

**AN ANALYSIS ON THE CHILD LABOUR LAWS OF KENYA:
A MISSION FOR THE BEST INTEREST OF THE CHILD.**

BY

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DECLARATION

I Awinda Abraham Bala, hereby declare that this research report is from my own work and effort and that it has not been submitted anywhere for any award. All other sources of information used have been acknowledged.

Signature:  _____ Date 17/05/2019 _____

APPROVAL

I confirm that the work in this dissertation is carried out by the Candidate under my supervision and now it's ready for submission.

Signature *Dakir* Date 11/5/19.

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Labour Inspection in Industry and Commerce Convention No 81 adopted on 11th July 1947, Entry into force on 7th April 1950, ILO C81 of 1947

Labour Inspection (Agriculture) Convention No 129 adopted on 25th June 1969, Entry Into force 19th January 1972 ILO C129 of 1969

International Covenant on Civil and Political Rights adopted on 16th December 1966, Entry into Force 23rd March 1973

International Convention in Economic, Social and Cultural Rights, adopted on 16th December 1966, Entry into Force 3rd January 1973

Universal Declaration of Human Rights, adopted on 10th December 1948 entered into force March 23, 1976 999 U.N.T.S. 302

African Charter on the Rights and Welfare of the Child

Employment Act (No. 11 of 2007)

Children's Act (Chapter 141 Rev.2010)

Basic Education Act (No.14 of 2013)

Constitution of Kenya (2010)

LIST OF ACRONYMS.

ACEWRC	African Committee of Experts on the Rights and Welfare of the Child.
ACRWC	African Charter on the Rights and Welfare of the Child.
AU	African Union.
CoK	Constitution of Kenya, 2010.
CRC	Convention on the Rights of the Child.
ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour.
ICCPR	International Convention on Civil and Political Rights.
ICESCR	International Convention on the Economic, Social and Political Rights.
UNICEF	United Nations International Children Fund.
UDHR	Universal Declaration of Human Rights.

ABSTRACT.

Child labour continues to be widespread phenomena across the globe. Worldwide over 215 million children have been described to be working, and many of them are involved in fulltime labour. Certain land expanses that have documented the highest numbers of child labourers include Asia and Sub-Saharan Africa.

The ILO has taken ingenuity to ensure eradication of child labour. Thereby, certain statutes to include the ILO Convention No. 138 on Minimum Age of Employment that seeks to ensure children below a certain age are not engaged in child labour. ILO Convention No. 182 is on the Worst forms of Child labour its aim is to ensure that children are not involved in dangerous activities that may be injurious to their well-being or may interfere with their rights entitled to them. The African Charter on Rights and Welfare of a Child has also outline the need for protection for children's rights and encourages state parties to ensure that the best interests of a child prevails.

Kenya has ratified all three instruments as an initiative to ensure children rights are protected. Various pieces of legislation such as the Constitution of Kenya 2010, Employment Act, Children's' act have provisions to ensure that child labour is eradicated. Despite all this pieces of legislation there is need for a child-revolving policy on the elimination of Child Labour. Such a policy would take into account the nature of work done by the child and consider what is best for the child.

This study will thus analyse the legal provisions on child labour and the steps taken by Kenya to fulfil its obligations. It will also give a recommendation on how to formulate a child-revolving policy in order to eradicate child labour and ensure the best interest of the child triumphs.

CHAPTER ONE.

1.0 Introduction.

Child labour is any form of prohibited labour done by a child in exchange for money¹. This form of labour is most likely to interfere with the child's mental and physical health.² Child labour has been recognized as a social problem across the globe and various organizations have been formed to fight child labour. Child labour deprives children of their childhood due to its exploitative nature. Child labour also deprives them the right to education among other rights.

Worldwide over 215 million children have been reported to be working many of them fulltime.³ Some of the regions that have recorded the highest numbers of child labourers include Asia and Sub-Saharan Africa. In Asia about 77.8 million children between the ages of five to seventeen are engaged in child labour.⁴ Most children work in the agriculture sector, fishing and seafood industries. Across Asia children are employed as domestic helps and some are even sexually exploited. Countries in Asia have tried to combat child labour by strengthening their legal framework and having labour inspectors in various sectors.⁵

In Kenya children are engaged in the worst forms of child labour. Most of the children are in the agriculture sector especially tea and coffee plantations.⁶ Reports also indicate that children work in the mining sector, fishing and herding animals.⁷ Children work long hours under hazardous conditions with dangerous tools and are exposed to toxic chemicals. These children are exposed to various risks including the possibility of death, injuries, health complications and even disabilities.

There has been a slight advancement in Kenya since 2012 to try and eradicate child labour. This is evident through various social protection programmes and policies that

¹ McKenna. Y. 'Transcript of Child Labour in Kenya'. 2015: 18-22. <https://prezi.com/child-labour-in-kenya>.

² International Labour Office. A practical guide to ILO Convention No. 182, (ILO AND IPU). 2002.

³ ILO findings on the Worst Forms of Child Labour <http://www.un.org>.

⁴ US Department of Labour. Findings on the Worst Forms of Child labour. 2014.

⁵ Ibid.⁴

⁶ Ibid.³

⁷ Ibid.⁴

cater for the vulnerable children. However, to be entirely successful in eradication of child labour there is a need to ensure that various gaps of the law have been addressed.

1.1 Statement of problem.

In 2010, Kenya received attention after a referendum was conducted and a new Constitution⁸ was ushered and promulgated. To the Kenyan citizens, veils of oppressive laws and colonial rule were opened to visions of ameliorated legal regimes. The Preamble provides that:

"Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations."

The drafters of the Constitution intended "her" to serve the current generation while preserving and sustaining the future generations in an advantageous environment. The provisions of the Supreme Document in Kenya have not been diligently followed as required and the extent of the problem is reflected by the fact that the Preamble Section concludes by:

"Adopt, enact and give this Constitution to ourselves and to our future generations."

This means that the next and future generations inherit flaws from the illuminated society and find themselves in the current and even much more impoverished state with regards to general protection of children.

However, to be entirely successful in eradication of child labour there is a need to ensure that various gaps of the law have been addressed. The legal framework governing child labour has legal gaps. This means that there are no provisions for children working under oral contracts, specifically those above the ages of sixteen and above. There is also no framework for protection of the employee rights of the working child. Working children are not afforded with the rights like other employees who are

⁸ The Constitution of Kenya, 2010 available at www.kenyalaw.org

above the age of eighteen. An example would be the minimum wage for children, working conditions, working hours and their representation in trade unions.

Policies enacted to eradicate child labour are not child revolving. Such policies are ineffective and hence child labour is not successfully eradicated. A child-revolving policy will ensure the protection of working children. Current policies have no regard to what would be best for the child. There is no framework on the types of work that would be beneficial for a child and how the rights of the working children would be protected.

1.2 Objectives of study.

The main objective of this study is to try and analyse both the national and international legal framework present to combat child labour. This analysis will enable me to identify the legal gaps in child labour provisions. Other objectives of this research include;

- i. To investigate whether the domestic child labour laws meet international labour standards and international human rights instruments.
- ii. To assess the legal framework of child labour laws for an effective child revolving policy to eradicate child labour.
- iii. To provide appropriate recommendations that can be adopted to address the challenges.

1.3 Research questions.

This research work will seek to answer the following questions;

- i. Does the domestic child labour law meet international labour standards and international human rights instruments?
- ii. Does the legal framework of child labour laws provide for an effective child revolving policy to eradicate child labour?
- iii. Does the assessment of the child labour laws provide for an appropriate recommendations that can be adopted to address the challenges.

1.4 Limitation to the Research.

This research limits itself to the legal framework regarding child labour. The research will only look at the domestic labour laws and the various international frameworks covering child labour that has been ratified by the country. The research will focus on trying to give recommendations develop policies that are child revolving in order to ensure effectiveness during implementation.

1.5 Research methodology.

The main research methodology that will be used will majorly be desktop research. The research will focus on international and domestic legislation concerning children's rights to try and eliminate child labour. Academic articles on child labour, international and country reports on the state of child labour will provide the necessary insight on the level of child labour in the country both globally and locally. Surveys and research done by international organizations will also be important in the research. Information gathered will be important in determining if international obligations and pressure has had any impact on the domestic laws.

1.6 Scope of study.

Trying to present, examine, assess, analyse, and compare then conclude a large subject such as children's rights protection and violation in the labour industry in Kenya and internationally and determining who to examine as to afford protection of such rights is indeed a hard work. It is hard because it has different dimensions at the national and international level end because it comprises a large composition of different areas forming such as legal, political and economic field. No doubt that each area has its own significance in forming the whole picture.

1.7 Structure of Study.

Chapter one will present the introduction, background of the study, statement of the problem, objective of study, research question, significance of the study, methods and materials used, and the literature review, scope of study and delimitation of study and structure of study.

Chapter Two will examine mainly the framework and detail the jurisprudence therein involved in which the order of the study is established.

Chapter Three which will examine the international child labour legal framework and analyse the Kenyan legislative, institutional and policy framework.

Chapter Four which will present to discuss and assess the legal framework gaps that exist in the analyzed framework.

Chapter Five will make recommendations or solutions relevant to the study and gaps found and as well make a conclusion to that effect.

CHAPTER TWO.

LITERATURE REVIEW.

2.0 Introduction.

The study has adopted two types of frameworks namely the theoretic and naturalist frameworks. The theoretic framework adopted is entailed by the naturalist approach, social contract theory and functionalist approach. Each theory makes generalization of ideas that prevail in this study in order to give a clear understanding. Conceptual framework contains some of the terms that in form this research study. Some of the concepts discussed give a better understanding of child labour and its provision in domestic and international legislations. The first part of this framework will cover the theoretical framework and the second part will entail the conceptual framework.

2.1 Literature review.

While there exists a number of legislative instruments which address child labour in Kenya, the lack of consolidated legislation on child labour has hampered efforts to contain the vice. Consequently, the incidence of child labour has been on the increase in the country. This has far reaching implications on the victims of child labour due to its numerous negative effects.⁹

There exists an agreement that child labour is a highly complicated and contentious issue, there is hardly any need to hold any large international conference of experts. The sheer complexity of issues of the children and young people working often under conditions that are way beyond human dignity, calls for a careful analysis of its various aspects. This could only be done by bringing together people who know the issues from working with them at a practical level, whether in policy making or programming and those who have studied them through systematic research.¹⁰

An ILO publication¹¹ outlines the action by member states to eliminate child labour. It gives the statistics on how many countries have developed a national policy and

⁹ Nyukuri Baraza Charles, *"An analysis of challenges to the enforcement of child labour laws in Kenya"*

¹⁰ Meljeteig, Per. "Introduction: Understanding Child Labour." 1999. 5-12.

¹¹ ILO. *Tackling Child Labour; From Commitment to Action*, ILO Journal, 2012: 12-23.

legislative framework to combat child labour. The report further indicates the interdependence between ILO and IPEC to combat child labour. The main works by both organizations is creating awareness of the child labour problem and programmes to encourage the ratification of child labour conventions worldwide. Data obtained from the report will enable one to understand the nature of child labour and which areas are worst affected.

Programmes undertaken by ILO and IPEC in other countries would be useful to know which programmes and policies are effective and which ones are not. There is need for parliamentarians to take action to ensure that they have set up programmes to combat child labour. Such programmes should aim at denouncing child labour, preventing engagement of children in child labour, giving special attention to vulnerable children and sensitizing the public on child labour.¹² Parliamentarians have to ensure that the legislative framework have measures to ensure rehabilitation and reinsertion of children to the education system. This information will be able to give useful insight on some the steps that need to be taken by legislators to ensure that child labour is eradicated.

Various form of work can develop or harm the child's development.¹³ There is need to develop a national child labour policy that encompasses the rights of the working children. Such a policy would be child revolving and hence more effective. In order to effectively eradicate child labour there is need for the government to address the causes of child labour. Access to free education can help to avoid the situation of children working.¹⁴

According to Sarah¹⁵, for the enforcement of their rights to be meaningful, we need not only reliable quantitative data but also measurements of the individual outcomes of services for children. These need to be both in the short and long term in nature. Short term to see if children have gained access to their rights and long term to see if that

¹² ILO. Handbook for Parliamentarians; Eliminating Worst Forms of Child Labour, Journal No. 3, 2002: 81.

¹³ Myers, William, and Jo Boyden. *Child labour: promoting the best interests of working children*. 1998.

¹⁴ Ibid.13

¹⁵ de Benitez, Sarah Thomas. *Street Children's Rights and the Convention on the Rights of the Child: A Study of Acceptance and Observance in Mexico and Ecuador*. Princeton University, Bendeim-Thoman Center for Research on Child Wellbeing, 2000.

access has been sustained. Children's rights are enforceable in the sense that outcomes can be measured: attendance and performance at school, height and weight, inoculations charts and job stability are all concrete items which can be fairly easily measured. Emotional well-being and social skills are also measurable, if more difficult to capture.

Employers have to take measures to ensure the safety of working children and that the rights of such children should not be undermined. The role of children when enacting a child revolving policy should not be undermined. There is no insight on how exactly children can be involved in law making and the forms of work appropriate for children, however, the study will be able to give recommendation on how children interests can be represented and illustrated in a national policy and the need for a framework of what work a child can be allowed to do.¹⁶

Accordingly, employers have to take measures to ensure the safety of the labouring child and that the rights of such child should not be demoralized. There is no insight on how exactly children can be involved in law making and the forms of work appropriate for children. The study will be able to give reference on how street children welfares can be described and represented in a countrywide policy and the want for an outline of what labour a child can be permitted to do.

2.2 Theoretical Framework.

2.2.1 Natural Law.

This study will be principally centered on the naturalist approach to try and understand why child labour has to be eliminated. Lon Fuller a natural law leaning scholar discusses the inner morality of law. There is no distinction between law and morality; law is a moral commitment. The purpose of law is to achieve social order by subjecting human conduct to the governance of the rules.¹⁷ A valid law has to be; promulgated, cannot be

¹⁶ Reynaert, Didier, Maria Bouverne-de-Bie, and Stijn Vandeveld. "A review of children's rights literature since the adoption of the United Nations Convention on the Rights of the Child." *Childhood* 16.4, 2009: 518-534.

¹⁷ Available at <http://www.gulawreview.org/entries/legal-theory/the-%E2%80%98inner-morality-of-law%E2%80%99-an-analysis-of-lon-l-fuller%E2%80%99s-theory> accessed on 18/12/2018.

retroactive, the rules have to be clear and concise, rules should not be contradictory and must be capable of fulfilling possible change.¹⁸ Any legislative framework that is set out to combat child labour should be able to fulfil the above requirements. The principles would provide order and coherence making the system efficient and effective.

John Locke is natural law leaning scholar who studied the character of liberalism in natural law. A liberal system would enshrine individual rights but people in society have to exercise their rights responsibly.¹⁹ People have a duty to respect the rights of other individuals in order to rightfully claim their own rights. With regards to child labour, children's rights have to be respected. An employer engaging a child in hazardous work is overstepping by denying the child other essential rights for his economic gain.

2.2.2 Social Contract Theory.

The social contract theory by John Locke emphasizes the rights of the individual especially where the sovereign fails to carry his duties. Man became the subject of the social contract making him subject to the law of the society.²⁰ Duty of the ruler was to provide protection; failure to provide protection, trust enjoyed by the ruler would be forfeited hence the ruler ought not to be obeyed.²¹ In relation to child labour in case legislators do not address child labour issues or provide comprehensive laws to combat child labour man has no obligation to obey the ruler. The will of the people prevails and they have a right to preserve themselves.

2.2.3 Functionalist Theory.

This study is also rooted in the functionalist approach based largely on the works of Emily Durkheim. In this approach a typical society was conceived as an organic whole whereby each member of society is required to perform its function in order to maintain others in society.²² This is similar to the functions of the human body, however, new approaches by other scholars have been developed in context with modern society.

¹⁸ Ibid.¹⁷

¹⁹ John Locke, Natural Rights, Natural Law and American Constitutionalism, <http://www.nlnrac.org/earlymodern/locke> accessed on 22/12/2018.

²⁰ Omony J, Key Issues in Jurisprudence, 20.

²¹ Ibid.²⁰

²² Mooney, K. Understanding Social Problems, London. 2007: 12.

Functionalists believe in any society individuals' work together in order to sustain each other.²³ This provides balance if any part fails to perform its function society may breakdown. Presence of child labour in a society malfunctioning society. Failure to provide the needs of a child in society makes the child resort to child labour.

2.2.4 Positive and Negative Liberties.

The idea of positive and negative liberties has been examined and defended by Isaiah Berlin.²⁴ Positive liberty is the possibility of acting in such a way to control someone's life and realize one's fundamental purposes.²⁵ Negative liberties on the other hand are the absence of barriers and constraints.²⁶ The difference between positive and negative liberties is that negative rights prevents the state from violating individual autonomy while positive rights impose a duty on the state to provide certain amenities.²⁷ The concept of negative liberty attempts to answer the question, "Within what area should a person be left to do what he is able to do without any interference?" Whereas positive liberty seeks to answer "who are the sources of interference and what determines such interference?"²⁸

It is not possible to attaining entirely negative liberties, therefore, Societies constantly place restrictions to the personal lives of individuals in order to prevent the liberty of other people from being infringed.²⁹ Child protection is an example of the difficulty the government may face when setting boundaries between private and public life. One would argue for full negative liberty should apply in the protection of children. However, this should not be the case the state should be able to intervene and guide caregivers on making decisions that would be best for the child.

²³ Available at <<http://www.wou.edu/~girodm/foundations/Durkheim.pdf>> accessed on 18/12/2018.

²⁴ Isaiah, B. Two Concepts of Liberty, OUP. 2015. 4

²⁵ Available at <http://plato.stanford.edu/entries/liberty-positive-negative/> accessed on 23/12/2018.

²⁶ Ibid.²⁴

²⁷ Tamar E, A Positive Right for the Protection of Children, Yale Law School, Vol. 7, Issue 1, 11

²⁸ Ibid.²⁴

²⁹ Ibid.²⁴

Children defy the conventional view of rights; this is because they lack rational capabilities.³⁰, excludes children from his conception of liberty. He states that liberty rights only apply to human beings who have attained full maturity of their faculties. Children must be protected from their own actions. Therefore do not have negative liberty to do as they please but have a positive claim for protection by the state.³¹ Children do not have the negative right to do as they please by engaging in any form of child labour in order to fend for themselves. The state steps in to ensure they are protected through legislative mechanisms.

2.3 Conceptual Framework.

The UNCRC³² defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.³³ Child Labour is any form of labour that is most likely to be mentally, socially and physically harmful to the child or interferes with their schooling³⁴.³⁵ Child labour affects four basic rights of the child; survival, protection, participation and development.³⁶ Child participation in work has to be distinguished from child labour. Child participation in work is the ordinary assistance given by child to a parent or guardian. Such form of work does not interfere with the child's health and education. This analysis on child labour laws will encompass the worst forms of child labour and the minimum age for admission to employment. The two main conventions dealing with these issues specifically are Convention No. 138³⁷ and Convention No 182³⁸ on the Worst Forms of Child Labour. Convention 138 applies to all the working children despite the economic sector they are

³⁰ John Stuart Mill. On Liberty, Legal Classics Library. 1869.

³¹ Ibid.²⁷

³² United Nations Convention on the Rights of a Child, (1989).

³³ Article 2, African Charter on the Rights and Welfare of the Child.

³⁴ Article 1, United Nations Convention on the Rights of the Child, (1989).

³⁵ International Labour Office, A practical guide to ILO Convention No. 182

³⁶ Mckenna Y, Transcript of Child Labour in Kenya, 2015: 18-22. <https://prezi.com/child-labour-in-Kenya> accessed on 27/12/2018.

³⁷ International Labour Organization Convention No. 138 on Minimum Age, (1973), available at <http://www.ilo.org>.

³⁸ International Labour Organization Convention No. 182 on Worst Forms of child Labour available at <http://www.ilo.org>.

working in. The basic minimum age for employment is sixteen years the child may do light work provided it is not hazardous to their health or safety.³⁹

These children must have completed all forms of compulsory school work. On the other hand worst forms of child labour include slavery, child prostitution and pornography, illicit activities and hazardous work.⁴⁰ Hazardous work can be defined as work in which by its nature can cause harm to the health, safety or the morals of a child.⁴¹ Hazardous work also includes work done by children in households subjecting them to long hours, unhealthy environment and unsafe equipment. Long hours of work can be defined as the time worked above the specified threshold by national regulations⁴².

This research will analyse the concept of vulnerability of street-children and other vulnerable children and their protection. It shall thereby secondarily stretch to cover invisible children workers for example those in the domestic industry for legislation does not cover their protection.

In order to understand the vulnerable children and their vulnerability, one has to understand the children themselves. Accordingly,⁴³ children are considered to be vulnerable if they or their parents are living with HIV/AIDS, children living on the street or living in an unsupportive environment with inadequate medical care, such children are exploited and are forced to work in hardship areas in order to provide for their families.

Poverty is one of the main reasons why children resort to the streets and into manual labour. They experience a wide range of shortages mainly food and clothing. In such conditions, such children cannot concentrate and end up dropping out of school. A case study done in Nairobi shows that child labour is usually divided into two forms; domestic chores and manual labour. Exploitative child labour is outside the household

³⁹ Article 7, Convention No. 138, 26 June, 1973.

⁴⁰ Article 3, Convention No. 182, (1999).

⁴¹ Ibid.⁴⁰

⁴² Diallo, C. 'Challenges and Strategies in Improving Labour Statistics in Africa'. 2010

⁴³ Dipankar, D. 'Addressing the Needs of Orphans and Vulnerable Children'. (2009). Vol. 2: 2.

and is mainly divided according to gender roles.⁴⁴ This clearly indicates that street children are vulnerable and are not protected hence open to child labour due to their background.

Child labour laws are also ineffective since they mainly regulate the formal sector. Domestic labour laws mainly regulate employment of children in specific sectors such as mining, manufacturing, fisheries plantations and manufacturing industries.⁴⁵ The laws do not have a legal minimum age for those working in the informal sector hence allowing an arena for child abuse.

Kenya has ratified ILO Convention No. 81⁴⁶ and No. 129⁴⁷ whereby these conventions effect that labour inspections should include inspection of premises, working conditions and employee's registration among other things.⁴⁸ The research shall also be under the fundamental principle of the best interest of the child. Embodied in the CRC⁴⁹, it states that the best interests of a child shall be a primary consideration and must be applied in a systemic manner in any matters concerning a child.⁵⁰ The Constitution⁵¹ also provides for the best interest of a child in any matter concerning the child for any action that affects the child or group of children due attention must be given to the child. This can be achieved through systematic participatory mechanisms taking into account age and gender.⁵²

Relying this research on a rights based in combating street and vulnerable child labour, this approach puts premium on the best interest of a child as provided thereof in CRC.⁵³ Article 32(1) compels states to protect children from hazardous work which may interfere with the child's health, physical, mental or moral development. The aim of this

⁴⁴ Ibid.⁴³

⁴⁵ Suda, Collette A. "The invisible child worker in Kenya: The intersection of poverty, legislation and culture." *Nordic Journal of African Studies* 10.2 2001: 163-175.

⁴⁶ Labour Inspection Convention (1947).

⁴⁷ Labour Inspection (Agriculture) (1969).

⁴⁸ Ibid.⁴⁵

⁴⁹ Ibid.³⁰

⁵⁰ Article 40(3), CRC, (1990).

⁵¹ Article 53(2), CoK, (2010).

⁵² UNHCR, Guidelines in Determining the Best Interest of a Child.

⁵³ Article 3, CRC, 30 July, 1990.

approach is to give children a voice in any matter concerning their wellbeing. On one hand children can be considered to be vulnerable and hence need protection and on the other hand they have a say to any matter that may affect their lives. Children are not only passive recipients of any action affecting their lives but can be treated as an active agent who influences their own lives.⁵⁴

2.4 Conclusion.

The vulnerable children continue to suffer and have a higher a degree of vulnerability as compared to any other group of children. Due to poverty and the urgency to provide for their families such children resort to child labour. As stated above it is quite difficult for the labour inspector to gauge the working conditions of these children due to the private nature of the informal sector. There is need for analysing the regulatory mechanism and provide recommendations on how to address this issue.

⁵⁴ Walakira. J. Interpretation of Child Labour in Uganda, Wien Law Journal, 2009: 33

CHAPTER THREE.

ANALYSIS OF LEGAL INSTUTIONAL FRAMEWORK ON CHILD LABOUR LAWS.

3.0 Introduction.

Child labour in Kenya has been regulated through various instruments namely Constitution⁵⁵, Employment Act⁵⁶ and the Children's Act⁵⁷. The International Labour Organization has also regulated child labour through ILO convention 138⁵⁸ and 182⁵⁹ which shall be discussed in depth all through this chapter. The main concern of this chapter is whether the issues in child labour have been well addressed by both domestic and international framework. Thus this chapter will give a brief history on child labour globally, study and analyse t he legal provisions on child labour both national and international and the government policies to eradicate child labour.

3.1 Global Framework on the Fight against Child Labour.

Child labour can be drawn back to the rise of industrial production in agricultural societies in the United Kingdom.⁶⁰ The practice became conspicuous in the 18th Century. People began became opposed to child labour when young boys at the age of ten where employed in factories whose activities were deemed to be dangerous to children's health.⁶¹ The enactment of the English Education Act in the year 1880 stated that children between ages of five to ten must attend school, this was in an effort to exclude children from the work place.

During the industrial revolution children as young as four years old were employed in production factories. Children crawled in landmines too narrow for adults, some worked as domestic servants others assistants or apprentices. The industry preferred children to adults because they provided cheap labour, they were submissive and the most vulnerable. Industrialization in Great Britain and other parts of Europe saw children shift

⁵⁵ Ibid.⁸

⁵⁶ Laws of Kenya, Employment Act Chapter 226 available at www.kenyalaw.org.

⁵⁷ Laws of Kenya, Childrens Act Chapter 141 available at www.kenyalaw.org.

⁵⁸ Ibid.³⁷

⁵⁹ Ibid.³⁸

⁶⁰ Available at <http://www.earlham.edu/~pols/globalprobs/children/Laila.html>, accessed on: 24/03/2019

⁶¹ Kelland, A. Children at Work; Child Labour Practices in Great Britain, Lynne Publishers, London, 2004: 12.

from working at home to working in mines and factories, children worked for long hours with little or no pay.

The fight against child labour started in the late 19th Century with the passing of the Robert Peel's Factory Act as a reform to the working conditions.⁶² There was aggressive activism and economic progress in the early 20th Century that led to reductions of child labour in industrialized nations.⁶³ A commission was set up in Britain to investigate into the issues of child labour; the findings of the report showed that children as young as the age of eight worked about sixteen hours daily. The findings led to the enactment of the Factory Act in 1833 that banned the work for persons under the age of nine and restricted working hours to eight for children over the age of fourteen.

Currently child labour is considered inappropriate for children below a certain age; the definition of child labour excludes household activities that are not harmful to the child's health. Steps have been undertaken to reduce child labour in the country through the enforcement of legal framework and governmental institutions.

3.2 National Provisions on Child Labour.

3.2.1 Provisions of the Constitution of Kenya.

The Constitution⁶⁴ is regarded as the supreme law of the land and any law enacted should abide by the principles set out in the constitution.⁶⁵ Chapter 4 of the Constitution outlines the Bill of Rights this has been seen as one of the most progressive bills globally.

Article 30(1) states that every person shall not be held in slavery, (2) no person shall be required to perform forced labour. Article 41 provides for fair labour rights for each worker, some of the rights include; fair remuneration, reasonable working conditions, join a trade union or go on strike. Article 53 provides for the rights of a child; every child has a right to be protected from abuse, neglect harmful cultural practices and

⁶² Factory Act, 1937.

⁶³ Basu, K. "Child Labour: Cause, Consequence, and Cure," *Journal of Economic Literature*, 1999: 10.

⁶⁴ *Ibid.*⁸

⁶⁵ Article 2(1): Constitution of Kenya, (2010).

hazardous or exploitative labour. Article 53(2) provides that the child's best interest is of paramount importance in any matter concerning children.

3.2.2 Provisions of the Children's Act.

The Children's Act⁶⁶ was enacted as law on 31st December, 2001 to provide for the rights of the child and to try to enhance the welfare of children in the country. The act was enacted to consolidate all the laws relating to the needs of a child and to give effect to the provisions of the Convention on the Rights of a Child⁶⁷ and the African Charter on the Rights and Welfare of the child.⁶⁸

Section 4 of the act provides for the best interests of the child. Section 4(2) states that all actions concerning children whether taken by public or private welfare institution the best interests of child shall be a primary consideration. Section 4(3) states that in any procedural matter the child shall be accorded an opportunity to express his opinion and it shall be taken into account depending on the child's age or maturity level of the child.

Section 10 of the act provides that every child is protected from economic exploitation that is harmful to the child's development. It further provides that child labour refers to a situation whereby a child provides labour to another person for payment, situation where child labour is used for gain whether or not the child benefits and a situation of contract for services with a child.⁶⁹

3.2.3 Employment Act.

The Employment Act⁷⁰ outlines the minimum terms and conditions in any employment contract. The act provides for prohibition against forced labour, discrimination in employment, payment of wages and other terms required in any employment contract.

Section 2 of the act defines the worst forms of child labour; it is any form of slavery for example trafficking of children, use and procuring any child for prostitution, procuring a

⁶⁶ Ibid.⁵⁷

⁶⁷ Ibid.³²

⁶⁸ African Charter on the Rights and Welfare of a Child, (1990).

⁶⁹ Section 10(5), Childrens Act CAP 141.

⁷⁰ Ibid.⁵⁶

child for any illicit activities for example trafficking drugs or any work if carried out by the child is likely to harm health and safety of the child.

Part VII of the act provides for the protection of the child. Section 56 prohibits any child below the age of 13 to perform any work however; children between the age of 13 and 16 can perform light work. Children between the ages of 16 and 18 are employable under the act Section 58 and 59 provides that the minimum age for employment in an industrial undertaking is 16 years as an apprentice. The employer cannot engage the apprentice in any form of work between the hours of 6.30 p.m. and 6.30 a.m.⁷¹

3.4 Case Law.

Joseph Maraka Adoro (minor suing through the uncle) vs Paul Njogo Kihara.⁷²

In this case the applicant brought a claim against the employer on behalf of the minor. The minor was working at the defendant's farm operating a grass shredding machine when his left arm was caught and shredded by the machine. The court stated that this was a tortious case and awarded the plaintiff damages. It also stated that it is not wrong for a child to engage in a vocation in order to become responsible citizens in future. However, when the work when the work exceeds the child's right to education and safety it becomes child labour. Whoever was found guilty must stop and should be punished.

B.A.A vs Republic.⁷³

The appellant was charged with the offence of wilful and knowingly causing a child to be in need of care and protection contrary to section 127(1)(b) of the Children Act. The appellant wilfully and knowingly caused O.A.K., a school pupil aged 14 years to be a child in need of care and protection by luring her out of school for child labour. The appellant was sufficiently punished for sentence of three years. The appellant court stated that in the period that she has been in prison, she must have reflected on her conduct and taken note of where she went wrong.

⁷¹ Section 60, Employment Act CAP 226.

⁷² *Andrew Maraka v. Paul Njogo Kihara*, [2004] ekr.

⁷³ *B.A.A vs Republic*, [2011] ekr.

M.C Mehta V State Of Tamil Nadu.⁷⁴

An activist lawyer filed a petition with the court claiming that the fundamental rights of children were being grossly violated in contravention of Article 24 of the Constitution of India, which provides that “[no] child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

The court ordered that employers illegally employing children must pay Rs. 20,000 into a fund known as the “Child Labour Rehabilitation-cum-Welfare Fund” to be used only for the benefit of that child. The court also ordered the government to either (a) provide employment for an adult member of every family with a child who is employed in a factory or mine or other hazardous work or, if not possible to provide an adult family member with a job, (b) contribute Rs. 5,000 to the Child Labour Rehabilitation-cum-Welfare Fund for each child employed in a factory or mine or other hazardous employment.

The Court’s reasoning was that there is need for the government to ensure children do not engage in child labour. Fines imposed on employers would not be enough to prevent a poor parent from having to put their child to work, the government owes these parents a duty of assistance to help remove their children from hazardous employment.

3.5 Government Policies on the Elimination of Child Labour.

3.5.1 National Plan of Action for the Protection for Children in Kenya (2015-2022).

This action plan provides for the child’s right to be protected. Child protection can be defined as preventing and responding to violence, exploitation, neglect and abuse.⁷⁵

The action plan outlines the statistical estimates of child labour in the country; it is estimated that 1.01 million children are engaged in child labour and 700,000 of them

⁷⁴ *M.C Mehta V. State of Tamil Nadu*, Supreme Court of India, [1996].

⁷⁵ Kenya Integrated Household Budget Survey, ‘*Child Labour Analytical Report*’ 2009, 22-29

are engaged in hazardous child labour. Child labour mostly occurs in the rural areas especially in the informal sector, for example, agricultural sector and domestic work.⁷⁶ The action plan also covers orphans and vulnerable children affected by HIV/AIDS. Other vulnerable children such as street-children lack monitored adult care making them most vulnerable to harmful labour and sexual exploitation.⁷⁷ In order to achieve the child's right to protection some of planned actions include; strengthening legal frameworks, enforcement of child protection systems, improve financial and technical capacities of duty bearers and promoting community based empowerment programs.⁷⁸

3.6 International framework.

It is important and substantial for states to ratify international human rights instruments as well as the framework governing eradication of child labour in order to curb the level of child labour worldwide. Ratification of international instruments binds states to international obligations which it has to comply with since it has duty to the international community and the society that the state will comply with the changes fully in order to comply with a specific convention. States have a duty to set up supervisory bodies which have the authority to supervise and monitor the implementation process as well as provide guidance on how to make the necessary changes in the existing law. States usually have a duty to report back to the specific body under the convention that has been ratified. Below is a detailed explanation on the provisions on child labour in different international instruments.

3.6.1 Convention on the Rights of a Child (CRC).

It is the first legal instrument that recognizes the fundamental rights of a child and provides a broader legal approach on how to curb child labour as compared to the International Labour Conventions. The convention defines a child as an individual under the age of eighteen unless under the law applicable to the child, majority is attained earlier.⁷⁹ The convention further provides that children shall be safeguarded from any

⁷⁶ KIHBS, 'Child Labour Analytical Report' (2009),22-29

⁷⁷ Chapter 3, *National Plan of Action for Children in Kenya*, (2015-2022)

⁷⁸ Ibid.⁴⁵

⁷⁹ Article 1, UN Convention on the Rights of a Child, (1990).

work that is likely to be hazardous or interfere with the child's education, physical, mental, spiritual, moral or social development.⁸⁰ States have an obligation to legislate the minimum age for employment, working conditions as well as penalties for violation of these provisions.

3.6.2 Convention 138 Minimum age for the Admission to Employment.

The convention provides a guideline on the minimum age which is a basic standard to be applied globally. The table below is summary of the internationally recognized ages for employment for children under the age of eighteen:

TABLE 1; MINIMUM AGE

Categorization of Work	The minimum age children can start to work
Hazardous work(work likely to put in danger child's health, morals or safety) should not be done by anyone under the age of 18	18(16 under strict conditions)
Light work-provided it does not jeopardize child's health, safety and morals	13-15

The basic minimum age for work should generally not be below the age of fifteen after compulsory basic education has been acquired by the child.⁸¹ The determination of age

⁸⁰ Article 32, UN Convention on the Rights of a Child, (1990).

⁸¹ Article 2.3, Convention No. 138, (1973).

limit differs between States that have ratified the instrument. For example the basic minimum age for developed states is fifteen while fourteen for developing states; hazardous work has an age limit of eighteen for developed states and exceptions can be made up to sixteen. Finally, light work can be carried out children between ages of thirteen to fourteen in developed states and twelve to fourteen in developing states.⁸² The rules set up provide a guideline for States to legislate according to these standards.

3.6.3 Convention 182 Worst Forms of Child Labour Convention.

In 1999, the International Labour Conference held in Geneva, Switzerland governments, employer organizations and trade unions adopted ILO Convention 182. The convention defines worst forms of child labour to include;⁸³

- a) all forms of slavery or practices similar to slavery, debt bondage and serfdom,
- b) the use of a child for prostitution or for the production of pornography,
- c) the use, procuring or offering of a child for illicit activities such as trafficking of drugs,
- d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

3.6.4 African Charter on the Rights and Welfare of the Child.

This instrument was adopted by the Organization of African Union (OAU) in 1990 and entered into force in 1999. The aim of this instrument is to promote and protect the rights set out in the African Charter on the rights and Welfare of a Child ACRWC and requires state parties to interpret and apply these rights.

The charter provides for the promotion of the best interest of the child in any action concerning children as a primary consideration.⁸⁴ It also provides for the essential survival, protection and development of children.⁸⁵ The charter also prohibits all forms

⁸² Available at <http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang-en/index.html> accessed on 08/04/2019.

⁸³ Article 3, ILO Convention No. 182, (1999).

⁸⁴ Article 4, African Charter on the Rights and Welfare of the Child, (1999).

⁸⁵ Article 5, African Charter on the Rights and Welfare of the Child, (1999).

of economic exploitation of children and requires state parties to have appropriate legislative and administrative measures to eradication of child labour.⁸⁶

3.7 Steps taken by Kenya after Ratification of Child Labour Instruments.

3.7.1 ILO Convention No. 138.

Kenya ratified this instrument on 9th April, 1979 and set the minimum age for employment to be sixteen years.⁸⁷ An overview of the convention depicts that state parties to the convention have a mandate to declare the minimum age which should not be below fifteen.⁸⁸ It also instructs state parties to permit light work for children between 13 to 15⁸⁹ years and any hazardous work that may affect the child's health or morals should be done by a person above 18.⁹⁰

3.7.2 ILO Convention No.182.

Kenya ratified this convention on 7th May, 2001. The main aim of this convention is the elimination of the worst forms of child labour. Parties have an obligation to come up with national regulations and mechanisms to ensure implementation.

In Kenya the Employment Act provides that no person can employ a child in any activity that constitutes worst forms of child labour.⁹¹ One can launch a complaint to the labour or police officer if he suspects a child may be involved in an activity that may constitute worst forms of child labour.⁹²

⁸⁶ Article 15, African Charter on the Rights and Welfare of the Child, (1999).

⁸⁷ Available at

http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283 accessed on 08/02/2019.

⁸⁸ Ibid.³⁷

⁸⁹ Article 4, Convention No. 138, 26 June, 1973.

⁹⁰ Article 3, Convention No. 138, 26 June, 1973.

⁹¹ Section 53, Employment Act, [Rev 2012].

⁹² Section 54, Employment Act, [Rev 2012].

3.8 Conclusion.

From the analysis of the laws it is encouraging the steps undertaken by Kenya and the international community to address the rights of a child. There are similarities between the conventions despite addressing different aspects of child labour. The ILO convention both seek to progressively eradicate child labour among children of all ages. The next chapter will have an in depth analysis on some of the articles on each legislation.

CHAPTER FOUR

ASSESSMENT OF THE LEGAL FRAMEWORK.

4.0 Introduction.

The ILO has regulated child labour through the Minimum Age Convention and Worst Forms of Child Labour Convention. Both Conventions aim to reduce and eventually eliminate child labour globally. After the ratification of these instruments, many countries have adopted domestic laws prohibiting harmful labour. However, statistics prove that children still participate in harmful work. The main purpose of this chapter is to assess the ILO child labour conventions. The main aim of the Minimum Age Convention was the progressive eradication of child labour while the Worst Forms of Child Labour Convention recognizes the existence of worst forms of child labour, and it seeks to eliminate. Domestic legislation will also be assessed and any gaps in the law shall be pin-pointed.

4.1 Assessment of National Legislation.

There have been various amendments to the domestic framework governing child labour. This has led to a slight advancement to curb child labour and hence a drop in numbers of children working in various sectors.⁹³ However, there continues to be certain issues that have not been addressed and some gaps in various pieces of legislation. The Minimum Age convention states that the minimum age shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than fifteen years.⁹⁴ However, one can employ a child in the ages between thirteen and sixteen who may engage in light work.⁹⁵ The Employment Act prohibits worst forms of child labour⁹⁶ and continues to state that the Cabinet Secretary shall come up with a list of hazardous work. There is need for policy guidelines on what constitutes hazardous work; this also applies to light work for children between ages thirteen to sixteen. This policy on what constitutes light work and hazardous work will shed light on what the types of work this will avoid any ambiguity.

⁹³ Kenya Integrated Household Budget, 2012.

⁹⁴ Article 2, Convention No. 138 on Minimum Age, 1973.

⁹⁵ Section 56, Employment Act, CAP 226.

⁹⁶ Section 53, employment Act, CAP 226.

Children are engaged in domestic work and are not provided formal recognition under the Employment act. There is also no provision for children who work with no written contract between the ages of sixteen to eighteen. Formal recognition of domestic work as a profession and formal extension of the provisions to non-contractual forms of work, would as well guarantee an extension of the rights and guarantees for workers provided in the Employment Act and in the other work-related laws to this specific category.⁹⁷ Even though Kenyan legislation already provides different instruments of protection for workers, there is no clear recognition of domestic workers.⁹⁸ There is need for recognition of domestic workers especially children working in this sector.

4.2 Assessment of International Framework.

4.2.1 Convention 138 Minimum Age Convention.

Some of the provisions in the convention are vague and give room for misinterpretation. Article 1 encourages member states to draft legislation that abolishes child labour and raises the minimum age consistent with the development of young persons.⁹⁹ This article does not state what child labour is. The definition is also not present throughout the convention. The article further does not indicate the need for special mechanisms to ensure implementation of the article.¹⁰⁰ This gives an impression that it would be sufficient to establish a minimum age without putting up institutional mechanisms to ensure compliance.

Article 2(1) states that each member to the convention shall specify and ratify the minimum age for employment in any occupation.¹⁰¹ This provision seeks to protect children in any form of work or employment. The content of this provision seeks to ensure that every child working in whichever sector is protected. This is important especially for children working on domestic households who are rarely recognized.

⁹⁷ CEFA, Policy Assessment in the Framework Domestic Workers in Kenya, 2016.

⁹⁸ Ibid.⁹⁷

⁹⁹ Article 1, Convention No. 138 on Minimum Age, 1973.

¹⁰⁰ Mavunga, R. A. Critical Assessment on the Minimum Age Convention No. 138 and the Worst Forms of Child Labour Convention No. 182. 2013.

¹⁰¹ Article 2(1), Convention No. 138 on Minimum Age, 1973.

However, it may cause a problem in many African set ups where children are required to engage in some form of work.¹⁰²

4.2.2 Convention 182 Worst Forms of Child Labour Convention.

Article 1 provides that the elimination of the worst forms of child labour must be treated as a matter of urgency.¹⁰³ This provision indicates the immediate necessity to have effective measures to ensure the eradication of child labour. This indicates that there is a categorization of the forms of child labour from the worst forms to the tolerable kind.¹⁰⁴ This categorization neglects other forms of work such as light work that is prevalent in most parts of the world.¹⁰⁵ Worst forms of child labour must be addressed urgently but other forms of light work that are prevalent needs to be revisited.¹⁰⁶

Article 6 of the convention stipulates that each member state has an obligation to implement programs to ensure the eradication of worst forms of child labour. It further provides that such programs should be designed and implemented with the relevant government institutions.¹⁰⁷ This convention can thus be described as action oriented. It protects children beyond the legislative provisions.¹⁰⁸ Unlike Convention 138 this convention requires the government to collaborate not only with worker organizations but also with the concerned groups.¹⁰⁹

4.2.3 International Convention on Civil and Political Rights (ICCPR).

The ICCPR has a provision on child labour that states should ensure that children and young persons should be protected from economic and social exploitation¹¹⁰. Any form of employment in work that is harmful to their morals or health should be punishable by

¹⁰² Ibid.¹⁰⁰

¹⁰³ Article 1, Convention No. 182, on Worst Forms of Child Labour, 1999.

¹⁰⁴ Reynaert, Didier, Maria Bouverne-de-Bie, and Stijn Vandeveld. "A review of children's rights literature since the adoption of the United Nations Convention on the Rights of the Child." *Childhood* 16.4, 2009: 518-534.

¹⁰⁵ White. *Childhood*. 1999.

¹⁰⁶ Ibid.¹⁰⁰

¹⁰⁷ Article 6, Convention No. 182 on worst Forms of Child Labour, 1999.

¹⁰⁸ Ibid.¹⁰⁰

¹⁰⁹ Hanson & Vandale. *International Children's Rights*. 2003.

¹¹⁰ Article 10, International Covenant on Economic, Social and Cultural Rights, 1966.

law.¹¹¹ The International Convention on Economic and Social and Cultural Rights (ICESCR) is more comprehensive in the provisions of child labour as compared to the Universal Declaration of Human Rights (UDHR) and The International Convention on Civil and Political Rights (ICCPR). UDHR provides that no one shall be held in slavery and servitude and shall be prohibited in all forms.¹¹² On the other hand the ICCPR provides that states have an obligation to ensure that no one is held under conditions of slavery and servitude this is an absolute right.¹¹³ As can be noticed there is no outright prohibition of the term 'child labour', however, certain forms of child labour can be interpreted to include under this provision.

4.3 International Labour Organization.

The International Labour Organization was created in 1919 to reflect the belief that universal peace can be achieved by social justice.¹¹⁴ The main aim of ILO's creation was the need for security, humanitarian, economic and political considerations.¹¹⁵ ILO's legal standards were agreed upon by governments, workers and employer's organizations.¹¹⁶ After a relatively long period ILO established Convention 138 Minimum Age Convention and Convention 182 Worst Forms of Child Labour Convention. Ratification of these two conventions is progressive and majority of the states have adopted the legislation.

Implementation of these two conventions indicates that states are formally acknowledging that child labour is unacceptable and taking initiative to end it. The table below is a global estimate of actions reported under both conventions.¹¹⁷

¹¹¹ Article 27, International Covenant on Economic, Social and Cultural Rights, 1966.

¹¹² Article 4, International Declaration on Human Rights, 1948.

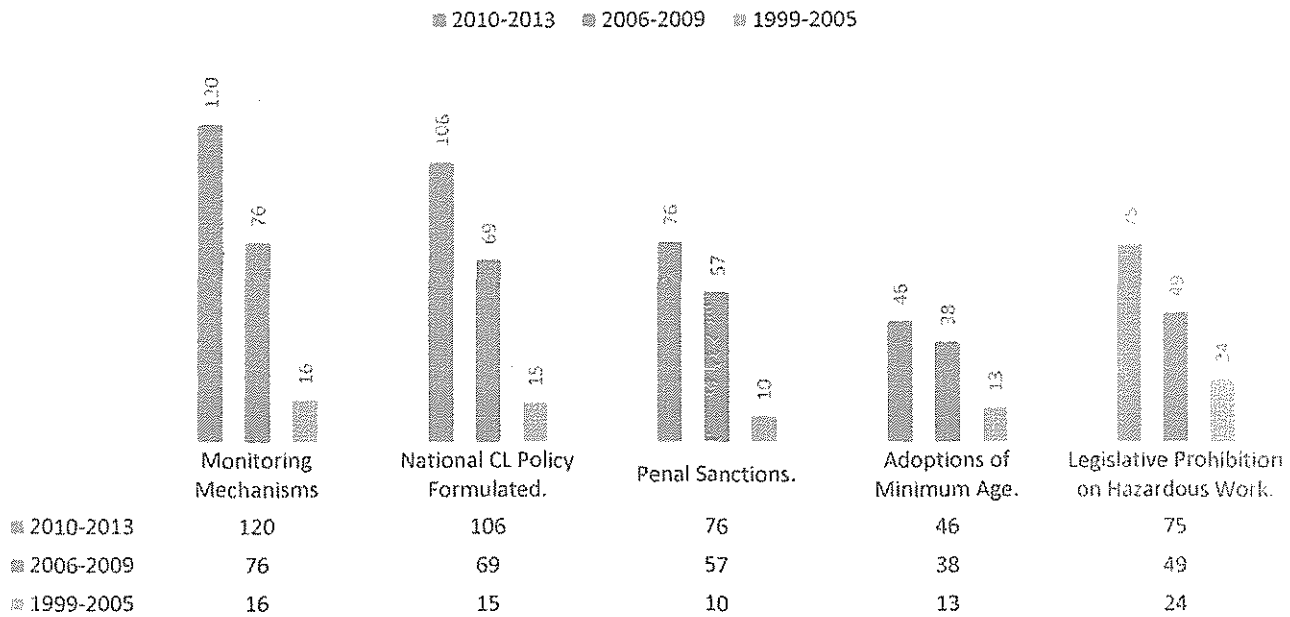
¹¹³ Article 8, International Covenant on Civil and Political Rights, 1973.

¹¹⁴ Available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>.

¹¹⁵ Ibid.¹¹⁴

¹¹⁶ ILO and IPEC. "Eliminating the Worst Forms of Child Labour". 2002. Page 16-17.

¹¹⁷ ILO. Making Progress against Child Labour, 2000-2009, 9.



The chart above is an indication of the positive impact the ratification of the ILO conventions has had on trying to eliminate child labour. The impact of good national legislation cannot be underestimated. Legislation sets forth specific rights and responsibilities for both individuals and the state. Over the recent years more states have taken up the initiative to curb child labour that has led to a drop of child labourers from 246 million to 186 million.¹¹⁸ The drop cannot entirely be attributed to the legislative framework in place but it has played a significant role.¹¹⁹

4.4 African Charter on the Rights and Welfare of a Child.

The ACRWC was entered into force in November 29, 1999 under the Organization of African Unity (OAU) which is currently the African Union (AU). ACRWC was aimed to serve as a blueprint for the observance of child rights across African countries. The African Children's charter similar to the Convention on the Rights of a Child defines a child to be any human being below the age of eighteen.¹²⁰

The African Children's Charter embodies the cardinal principle of the best interests of a child. It provides that all action concerning the rights of a child has to consider the best

¹¹⁸ Available at <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS221568/lang-en/index.htm>.

¹¹⁹ Ibid.¹¹⁷

¹²⁰ Article 2, African Charter on the Rights and Welfare of the Child, 1999.

interests of a child.¹²¹ In any judicial proceeding affecting a child who is able of communicating an opportunity shall be provided for the child to air his or her views.¹²² Article 4.1 vaguely defines the term 'best interests of a child' which give lee way to varied state interpretation. This can lead to states interpreting the charter in a manner detrimental to the child. Article 4.2 on the other hand does not cater for a child who cannot communicate this is discriminatory for children who have physical impairments or those who cannot communicate due to age.

4.4.1 Implementation of ACRWC.

The ACRWC has been in force for twenty-six years now with 47 countries ratifying the charter out of 54 countries in Africa. State parties have an obligation to recognize the rights under the charter and take constitutional steps to ensure measures have been taken to implement the provisions of the charter.¹²³ The Charter sets up the African Committee of Experts on the Rights and Welfare of the Child hereinafter known as the Committee.¹²⁴ It has a mandate to promote and protect the rights enshrined in the charter, monitor the implementation of the charter and interpret provisions of charter at the request of the state party.¹²⁵

The ACERWC tracks the implementation of the charter by the state reports from state parties. The ACERWC is empowered to receive and examine the reports submitted by State parties on the measures they have adopted to give effect to the provisions of the Charter as well as the progress achieved in the exercise of the rights recognized.¹²⁶ State parties are required to submit reports two years after the committee starts its work and every three years thereafter.

Kenya has submitted an initial and subsequent report on the measures it has taken to ensure the implementation of the charter. The report entails the general measures undertaken by various state ministries, non-state organizations and children institution

¹²¹ Ibid.⁸⁴

¹²² Ibid.¹¹⁹

¹²³ Article 1.1, African Charter on the Rights and the Welfare of the Child, 1999.

¹²⁴ Article 32, African Charter on the Rights and the Welfare of the Child, 1999.

¹²⁵ Article 42, African Charter on the Rights and Welfare of the Child, 1999.

¹²⁶ Available at <http://www.ihrda.org/515-2>.

to ensure measures have been put in place to protect the rights of the child. Some of the measures listed include the legislative framework put in place that is the Children's Act and setting up policies like the National Action Plan for Children. It has also increased the budget allocated to the children policy by approximately thirty-nine million in the financial year 2011/2012.¹²⁷

4.5 Conclusion.

On assessment of both National and International legislation it is evident the impact that legislative mechanism have to curb child labour. There has been positive progress from the drop of the number of child labourers globally. Our domestic legislation has shown efforts to implement both ILO provisions and ACRWC. Labour Law enforcement mechanisms and criminal law mechanisms have not been effective as it should be. Effective enforcement mechanisms would lead to more progress.

¹²⁷ State Party Report Kenya, (2013). Report to the African Union on the Implementation of ACRWC.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.0 Introduction.

As highlighted so far the legal framework governing child labour has been progressive and has been able to curb child labour. However, child labour continues to be a problem in Kenya and other parts of Africa. There is need to analyse what more can be done to ensure that the number of children engaged in child labour progressively declines.

This chapter will thus entails the recommendations and conclusion to this study. As already discussed in the previous chapter Kenya has taken various compliance steps to ensure that the domestic laws accommodate international labour laws. This chapter will give further remarks on what can be done to fill in gaps in the legal framework and recommendations on the formulation of a child centered policy on the eradication of child labour.

5.1 Reforms and Recommendations.

5.1.1 Eliminating Child Labour in Kenya.

The complete eradication of child labour needs a critical evaluation of some of the steps currently being taken by the institutions and the enforcement of new mechanisms to ensure effective eradication. One of the steps already taken is the ratification of ILO Convention 182 on the Worst forms of Child Labour and ILO convention 138 the Minimum Age Convention. The domestic laws that have ensured implementation of the ILO convention 182 under the Employment Act that outlines the worst forms of child labour.¹²⁸ Implementation of ILO Convention 138 is evident in the Employment Act that outlines the minimum age for admission to employment is sixteen years.¹²⁹ Below are some of the recommendations that can be implemented;

- i. Fulfilling obligations under the CRC. The CRC Committee has stated that there is a need to improve data collection to get a full view of the child labour situation in

¹²⁸ Section 53, Employment Act (Revision, 2012).

¹²⁹ Section 57, Employment Act (Revision, 2012)

the country. This will allow a country to assess what measures still need to be taken to eliminate child labour in all its forms. The CRC is concerned about the enforcement mechanism, and has pinpointed the lacking of "coordination and collaboration among government agencies in data collection and the inadequate technical capabilities for data collection, analysis, and reporting which are significant in order to obtain a sufficient enforcement of the legislation".¹³⁰ The ILO has communicated that the enforcement procedure is on the right track, but one of the major concerns is that penalties should be imposed in practice, to be able to effectively enforce the legislation.¹³¹

- ii. Labour inspection is a tool that can be used in the eradication of child labour in the country. The labour inspection system is under the Occupational Safety and Health Act¹³² which provides for the Occupational Safety, Health and Injury Benefits Authority (OSHIBA).¹³³ The authority has a mandate to implement the act, improve and ensure health and safety and good working conditions for the employers.¹³⁴ Labour inspectors have the power to inspect and enter into premises at any time without any notice to the employer.¹³⁵ Such inspections would check on the working conditions of the employees and if any safety precautions have been taken up to ensure that no harm is being inflicted on the employee. Labour inspection would confirm that employees are not under the age of sixteen and those employed between ages sixteen and eighteen do not perform worst forms of child labour. Labour inspections should aim to target every sector.
- iii. Trade unions are an important tool that can be used for the eradication of child labour in the country. Trade unions are very influential and active in various issues affecting employees throughout the state and have interconnected goals

¹³⁰ UN Committee on the Rights of the Child (CRC), "Consideration of reports submitted by States parties under Article 44 of the Convention, 2006.

¹³¹ UN Committee on the Rights of the Child (CRC), "Consideration of reports submitted by States parties under Article 44 of the Convention, 2006.

¹³² Occupational Health and Safety Act, No. 15, 2007.

¹³³ Available at <http://www.mywage.org/kenya/home/labour-laws/health-and-safety-at-work>.

¹³⁴ Available at <http://www.labour.go.ke>.

¹³⁵ Section 32, Occupational Health and Safety Act, No. 15, 2007.

to ensure the eradication of child labour. Child labour is a trade union issue because it is a violation of human rights and a cheap source of labour for employers among other reasons. Trade unions can support the cause by coming up with a trade union policy against child labour.¹³⁶ The policy should cut across all sectors in the economy. The policy should oppose all forms of child labour and uphold children's right such right to education and the minimum age of work to comply with ILO provisions.¹³⁷ The government should ensure that this initiative is well funded in order to achieve its mandate.

- iv. Legal awareness and literacy would be important to ensure the elimination of child labour. There is need to reach out to areas most prone to child labour and areas with a high number of vulnerable children. Education on the effects both physical and psychological would deter parents from engaging children in any hazardous activity.
- v. There is also need for safe-reporting mechanisms to ensure that citizens are able to inform the authorities on any suspicious activity if an employer engages a child in any of the worst forms of child labour.
- vi. The vulnerable children also need protection due to their vulnerability they are prone to perform any kind of work to ensure that their families can have basic needs. This can be regulated by taking up measures to eradicate poverty and prevalence of HIV which leaves children as orphans. Eradication of poverty would reduce the number of vulnerable children throughout the country and allow them a chance to education.
- vii. Vocational training can be used as a means to deter children from child labour. Vocational training is an educational service aimed at equipping a person with skills to make him more sufficient. Vocational training can deter child labour by enabling children to access basic needs, rehabilitation of children who have need support after being exposed to hazardous work.¹³⁸ It can also introduce children

¹³⁶ ILO. Trade Unions and Child Labour, a Tool for Action, 2016: page 24.

¹³⁷ ILO. Trade Unions and Child Labour, a Tool for Action, 2016: page 28.

¹³⁸ Pius, M. Addressing Child Labour through Vocational Training, Issue No. 6, 2007, page 4.

to income-generating activities that can help them assist their families (Pius, 2007).¹³⁹

- viii. There is also need for policy guidelines on what constitutes light work. This policy will provide a list of work for children between the age of thirteen and sixteen. Light work can constitute non-hazardous work which can allow children to learn the roles they are expected to do in adulthood.

5.2 Development of a Child Centered Policy.

This section of the chapter entails the need of developing a policy that promotes the best interests of working children. Working children in this context would mean children who have attained the age of sixteen and are not performing work that does not entail worst forms of child labour. A child-centered policy will take into account the opinions of a child before making any laws that may affect them.

Various factors have to be taken into consideration before coming up with the policy. This approach will entail how the child experiences the work, appropriateness of the work and the interventions in work taking into account the effects the work may have on the child.¹⁴⁰ There is need to respect children and evaluate their potential and individuality this will allow them to effectively communicate their opinions on the basis of what is best for them.

A child-centered policy would entail understanding the impact of work in children's lives and assessing the impact of this work on both a physical and psychological basis. Understanding work in children's lives would allow one to be aware of how work relates to their personal lives. Children may view work as a learning experience and a chance to help out in the family probably due to poverty affecting them. Assessing impact of work on children must be done both positive and negative effects. Correct data must be analyzed and negative assumptions of work should not be blindly drawn. One of the positive impacts is the increased levels of responsibility a child acquires through work this is essential for the child's development and survival.

¹³⁹ Ibid.¹³⁶

¹⁴⁰ Myers, B. Promoting the Best Interest of Working Children, US Educational Research Center. 1998.

A child centered policy can be guided by various principles. Any action done by the government should be based on accurate data on children's work and the impact on their lives. The data should include life situation of children, effects of work on children and how the work they do affects their personal lives. Policies put in place should ensure that they leave the child better off. Interventions put in place would ensure that they work they engage in is safe. Children must be involved in the policy-making procedure, under the CRC opinions of children should be considered in matters affecting them. The policy implemented should be regularly monitored to ensure that it has achieved its objectives.

5.3 Conclusion.

This thesis has sought to evaluate the main areas the assessment of national and international framework governing child labour and the development of a child-centered policy to ensure the best-interests of a child is safeguarded. The National framework has indicated that it has complied with its obligations under the ratified instruments. The state has taken up the initiative to enforce the Children's act to cater for the welfare of the child and the Employment Act to cater for the welfare of employers and employees. In conclusion the National framework is not conclusively comprehensive on all factors affecting children and it needs to be addressed.

Most countries have ratified the ILO convention 138 and ILO convention 182. This is very progressive and data indicates that there has been a significant drop in the number of child labourers. However, some of the provisions are ambiguous and allow room for misinterpretation. Some of the provisions give a wide discretion to state parties when it comes to the definition of some terms. The ACRWC has also taken positive measures to ensure the implementation of the ACRWC. State parties have been able to adhere to their requirements under the charter by submitting state reports on the steps undertaken to implement the charter.

The development of a child centered policy will take into account the voice of the child. It will be able to factor in conclusively the type of work done by the child and how it affects the child. Effects of work on children both physical and psychological must be

assessed conclusively and empirical data collected paying to both the positive and negative impact of work on children's lives. Child-centered policy upon monitoring will be able to indicate effectiveness due to the fact that children affected by the policy would be able to air their opinion.

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