there were 110 reported deaths of migrant workers.¹¹⁷ This forced the ministry of labour to respond, assuring those intending to migrate to the Gulf, and those already there of protection.¹¹⁸

¹⁰⁹ Fernandez, Bina 2011 ‘Household Help? Ethiopian Women Domestic Workers’ Labour Migration to the Gulf Countries.’ *Asian and Pacific Migration Journal* 20 (3-4):433-57.

¹¹⁰ Ibid.

¹¹¹ Schewel, K. (2022). *Aspiring for Change: Ethiopian Women’s Labor Migration to the Middle East*. *Oxford Academic*, 100 (4), 1619-1641. Retrieved 15 September 2022, from <https://doi.org/10.1093/sf/soab051>.

¹¹² Ilo.org. (2022). Retrieved 15 September 2022, from https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/documents/genericdocument/wcms_242066.pdf.

¹¹³ Mengie, G. (2022). *ILO FAIRWAY supports returning Ethiopian migrant workers*. Ilo.org. Retrieved 15 September 2022, from https://www.ilo.org/africa/media-centre/news/WCMS_802563/lang-en/index.htm.

¹¹⁴ Ibid.

¹¹⁵ Ndege, Y. (2022). *Funding Needed to Assist Over 100,000 Ethiopian Migrants Returning from the Kingdom of Saudi Arabia*. International Organization for Migration. Retrieved 15 September 2022, from <https://www.iom.int/news/funding-needed-assist-over-100000-ethiopian-migrants-returning-kingdom-saudi-arabia>.

¹¹⁶ Ibid.

¹¹⁷ Citizen TV. (2022). *Government announces measures to protect migrant workers* [Video]. Retrieved 20 September 2022, from <https://www.youtube.com/watch?v=VY9PQ29nkbA&t=3s>.

¹¹⁸ Ibid.

In a press release dated 16 September, 2022, the Kenyan government assured its migrant workers of the introduction of a wage protection program and a distress alert line to security agencies. The government of Saudi Arabia on the other hand formed a protection and support department to handle complaints from the migrant workers, agencies and embassies.¹¹⁹ It has also abolished the *Kafala* system, according the migrants a right to change employers. The government of Kenya has introduced an oversight and community feedback mechanism to facilitate continuous monitoring of private recruitment agencies.

Nonetheless, despite this huge milestone for Kenya, a compensation scheme for the already reported deaths and violations is yet to be established. The families of the victims are yet to find justice.

V. Conclusion and way forward for African states

V.1 Conclusion

There is a gap in the laws touching on migrant workers in relation to Gulf Region states either at the international or domestic level. There is no remedy for the damages suffered by injured domestic workers. We find that, in such instances, the state should be held liable to compensate for violation of the rights of its citizens caused by its negligence. Thus, migrants suffer the inevitable dealings of unscrupulous recruitment agencies, dehumanizing treatment, poor wages or no wages at all. In worst, yet popular cases, it has resulted in death of African migrant workers. In cases of death, there is barely any compensation for the victims. This is a cancer that is feeding on the flesh and blood of African Migrant Workers.

From the foregoing, due to social economic changes, domestic workers migration should be interpreted with optimism and not negativity. For instance, the measures undertaken by Ethiopia are reactive rather than proactive. They are retrogressive to the extent that they do not appreciate the dynamics of economic migration. They are neither a prevention nor a cure to the issue! In essence therefore, African states should not be baited by the economic gains from Gulf region states at the expense of fighting for their citizens' rights.

We conclude that, Kenya as the first African country to engage with Saudi Arabia on matters regarding protection of their citizens, other African states should overcome their fear and do the same. Stop viewing GCC states as their godfathers but respect them as equals. Even so, these protections that Kenya has managed to secure are yet to be implemented. The ball is in Kenya's court on how it will achieve compliance and implementation of the protections. The Philippines is the mirror reflecting what African states should be pushing for.

V.2 Way forward/solution for African states

While many people may suggest for prohibition of migration in its totality, we assert that this may not be a solution to the problem, but instead a shortcut escape route that will infringe on the socio-economic rights of Africans, as well as their freedom of movement. It is against this background that we propose a hybrid of the measures taken by Kenya, Ethiopia and the Philippines as the best and most responsive solution to the problem.

¹¹⁹ Ibid.

The measures taken by Kenya and Philippines, in the fight against the violations ought to be the baseline from which all the other African states race from. They ought to equally take stringent measures to advocate for the rights and welfare of their migrant citizens. These include; the abolishment of *kafala* system, issuance of a distress line call, formation of a protection and support department in the GCC states to handle complaints from the migrants and, agencies.

As a reactive measure in cases of violation, there ought to be a means in which the violated returnees' migrant workers are reintegrated back into society, as in Ethiopia. This calls for the establishment of a mirror 'FAIRWAY' program to assist them financially, with an aim of making them economically independent. This will also help with reducing the escalating unemployment rates.

Under tort common law, the reported cases of death ought to be compensated by the state. The state owes the migrants a duty of care (under social contract theory), which in most cases, is violated by the employers, resulting in the death of the migrants. The state should establish a compensation program that looks into compensation and who qualifies for compensation. Since the state owes a duty of care to migrant workers, it suffices for a migrant worker to prove their right has been violated and they have suffered damages for a compensation to fall due.

Conclusively, it is one thing to make policies and it is quite another thing to implement them. African states ought to be 'makers and doers of the word'. The solutions to the problems affecting Africa are in Africa. We have the laws, policies, frameworks required to address our predicaments. Let us transform Africa through local solutions!