

HEALTH AND SAFETY LABOUR RIGHTS IN
KENYA: A CASE STUDY OF THE EXPORT
PROCESSING ZONE (EPZ)

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This Thesis is submitted in partial fulfilment of the requirements for Degree of Master of Laws in the Faculty of Law, University of Nairobi.


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Nairobi

DECLARATION

I, **BONIFACE PIUS MUSEMBI**, do hereby declare that this is my original work and it has not been submitted and is not currently being submitted for a degree in any other University.

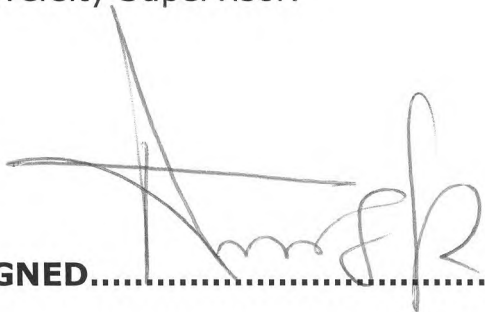
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This Thesis is submitted for examination with my approval as University Supervisor.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

The Export Processing Zones (EPZs) have been a sure way of attracting foreign direct investment in the developing countries like Kenya. However, EPZs are a real threat to human rights and more so those of workers employed in the EPZ factories. This study seeks to demonstrate how the health and safety labour rights of workers at the Kenyan EPZs have been threatened. This threat persists even though there exists checks and balances under international and national laws that govern matters of human rights and labour laws.

Labour is a form of work, and indeed the very basis of man's existence. It distinguishes him from other animals and he cannot survive unless he eats, has clothing, shelter and all other natural needs.¹ Labour Laws can be defined simply as "those general principles, which govern the relationship existing between one who sells personal labour and another who buys such labour. It is the same thing as saying that labour laws generally govern the relationship between an employee and an employer".²

At the Kenyan EPZs there is lack of observance of labour laws and basic human rights. This goes against the spirit of international law, to which Kenya is a signatory. There is also a deliberate breach of the national laws governing matters of health and safety rights of workers.

The health and safety rights of workers in the Kenyan EPZs under breach include among others; denial of maternity and sick leave for women workers, compulsory overtime hence, overworking workers beyond the statutory working hours, working under environmentally unhealthy conditions, working in unventilated halls, slippery floors due wetness and lack of protective clothing/gear. Other breaches include; failure to secure transmission machines and dangerous parts, lack of training and supervision of inexperienced workers, failure to provide health and safety awareness programmes for workers and failure to provide reasonable accommodation facilities or allowances besides the normal wages to afford reasonable housing facilities. In addition, women workers are subjected to mental, physical and sexual harassment by their supervisors exposing them to stress related sicknesses, injuries and danger of acquiring sexually transmitted diseases including AIDS. There is also failure by management to allow medical officers to inspect the factory facilities, workmen compensation schemes for injured workers are poor and employees are denied the right to form trade unions. This curtails the very fundamental right of freedom of association and the right to collective bargaining hence, denying workers the right to champion their labour rights including those of health and safety.

All human beings are born free and equal in dignity and rights.³ The labour rights enumerated under the Universal Declaration of Human Rights include among others: the right not to be held in slavery or servitude - slavery and slave trade are prohibited in all their forms, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right to an effective remedy by a

competent national tribunal for acts of violation of rights granted by the constitution or by law.⁴

In recognition of these facts the United Nations adopted the International Bill of Human Rights, a Universal Declaration of Human Rights in 1948 in an effort to consolidate world peace towards the liberation of individuals from the unjustified oppression and constraint to which they are often subjected.

The universal Declaration of Human Rights touches on the core rights of workers in matters of health and safety. It accords everyone the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. It also guarantees everyone the right to a standard of living that is adequate for health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services. The rights to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control are also enshrined in the declaration.⁵

The right to work, free choice of employment, just and favourable conditions of work and protection against unemployment are among the labour rights provided under the International Bill of Human Rights. Everyone, without discrimination, has a right to equal pay for equal work. Further, everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone also has the right to form and join trade unions for protection of his interests.⁶

The Universal Declaration of Human rights makes these rights a common standard of achievement for all peoples and nations. Every individual and every organ of society is expected to keep this Declaration constantly in mind, to strive to teach, educate and promote respect for these rights and freedoms and progressive measures, national and international, to secure their universal and effective recognition and observance. This obligation is to both the peoples of member States of the United Nations themselves and among peoples of territories under their jurisdictions.⁷

Kenya, which is a member of the UN is bound to observe these universal rights, and has developed industrial relations through legislative control and the industrial relations machinery.

This study points to the fact that, international and national laws guaranteeing labour rights notwithstanding, employers in the Kenyan EPZs continue to infringe the rights of workers in matters of health and safety without impunity.

Chapter one of this study makes an introduction to the study, gives a background to the problem, the objective of the study, tested hypotheses, the research question, the conceptual framework, literature review of the study, limitations of the study, research methodology and chapter breakdown.

In chapter two the study introduces the international labour laws and standards as well as the international instruments that deal with matters of health and safety rights. This chapter also gives

consideration to the national labour laws and the labour standards as they relate to health and safety of workers. A few case laws on matters of health and safety of workers and the national task force report on labour laws have been discussed in this chapter.

Chapter three of this study has discussed at length the health and safety labour standards practised at the Kenyan EPZs, the Export Processing Zones Act Chapter 517 Laws of Kenya and generally discussed globalisation and the EPZs.

Chapter four dealt with the recommendations and conclusion of the study.

1.2 Background to the Problem

Export Processing Zones (EPZs) are special geographic areas, usually at or near ports or borders, where the normal rules regarding foreign investors are relaxed by host governments.⁸

As a general rule, products entering and leaving EPZs are exempt from all import and export taxes. Corporate and other taxes and licence fees are also waived for firms operating in the zones. Labour unions are not allowed and even existing labour laws are not enforced, including, sometimes, the minimum wage laws. EPZs often attract foreign companies by offering a 'tax holiday', which suspends all corporate taxes for several years.⁹

In Kenya, EPZs were established in 1990 by an Act of Parliament called the Export Processing Zones Act Chapter 517 of the Laws of

Kenya. The goal of establishing EPZs was to promote export-oriented industrial investment within designated free zones, generate jobs, technology transfer, development of backward linkages, and diversification of export products and markets. The Export Processing Zones Authority, which was established by the Export Processing Zones Act Chapter 517 Laws of Kenya, manages the sector. The Export Processing Zones Authority seeks to attract investors by offering fiscal and administrative incentives.¹⁰

The Export Processing Zones Authority seems to be primarily concerned with ensuring investors' comfort rather than the upholding of workers rights. It has a labour relation's office, which attempts to address employment issues in the EPZs. The labour relation's aspect of the Export Processing Zones Authority is not part of the duties expressly given to it, hence the tendency to overlook industrial disputes in the sector. Labour issues are largely ignored but are subsumed in the provisions of the Export Processing Zones Act Chapter 517 Laws of Kenya, most of which deals with the economic well being of the investor as well as incentives to encourage investment in the EPZs.¹¹

The Export Processing Zones Act Chapter 517 of the laws of Kenya is silent on the issue of health and safety rights of workers in the EPZs. The only hint of the government's interest in the workers appears in Regulations 5 and 7 of the said Act. These regulations require companies applying for licences to operate in the EPZs to provide information on the number of employees (both local and expatriates) that they expect to engage. Regulations 6, 9, 10, 11 and 12 also require EPZ operators to keep records of numbers and ranking of

employees. These companies are also required to make certain returns to the EPZ Authority.¹²

The Constitution of Kenya (though not directly dealing with labour laws) and various Acts of Parliament including the Employment Act Chapter 226 Laws of Kenya, Regulations of Wages and Conditions of Employment Act Chapter 229 Laws of Kenya, Trade Unions Act Chapter 223 Laws of Kenya, the Trade Disputes Act Chapter 234 Laws of Kenya, the Industrial Training Act Chapter 237 Laws of Kenya and the Workmen's Compensation Act Chapter 236 Laws of Kenya do govern general employment relationships in Kenya.¹³

This study therefore endeavoured to establish whether health and safety rights of workers at the Kenya EPZs have been upheld according to international and national labour standards.

1.3 The objectives of the research

Protection of workers against sickness, disease and injury arising out of employment is one of the tasks assigned to International Labour Organisation (ILO) under its constitution.¹⁴ This study will critically examine if health and safety labour rights of workers at the EPZs in Kenya are upheld as per the ILO values and other international standards. These standards include the universal declaration of human rights and the various ILO conventions governing matters of health and safety.

This study further endeavoured to establish whether the health and safety labour rights of workers are upheld at the EPZs as per the

national standards provided for in the various laws of Kenya. These laws include; the Factories Act Chapter 514 Laws of Kenya, the Workmen Compensation Act Chapter 236 laws of Kenya, the Trade Unions Act Chapter 223 laws of Kenya, the Trade Disputes Act Chapter 234 and the Employment Act Chapter 226 laws of Kenya. Other standards discussed under this study are the Common Law Equity and Statutes of General Applications and case laws determined by the High Court and the Court of Appeal.

1.4 Hypotheses

This study tested the following hypotheses:

- a) There is failure by factories at the Kenyan EPZs to provide workers with a healthy and safe working environment thereby exposing them to the risk of injuries and illnesses.
- b) Companies in Kenyan EPZs do not comply with international and national labour standards in matters of health and safety.

1.5 The research question

In this regard, the study sought to answer the following questions:

What health and safety risks do workers in the Kenyan EPZs face?

Do companies operating in the Kenyan EPZs comply with local and international labour laws governing health and safety rights of workers?

1.6 Conceptual framework

The study is based on the concept of alienation of labour. Karl Marx's theory regarding this concept is that political economy begins with the fact of private property. Political economy gives no explanation concerning the foundation of the division between labour and capital. Karl Marx's theory further states that the more wealth the labourer produces the poorer he becomes. The labourer becomes a cheaper commodity the more commodities he creates. The increase in value of the world of things rises in direct proportion to the decrease of value of human beings. Labour does not only produce commodities, it produces itself and the labourer as a commodity, and in relation to which it produces commodities.¹⁵

Karl Marx's concept of labourers being treated as a commodity is relevant in a world where free trade takes a fast lane in the name of globalisation. With multinational companies investing at the Export Processing Zones in Kenya the issue of labour rights arises. This study builds on international labour laws on health and safety. Using the concept of Karl Marx on the alienation of labour this study shall critically analyse the plight of workers vis-à-vis labour rights in the area of health and safety at the EPZ's in Kenya.

1.7 Literature review

This study considered the following literature:

Rose Janet Ayugi- Masinde, Lecturer, Faculty of Law University of Nairobi, "*A report on Labour Law Cases in Kenya*".¹⁶ The study makes

a general overview of labour laws in Kenya. Even though the study refers to labour case laws in Kenya and whether the ILO standards have been upheld, the study does not zero in on matters of health and safety rights leaving a gap in this area of labour rights. This study is geared towards filling this gap.

Dr. Migai Akech, Lecturer, Faculty of Law in the University of Nairobi, *Governing the International Market Trade, Multinational Corporations, and Social and Economic Rights*".¹⁷ This paper talks about social and economic rights as laying a foundation for global governance in general and international trade regulation in particular. The paper suggests that the lack of international regulation of multinational corporations' (MNCs) activities and the non regulation of foreign direct investments (FDI) operations in third world countries has led to human rights abuses and environmental harm. The paper however, does not concentrate on matters of labour rights, which have been severely mutilated while advancing the selfish whims of MNCs and the FDI operations in third world countries and in particular Kenya.¹⁸

This study dwells on the health and safety labour rights infringed upon at the Kenyan EPZs by the MNCs in the government's quest for the much-touted FDI in total disregard to the international and national labour standards and laws governing human rights.

A publication of the Faculty of Law, University of Nairobi, 1994 entitled, *"Law and Development in the Third World"*. This book articulates the views of scholars from diverse persuasions on matters concerning law and development in the third world. In his contribution, Mr. Yash Vyas wrote a paper entitled *"Government Regulation of*

Private Enterprise: Issues and Problems." In his contribution, Mr. Shem O. Ong'ondo has written an article entitled "*Foreign Investment and Development*". These two papers are relevant to this study. The study by Yash Vyas discusses the government role in relation to the economy while regulating private enterprises in a free-enterprise system. Concerning regulation of labour, the study quotes four types of regulation: minimum labour standards, protection of women and children, protection against industrial hazards and maximum hours and minimum wages.¹⁹ The study takes a general view that pressure is now being put on the governments in the third world to deregulate by the vested national and international private interests. The study does not focus on international and national standards in matters of health and safety where private enterprise is concerned.

On the other hand the study by Shem Ong'ondo on Foreign Investment and Development articulates the fact that foreign direct investment in an independent world is an economic activity that even the most developed countries cannot do without. The study further avers that for foreign investment to be of any use to the affected country it must be directed. While the study properly suggests that third world countries need foreign investment and elaborates on the best legal framework Kenya would need in order to attract FDI, the study does not mention the human rights and labour rights repercussions which come with FDI.

This study therefore looks at the specific health and safety regulations and standards the government needs to put in place to curb the adverse effects of FDI and private investors in general at the Kenyan EPZs.

The Kenya Human Rights Commission, a study material entitled "*Manufacture of Poverty*", The untold story of EPZs in Kenya.²⁰ This study highlighted the plight of women workers in the EPZs. It also highlighted the fact that if not carefully regulated, direct investment does have detrimental effects on the enjoyment of human rights. The study concentrates on the integral link between trade liberalisation and the enjoyment of human rights in general. It highlights the urgent need to improve the dialogue between human rights, trade, finance and environmental practitioners, and advocates greater consultation and activism to stem the rising tide of the manufacture of poverty in the EPZs.

While looking at how direct investment has had detrimental effects on enjoyment of human rights at the EPZ, one cannot avoid talking about which specific health and safety rights are infringed and what the local and international laws say about these rights. These have been mentioned only in passing in the said study.

This study identifies the specific health and safety labour rights that may be infringed upon in the Kenyan EPZs. The study also considers the local and international labour laws governing such rights.

Christopher McCrudden and Anne Davies have written an article on "*A Perspective on Trade and Labour Rights*".²¹ J. INT'S ECON.L. (2000). This study assumes conflicts between trade liberalisation and labour rights globally. The article looks at the extent to which there is a conflict between trade liberalisation and labour rights. The study

further investigates how major international institutions like the ILO and the WTO should respond in resolving such conflicts.

The study was relevant to this paper because it provided the international perspective on the impact of globalisation on labour laws.

ILO, *"Declaration on Fundamental Principles and Rights at Work."*²² Adopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work is an expression by governments, employers and workers organisations to uphold basic values – values that are vital to human social and economic lives.²³ This material deals with core labour rights at the international level. The declaration covers four areas: freedom of association and the right to collective bargaining, the elimination of forced and compulsory labour, the abolition of child labour and the elimination of discrimination at the work place.

The material was relevant to this study as it highlighted the international labour standards on matters of health and safety.

Oxfam GB has published a study entitled *"Hours of forced Overtime in One Week"*, *Respect Workers' Rights in the Sports Industry.*²⁴

This publication contains an analysis of the expansion of international trade and sportswear goods under the auspices of corporate giants such as Nike, Adidas, Rebook, and Puma. It further shows the way millions of workers especially women employed in this sector from China, Turkey, Indonesia and Bulgaria have had their labour rights infringed upon in the guise of trade and globalisation. The report asks fundamental questions about the global sportswear industry –

questions that go to the heart of debates on poverty, workers' rights, trade, and globalisation.

The relevance of this publication is that it provided information on how the labour rights of workers have been violated in the global sportswear industry.

As shown above, there are divers' studies and broad literature relating to labour laws in general at the work place in Kenya and internationally. However, there is inadequate literature that specifically addresses matters of health and safety rights of workers in the EPZs in Kenya. That is the focus of this study.

1.8 Limitations

The study confined itself to labour rights concerning matters of health and safety at the Kenyan Export Processing Zones (EPZs) factories in the Nairobi area.

1.9 Research Methodology

To fully address the issues raised the study used the following methodology:

- a) Library research,
- b) Internet services.

1.10 Chapter Breakdown

Chapter one of this study makes an introduction to the study, gives a background to the problem, the objective of the study, tested hypotheses, the research question, the conceptual framework, literature review of the study, limitations of the study, research methodology and chapter breakdown.

Chapter two introduces the international labour laws and standards and international instruments on matters of health and safety rights. This chapter also looks at the national labour laws and the labour standards on matters of health and safety of workers. The chapter also touches on matters of health and safety of workers. The national task force report on labour laws which has remained a private document until debated by parliament into law is also discussed in this chapter.

Chapter three of this study discusses at length the health and safety labour standards practised at the Kenyan EPZs, the Export Processing Zones Chapter 517 Laws of Kenya and generally discusses the issue of globalisation and the EPZs.

Chapter four deals with the recommendations and conclusion of the study.

CHAPTER TWO

HEALTH AND SAFETY LABOUR LAWS

2.1 Introduction

The International Labour Organisation (ILO) is the UN specialised agency that seeks the promotion of social justice and internationally recognises human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles, which brought the League of Nations into being, and it became the first specialised agency of the UN in 1946.

The ILO formulates international labour standards in form of Conventions and Recommendations setting minimum standards of basic labour rights: freedom of association, the right to organise, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues. It provides technical assistance primarily in the fields of: vocational training and vocational rehabilitation, employment policy, labour administration, working condition, management development, co-operatives, social security and labour statistics²⁵ and occupational safety and healthy.

2.2 The Law governing International Labour Laws

Introduction

Free trade and labour rights are not new. Rules to protect the rights of workers are some of the oldest in the world.²⁶ Following the First World War, the treaty of Versailles in 1919 established a framework for a "New World Order". Part of the package that emerged was a set of treaty provisions setting up the International Labour Organisation (ILO) under the League of Nations. The ILO was given a broad mandate: to establish international labour standards in form of Conventions, to persuade states to join these Conventions, and to resolve disputes concerning their implementations.²⁷

The Havana Charter setting up the International Trade Organisation linked labour standards and trade. Labour rights were given a further boost when they were included in the Universal Declaration of Human Rights of 1948.²⁸ They became part of a new enforcement bill of international Bill of Rights that the member states of the United Nations drafted. Kenya is a member of the United Nations hence it ascribes to the Universal Declaration of Human Rights.

Articles 24 and 25 of the International Bill of Human Rights depict the right to rest and leisure. The Bill provides for the limitation of working hours, periodic holidays with pay, the right to a standard of living adequate for health and well-being of a person and his family, including food, clothing, housing, medical care and necessary social services among other rights.²⁹

Other international Conventions dealing with labour rights include the United Nations Convention on the Elimination of all Forms of Discrimination against Women (1979) and The United Nations Convention on the Rights of the Child (1989).

2.2.1 International Labour Standards

The ILO is the source of international law that is embodied in its Conventions and Recommendations and documents that form the supervisory mechanisms responsible for the application of those international labour standards. The ILO's Conventions are international treaties, subject to ratification by ILO member states. Its Recommendations are non-binding instruments that typically deal with the same subject as Conventions.³⁰

The constitution of the ILO recognises that labour is not a commodity and affirms that all human beings irrespective of race, creed, or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, and of economic security and equal opportunity. Since its inception the main concern of the ILO has been the formation of International Labour Standards and the effective implementation of those standards.³¹

ILO supervisory mechanisms established under various articles of the ILO Constitution enforces the application of international labour standards. Under Article 19 member States are required to report at appropriate intervals on non-ratified Conventions and on Recommendations indicating the extent to which effect has been given or is proposed to be given to those instruments. Under Article 22,

reports are periodically requested from States that have ratified ILO Conventions.

The ILO objective is to promote strong social policies, democratise institutions, and promote the guarantee of fundamental principles and rights at work as part of maintaining the link between social progress and economic growth.

The ILO Declaration on Fundamental Principles and Rights at Work and its follow-up adopted by the International Labour Conference at its 86th Session, 18th June 1998, marked a renewed universal commitment amongst Members.

The aim of the Declaration is to attempt to reconcile the desire to stimulate national efforts to ensure that social progress goes hand in hand with economic progress and development. The Declaration is a promotional instrument and a reaffirmation by ILO's government, employer and worker constituents of central beliefs set out in the Organisation constitution.

The Declaration commits Member States to respect and promote principles and rights in four categories: freedom of association and effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and elimination of discrimination in respect of employment and occupation. These rights are universal. They apply to all people in all states regardless of the level of economic development. It recognises that economic growth alone is not enough to ensure equity, social progress and to eradicate poverty.³²

It is important to note that according to the ILO Declaration, all members, even if they have not ratified the conventions in question, have an obligation, arising from the very fact of membership in the organisation, to respect, to promote, and to realise, in good faith, and in accordance with the constitution, the principles concerning the fundamental rights which are the subject of those conventions.³³

Member States that have not ratified one or more of the core Conventions are asked each year to report on the status of the relevant rights and principles within their borders, noting impediments to ratification, and areas where assistance may be required.

Besides the ILO Declaration on the Fundamental Principles and Rights at Work several Conventions and Recommendations on Health and Safety of workers have been ratified and passed by member countries. Amongst these are: Convention C1 Hours of Work (Industry) Convention, 1919, Convention C3 Maternity Protection Convention, 1919, Convention 103 Maternity Convention, 1952, Recommendation 97 Protection of Workers' Health Recommendation, 1953, Convention C155 Occupational Safety and Health Convention, 1981, Recommendation R164 Occupational Safety and Health Recommendation, 1981, Convention C161 Occupational Health Convention, 1985, Convention C183 Maternity Protection Convention, 2000 and Convention C187 Promotion Framework for Occupational Safety and Health Convention, 2006.

The term **health** in relation to work indicates not only merely the absence of disease or infirmity; it also includes the physical and

mental elements affecting health and which are directly related to safety and hygiene at work.³⁴ The term **workers** cover all employed persons, including public employees.³⁵

These Conventions and Recommendations have put in place technical measures for control of risks to the Health of workers. As a measure it is a requirement of National laws or regulations to provide methods of preventing, reducing or eliminating risks to health in places of employment. It is also a requirement for the employer to take appropriate measures to ensure that general conditions prevailing in places of employment are such as to provide adequate protection of health of workers. In particular that:

- (a) dirt and refuse do not accumulate so as to cause risk of injury to health;
- (b) the floor space and height of workrooms are sufficient to prevent overcrowding of workers, or congestion owing to machinery, materials or products;
- (c) adequate and suitable lighting, natural or artificial, or both, is provided;
- (d) suitable atmospheric conditions are maintained so as to avoid insufficient air supply and movement, vitiated air, harmful draughts, sudden variations in temperature, and so far as is practical, excessive humidity, excessive heat or cold, and objectionable odours;
- (e) sufficient sanitary conveniences and washing facilities, and adequate supplies of wholesome drinking water, are provided in suitable places and properly maintained;

- (f) in cases where it is necessary for workers to change their clothing when commencing or ceasing work, changing rooms or other suitable facilities for the changing and storage of clothing are provided and properly maintained;
- (g) in cases where the workers are prohibited from consuming food or drink at their workplaces, there is on the premises suitable accommodation for taking meals, unless appropriate arrangements exist for the workers to take their meals elsewhere;
- (h) measures are taken to eliminate or reduce as far as possible noise and vibrations which constitute a danger to the health of workers;
- (i) provision is made for the storage under safe conditions of dangerous substances.³⁶

Other measures include providing workers with such clothing and equipment and other means of personal protection as may be necessary to shield them from the effects of harmful agents. Also ensuring that national laws or regulations contain special provisions concerning medical examinations in respect of workers employed in occupations involving special risks to their health.³⁷

The most recent ILO Convention on matters of Health and Safety of workers is Convention C187, Promotion Framework for Occupational Safety and Health Convention, 2006. The Convention was adopted on 15th June 2006. This Convention makes it mandatory for ILO members to promote a health and safe health-working environment by formulating a national policy and establishing, maintaining and progressively developing and periodically reviewing a national system for occupational safety and health.³⁸

The Maternity Protection Convention (Revised), 1952 and the Maternity Protection Recommendation, 1952 were meant to promote equality of all women in the workforce and health and safety of mother and Child and the development of the protection of maternity in national law and practice.

Convention 183 Maternity Protection Convention, 2000 which was adopted by the ILO on 15th June 2006, in addition to the Maternity Protection Convention and Recommendation of 1952 put into account other provisions of international Conventions and Declarations. These include the Universal Declaration of Human Rights (1948), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979), the United Nations Convention on the Rights of the Child (1989), the Beijing Declaration and Platform for Action (1995), the ILO's Declaration On Equality of Opportunity and Treatment of Women Workers (1975), the ILO's Declaration on Fundamental Principles and Rights at Work (1998), as well as the international labour Conventions and Recommendations aimed at ensuring equality of opportunity and treatment for men and women workers, in particular the Convention concerning Workers with Family Responsibilities, 1991.³⁹

The Convention provides that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or child. It further stipulates that a pregnant woman shall be entitled to a period of maternity leave of not less than 14 weeks.⁴⁰

Today, 195 ILO conventions have been adopted by members, providing an array of protection to workers world-wide. These range from fundamental basic rights such as freedom of association, the right to organise, collective bargaining, abolition of forced labour, equal opportunities and treatment, outlawing of child labour, maternity protection and health and safety regulations. Most of these international standards have been translated into national legislation. Inherent in these laws is the obligation upon governments to adopt mechanisms to ensure that workers are protected, to establish trade unions to protect and defend their interests, and to provide means of challenging breaches and gaining reparations for wrong doing. However the gap between the latter and the practice is far too wide in *many countries*.⁴¹

Even though Kenya has not ratified most of the said ILO Conventions on Health and Safety rights, much of the provisions in ILO Conventions and Recommendations have been adopted in the Kenyan laws dealing with health and safety rights. The Factories Act Chapter 514 laws of Kenya and the Employment Act Chapter 226 laws of Kenya are some of the Acts that cover most of the ILO Convention provisions on Health and Safety rights.

However, it is important to note that Kenya has ratified other key ILO Conventions touching on core labour rights. These include:

- (a) Convention number 29 on forced labour.
- (b) Convention number 98 on the Right to organize and collective Bargaining of 1949.
- (c) Convention number 100 on equal remuneration of 1951.

- (d) Convention number 105 on Abolition of Forced Labour of 1957.
- (e) Convention number 111 on discrimination in employment and occupation of 1958.
- (f) Convention number on Minimum Age of 1973 (specifying 16years).
- (g) Convention number 182 on worst forms of child labour of 1999.⁴²

Kenya is a member of the United Nations and its specialised agency, the International Labour Organisation (ILO). Per sevastik (1997) argues that a State bound by international law has to carry out its international obligations irrespective of the contents of its constitutional legislation. A State's own constitution may indicate what measures have to be taken with regard to the implementation of its international obligations. **Monism** and **Dualism** are the terms used to describe the legal framework within which governments carry out their international obligations.⁴³

Kenya is essentially a dualist country, which means that treaties have to be translated or transformed into legislation before they can become operative, unlike in America where treaties become upon ratification, automatically part of American Law.⁴⁴ This creates a serious gap in implementation of international Conventions that Kenya has ratified or is bound under international plane to domesticate.

2.3 National Labour Standards

Laws governing Labour matters and more so on health and safety are derived from a number of sources in Kenya. These include:

2.3.1 The Constitution of Kenya

The Constitution is the supreme law of Kenya. Any other law that is inconsistent with it has no legal effect. The Constitution does not govern labour matters directly, but does provide a background against which labour relations and laws operate. This includes:⁴⁵

- (a) Providing for the power to create ministries and hence the appointment of the Ministry of Labour and Human Resources;
- (b) The power to make laws, hence the passing of labour laws by parliament;
- (c) Protection of fundamental rights and freedoms in the areas of life personal liberty, slavery, and forced labour, expressions association and movement, discrimination etc. Any other (labour) laws or practices must comply with these minimum requirements of the constitution.

The Constitution of Kenya is therefore the cardinal custodian of all human rights in the land. Matters of health and safety labour rights are guaranteed under Section 73 (1) and (2) of the Constitution, which provides that there shall be no forced labour, slavery or servitude. The right to form trade unions to champion labour rights of workers including health and safety rights is granted within Section 80 of the Constitution. This Section 80 provides for freedom of association and

collective bargaining. Section 82 of the Constitution offers everyone protection from discrimination on grounds of race, gender, sex, creed or tribe. This Section outlaws all forms of discrimination at the place of work.

There are other written laws made by Parliament or by bodies given authority to make these laws on behalf of Parliament (known as subsidiary legislation). However, it is important to note that any other (labour) laws or practices must comply with the said minimum requirements of the Constitution. Among these other laws, which deal with matters of health and safety, are:

2.3.2 The Factories Act Chapter 514 Laws of Kenya

The Factories Act Chapter 514 laws of Kenya have its date of commencement as 1st September 1951. It was established by an Act of Parliament to make provision for health, safety and welfare of persons employed in factories and other places, and matters incidental thereto and connected therewith. Even though it came into operation earlier, this Act is a replica of the ILO Recommendation 97 Protection of Workers' Health Recommendation, 1953.

In ensuring health and safety rights of workers, this Act recognises certain provisions, which have direct impact on labour rights of workers in the factories. Among the measures provided under this Act are:

- (a) A requirement for all factories and other places to maintain a healthy and safe working environment. It is mandatory that every

factory is kept in clean state free from any effluvia arising from any drain, sanitary convenience or benches and provides further generality on cleanliness.⁴⁶

- (b) Ensuring that factories are not, while work is carried on, is so crowded as to cause risk of injury to health of the persons employed therein.⁴⁷
- (c) Ensuring that factories have put in place effective and suitable provision for circulation of fresh air in each workroom and the adequate ventilation of the room.⁴⁸
- (d) Ensuring that every factory makes effective provision for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of the factory in which persons are working or passing.⁴⁹
- (e) A requirement that every factory provide sufficient and suitable sanitary conveniences for persons employed in the factory. Such facilities shall be maintained and kept clean.⁵⁰
- (f) Every factory is required to ensure that all transmission machinery and dangerous parts of any machinery are securely fenced for the safety of the employees.⁵¹
- (g) Ensuring need to protect workers from injuries. Every factory is prohibited from employing workers at any machine or in any process, being a machine or process liable to cause bodily injury. The worker must first be fully instructed as to the dangers likely to arise in connection therewith and precautions are observed. The worker must also receive sufficient training in work at the machines or in the process and work under adequate supervision by a person who has thorough knowledge and experience of the machine or process.⁵²

(h) Ensuring that workers employed in any process involving exposure to wet or any injurious or offensive substance shall be provided with protective clothing and appliances.⁵³

These laws are applicable to all factories across the board in Kenya with no exception.

2.3.3 The employment Act Chapter 226 Laws of Kenya

This is an Act of Parliament, which has its commencement date as 3rd May 1976. The Act is meant to consolidate, with amendments, the law relating to employment and for matters incidental thereto and connected therewith. The Act comprehensively covers matters of Labour rights including those of health and safety of workers. Among the key highlights are:

(a) The Act guarantees every worker at least one rest day in every period of seven days.⁵⁴ The enjoyment of this weekly rest may be postponed by agreement between the employee and the employer. But this cannot be done where the employee is below 16 years of age.⁵⁵

Employees have a right to leave and rest. There are several types of leave dealt with under the Employment Act and Regulation of Wages Act. Annual leave is the number of days an employee is permitted to rest from work for every 12 months of service. Compassionate leave is leave, which an employee needs to attend to such personal misfortunes or problems such as deaths, accidents or sickness, concerning relatives or friends. An employee who requires

compassionate leave may get it by prior arrangement with the employer. Any number of days he gets is deducted from his annual leave entitlement for the year.⁵⁶

An employee who spends all his annual leave on compassionate leave may be granted a further 5 days without pay. But all this is at the discretion of the employer who is not under any obligation to grant the leave.

These provisions are in line with the international standards under the International Bill of Human Rights.⁵⁷

(b) Every employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to his wages or salary, as will enable the employee to obtain reasonable accommodation.⁵⁸

This particular provision makes it the responsibility of the employer to ensure that the living conditions of the employee are reasonable by providing such accommodation or paying the employee such sufficient sum besides his salary. The living conditions of the worker are therefore protected to ensure that they are not so degrading as to cause health problems to the worker.

(c) The employer is required to provide a sufficient supply of wholesome water for the use of his workers at the place of employment and, as the case may be, within a reasonable distance

of any housing accommodation provided for the worker by the employer.⁵⁹

This section makes it mandatory for the employer to ensure that employees are supplied with a clean drinking water facility and enough water to clean them or bath with at the place of work and home.

This particular provision of the national standards is in line with the ILO Recommendation R97 on Protection of Workers' Health Recommendations, 1953, hence complying with the international labour standards.⁶⁰

(d) The Act ensures medical cover for Workmen whether the illness or injury was as a result of the employees' work or not. The treatment provided is to be at the cost of the employer unless provided free by the government.⁶¹

The employer is under a duty to ensure that medical attention is given when he notices that an employee is sick. It is also his duty to establish ways through which any sickness will be brought to his attention. The employer is required to report to the labour officer or the district commissioner any deaths of his employees. Any belongings or outstanding wages of the deceased should be delivered to whoever has legal rights over them.⁶²

(e) The Act makes it mandatory for the employer to always have ready at the work place a sufficient quantity of aspirin, quinine or some other recognised medicine for treatment of malaria, epsom

salts and a solution of recognised antiseptics and at least first-aid kits.⁶³

This ensures that first-aid facilities within the place of work are available to cater for the health and safety of the workmen.

2.3.4 The Workmen's Compensation Act Chapter 236 Laws of Kenya.

This is another Act of Parliament that sets national standards in matters of labour rights of health and safety. The Act has a commencement date of 1st October 1949.

Regarding matters of compensation, the Act requires that the employer defray reasonable expenses incurred by a workman as a result of an accident that would entitle the workman to compensation under the Act.⁶⁴

The Act further requires that the employer who employed a workman during the last twenty-four months compensate such a workman, provided a medical practitioner grant a certificate indicating that the workman is suffering from a scheduled disease causing disablement or a scheduled disease caused his death.⁶⁵

The term "**Workman**" has been defined under the Act as any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is express or implied, is oral or in writing, whether the

remuneration is calculated by time or by work done and whether by day, week, month or any longer period.⁶⁶

The concern is that the definition of the term "**workman**" excludes a person who is not a manual labourer, casual employee, a person who is given material to work in his own home not controlled by the employer, a member of the employee's family, members of the armed forces and any other class of persons excluded by the minister of labour. Compensation given to the workman or his dependants hinges on two considerations: the earnings of the workman and the level of incapacity caused by the injury.

In cases where death results from injury, the amount of compensation will depend on whether the employee leaves dependants. Payment may also be made for permanent total incapacity, which stops a person from engaging in any employment, which he was able to engage in before the accident. Permanent partial incapacity is that which reduces the earnings of a person compared to what he was earning at the time of the accident. The court will determine the percentages.⁶⁷

Temporary incapacity is the kind that lasts for only some time. The law assumes that it will disappear and will not affect the person forever. Where it occurs, compensation may be awarded in lump sum.

This provision of law for many years has left out many workers in Kenya who would have fallen within the definition of the term Workman and would therefore have benefited from the rights to compensation in the event of an accident or sickness as provided in the Act.

2.3.5 The Trade Unions Act Chapter 233 and the Trade Disputes Act Chapter 234 Laws of Kenya

Besides the Constitution, these two Acts are the main statutes that set national standards on the regulation of Trade Union activities and disputes that arise out of the employment relationship. Since employees' disputes are championed and resolved through the provision of these Acts, matters of Health and Safety rights of employees though not directly mentioned in the said Acts are pertinent under the two Acts.

(A) The Trade Union Act

There were about 41 registered Trade Unions in Kenya by the year 2005.⁶⁸ The objective of the Trade Union Act is to provide for:

- (a) Staff associations, employees associations and employee organisations,
- (b) For registration and control of trade unions.

Part 1 of the Act deals with preliminary issues mostly of interpretation of words. For example: '**employee organisation**' is defined as "any association or combination, whether temporary or permanent, of more than six employees who work for different employers, which has as its principal purpose the regulation of relations between such employees and their employers or between such employees amongst themselves".

"Lock-out" means "the closing of a place of employment or suspension of work, or the refusal by an employer to continue to

employ any number of persons employed by turn in consequence of a dispute, done not with the intention of finally determining employment but with a view to compelling those persons, or to aid another employer in compelling persons employed by him to accept terms or conditions of or affecting employment.

“Strike” means “the cessation’s of work by a body of persons employed, acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer or any person or body or persons employed or to aid other employees in compelling their employer, or any persons or body or persons employed, to accept or not to accept terms or conditions of or affecting employment”

“Trade disputes” means “any dispute or difference between employers and employees, or between employees and employees, connected with the employment or non-employment of the terms of the employment or the conditions of labour of any person”.

‘Trade Union’ means;

“(a) Any association or combination, whether temporary or permanent, or more than six persons or employees’ association or employee organisation not deemed to be a trade union; the principal objects of which are under it’s constitution the regulation of the relationship between employees and employers...

(b) “Any association or combination of trade unions”

Members of a trade Union must be above 18 years.⁶⁹

Part IX deals with picketing and intimidation

Any act done in contemplation or furtherance of a Trade dispute shall not be punishable as a conspiracy but does not affect the law relating to riot, unlawful assembly, breach of peace or any other offence against the government as established by law.⁷⁰

The minister has powers to make regulations to give effect to the principles and provision of the Act with regard to all matter stated in this Act.

(B) The Trade Dispute Act (CAP 234 Revised 1991)

This Act commenced on 8th June 1965. The objectives of the Act are to provide for the settlement of trade disputes generally, for the settlement of trade disputes in essential services, for the establishment of Bench of iniquity, for the establishment of standing individual court, to control and regulate strikes and lockouts and to make provisions regarding the collection of union duties.

The Kenya Industrial Courts operate under this Act. The types of Trade disputes that have come before the Industrial court have been both 'rights' and 'interest' disputes. Health and Safety labour matters that are brought before the Industrial court include: hours of work, sick leave, unfair labour practices, medical scheme, level of union representation and lunch break.⁷¹

The Act binds every employer to accept and implement Union check-off forms and recognise the union after it acquires simple majority of workforce in its members (i.e. 5%).⁷² By the year 2004, only eight

companies had recognised and accepted the establishment of trade unions in the Kenyan EPZs.⁷³

In brief the Act covers in detail an elaborate procedure of settling of industrial disputes.

2.3.6 Common Law Equity and Statutes of General Application:

(Inherited from United Kingdom) Common Law is essentially English Customary law as declared by the courts. Doctrines of equity are principles of justice developed by the courts to fill gaps in common law or create fairness where the common law was found to be unfair. Statutes of general application applying to citizens in general in UK also apply in Kenya (if passed before 12 August 1897).⁷⁴

2.3.7 The Industrial Court, The High Court of Kenya and the Court Appeal.

The industrial court deals with collective disputes. These matters can be referred to the ordinary courts at first instance. However, Administrative law provides for the judicial review of actions of administrative tribunals and other bodies, and this includes the Industrial Court. The Trade Disputes Act provides that the award of the Industrial Court is final as far as industrial matters brought before the court are concerned. Indeed various attempts to question the court awards have failed in the High court with the latter court upholding the Industrial Court's awards.

The High Court of Kenya and the Court of Appeal are the superior courts of record in Kenya.⁷⁵ Although the law does not provide for the right of appeal against administrative decisions, the superior courts still exercise a residual centralised power on matters such as vires, which are relevant to the legality of official decisions. The courts ensure that decisions made on political and other grounds conform to the law and that certain basic standards of fair procedure are observed. The courts will and can review decisions of industrial courts where an issue of excess or abuse of power or breach of requirements of natural justice (rule against bias and right to hearing) has been revised.

Herein below are some of the labour cases as decided by the High Court and Court of Appeal on matters of health and safety rights.

2.3.8 Case Laws

- 1) **High Court of Kenya at Nairobi, Civil Case Number 1695 of 1996. Evans Njoroge versus Affiliated Business Contracts Ltd.** (Judgement delivered on 24th February 1998 by G.P. Mbitio J.).

In this case the plaintiff by the suit filed on 11th July, 1996 against the defendant sought general and special damages for injuries suffered while on duty with the defendant on 18th August 1993. The plaintiff alleged that the defendant failed to provide a safe working environment. The court was satisfied that as a result of the defendant's failure to provide safe working conditions, the plaintiff's right hand was caught up in a machine used for straightening fish skin while he was putting fish skins into it. The machine up to a point

above the palm or wrist crushed the plaintiff's hand. The injury was so severe that when the plaintiff was taken to hospital the arm had to be amputated. Although the court did not refer to the ILO provisions it upheld the national standards of the Factories Act Chapter 514 Laws of Kenya by awarding damages to the plaintiff.

2) In the High Court of Kenya at Nakuru, Civil Appeal No. 38 of 1995. Sokoni Saw Mills Ltd. Verses Bernard Muthumbi Njenga. (Judgement delivered on 17th April 1998, by D.M. Rimita J.)

The appellant Sokoni Saw Mills Ltd. was the defendant in the lower court while the respondent was the plaintiff. The plaintiff sustained injuries on 27th February 1992, while operating a machine at the defendant's business premises. His hand got caught up in the machine and his middle finger was chopped off completely and others rendered useless. In the lower court the magistrate found the defendant 100% to blame for the accident and awarded him damages to the plaintiff. While the issue of how much damage was awarded was a subject of appeal, this study is concerned about the failure by the learned magistrate in the superior court to apportion liability.

The plaintiff was working with the defendants' saw machine when a piece of timber came in too fast. As he tried to finish it, his hand got caught in the machine because a pile of by-products that had been heaped behind him and had not been swept for a week did not give him enough room to move backwards in order to avoid the accident. The plaintiff blamed the defendant for the accident. The court ruled that it was the duty of employers to provide their servant with a safe

place of work. The employer should make the place as safe as the exercise of reasonable skill and care would permit. The court upheld the ruling of the trial magistrate and further added that the plaintiff's injury was evidently as a result of a defective system that did not adequately protect the plaintiff at the time of the operations.

3) Court of Appeal at Nairobi (Law, Lutta and Mustafa, JJ.A.) Civil Appeal No. 21 of 1970. (Appeal from the High Court of Kenya- Harris. J). Kimothia verses Bhamra Tyre Retreaders and Another. (Judgement on 19th November 1970)

The Appellant Kimothia, a workman in the Respondents Company suffered an unpleasant and painful accident at work when his right hand was caught in the rollers of a rubber-milling machine. As a result he lost index, middle and ring fingers, with consequently a substantial loss of function of the hand, affecting his loss of earning power. The court appeal upheld the ruling of the superior court that the machine was dangerous and inadequately fenced. However the court refused to enhance the award made in the superior court.⁷⁶

This shows the Court of Appeal zealous to uphold the rights of workers on matters of health and safety as enshrined in The Factories Act Chapter 514 Laws of Kenya.

4) High Court of Kenya at Nairobi. Tera Aduda and Others versus Registrar of Trade Unions. (Judgement of 16th June 1978).

On an application for registration of a trade union, the court held that regard may be put in considering whether an existing union provides sufficient representation in accordance with section 16(1) of the Trade Union Act Chapter 233 Laws of Kenya. This being in line to stated Government policy on the amalgamation of trade unions with view to having fewer, but stronger and viable unions.

In its ruling, the court held, “the true construction of section 16 of the Act, if the Registrar of Trade Unions is satisfied that one (or more) of the requirements of the section has not been complied with he may, in his discretion, refuse registration. In so refusing he is not required to give details of the reasons for his refusal”.⁷⁷

This ruling is completely out of tune with the rights of workers as provided under the international standards through the ILO provisions and the Universal Declaration of Human Rights, which Kenya ascribes to.

These case laws demonstrate that infringement of workers labour rights regarding matters of health and safety in Kenyan factories is common. There is therefore urgent need to review both national and international labour standards in this country.

2.3.9 Task Force To Review Labour Laws

The president of Kenya established a Task Force to review Labour Laws in Kenya in 2001. The objective or mandate of the Task Force

was to review all the laws relating to labour and make recommendations for reform. It was composed of all actors in the industrial relations field, Judges, unions, employers and state law office representatives.

The Task Force intends to make detailed recommendations for reform. However the details remain confidential until the official report is submitted.⁷⁸

Until the report is reduced into a bill, debated by parliament and accented by the president into law, the same remains of no consequence and does not wield any influence to the national standards on labour laws in Kenya.

CHAPTER THREE

EPZS IN KENYA AND THE PRACTICED LABUOR STANDARDS

3.1 Introduction

Through the 1960's the concept of EPZs remained largely geographical. In the early 1970s, Mauritius converted the EPZ concept from a geographical to administrative focus, with the EPZs virtually covering the entire Island.⁷⁹ The modern EPZ is an industrial park controlled by customs administration and/or an EPZ authority. Imports are duty and tax-free. The processed products are exported.⁸⁰

All over the developing world, different countries use diverse terms of the EPZ concept. There are twenty-three different terms at the moment used to outline the EPZ and the interrelated notion. However the desire for enhanced industrial growth in developing countries has led to the globalisation of the EPZ concept.⁸¹

Since the establishment of Export Zones in Kenya 1990, there are 31 gazetted zones and 54 operational export-oriented enterprises engaged in manufacturing or processing of among others, garments, cotton yarn, human and veterinary pharmaceuticals, sisal dartboards, torches and batteries, preserved flowers, and security documents. There were 26,447 Kenyans employed at the EPZs by December 2002.⁸²

Over eighty five percent of the companies operating at the Kenyan EPZs are foreign owned.⁸³ United States of America is the major target

market for industries involved in garment and apparel production in Kenya's EPZs taking a whopping 41%. COMESA region and Europe follow this with 38% and 21% respectively. Wal-Mart and K-Mart American companies are the major sourcing companies for the Kenyan textile products. Sourcing is done through several companies operating at the EPZs. When the said companies operating at the EPZs receive orders beyond their capacity, they sublet to an established network of other factories in the sector. This generates a lot of pressure to the workers to deliver hence, stepping down all labour laws at the garment production factories.⁸⁴

3.2 Infringement of Healthy and Safety Rights of workers at Kenyan EPZs.

In January 2003 workers in the Kenyan EPZs went on strike. They gave a list of seventeen grievances to the department of labour. These grievances included among others underpayment (below the minimum wages), trade union repression, excessive working hours, sexual harassment, and unrealistic production targets that led to unpaid overtime. The strike led to massive dismissals at the garment factories. The affected factories by the strikes included four of them located at the Ruaraka EPZs in Nairobi. These companies are; Indigo Garments EPZ Ltd., Kentex Apparels EPZ Ltd., Sahara Stitch EPZ Ltd. and Baraka Apparel EPZ (K) Ltd.⁸⁵ Three of said companies are foreign owned.⁸⁶

A stakeholders committee of representatives of employers, employees and the labour department, which was formed to discuss the grievances, stalled with no solution. The government declared the

strike illegal. Most of the companies hired new workers and got rid of the trade unionists and signalled to all workers that any demands on their part would not be honoured and any protests would be dealt with effectively. Many of the workers filed claims at the industrial court which are still pending to date. A Government order instructing all employers to reinstate their employees was ignored by the companies affected.⁸⁷

On 25th April 2005, the World Health Organisation (WHO) and the International Labour Organisation (ILO) marked the World Day for Safety and Health in order to stress the importance of a preventive safety culture world-wide. At that time, ILO estimated that the number of accidents and illnesses related to health and safety claimed more than 2 million lives annually. This is because of industrialisation in developing countries.⁸⁸

A new assessment of work place accidents and illnesses by the same organisation indicates that the risk of occupational diseases has become by far the most prevalent danger faced by people at their jobs. These account for 1.7 million work-related deaths annually outpacing fatal accidents by a factor of four. In addition to job-related deaths, ILO estimates that there are 268 million non-fatal workplace accidents each year, as a result of which victims miss at least three days of work, as well as 160 million new cases of work related illness.⁸⁹

A study by the UN Office for the Co-ordination of Humanitarian Affairs on "*KENYA: Focus on working conditions in EPZ companies*",⁹⁰ established the following:

An estimated 36,000 people toil under harsh conditions in Kenya's Export Processing Zones. Machine operators, helpers and quality controllers at the EPZ garment factories work while sitting or standing for between eight and 12 hours daily with only a 45 minute break in between in order to fulfil the quota set by supervisors. Often machines get hot and, without ventilation, the workers are constantly in a state of extreme discomfort. The story is similar in the food industry.

Workers especially pregnant women have collapsed or fallen seriously ill after long hours of hard work. Some workers work around the clock, with only short breaks in order to meet their targets. If a worker does not meet her target she is detained inside the factory until she works to complete her quota. Some women have been raped and beaten by their supervisors exposing them to diseases such as Aids. Furthermore workers are not allowed to form trade unions contrary to the provisions of the national and international laws governing observance of basic human rights.

Other reports indicate that at the Kenyan EPZs, maternity protection remains the most elusive of the rights of women workers. Some companies conduct pregnancy tests for new women employees. Those found to have conceived are sieved out. The companies never consider providing the employees who conceive while in employment with light duties as required in the prenatal stages. When the time comes for maternity leave, most of the companies do not provide pay during the leave.⁹¹ This is in total contravention of the national and international laws on labour standards in matters of health and safety of workers.⁹²

Other anecdotal evidence includes:

Lack of protection of workers against diseases, sicknesses and injury, lack of a compensation scheme for occupational injuries and illnesses and lack of reporting the deaths of workmen to the labour officer in the area. Certain factories do not provide workers with protective clothing and other gear and appliances when needed. Guarding and fencing off the transmission machines and dangerous parts of the machinery is not done. Workers complain that accommodation facilities and allowances besides the normal wages are not adequate. Finally, many companies in the EPZ do not provide adequate training and supervision to inexperienced workers contrary to the Factories Act.

3.3 The EPZ Act Chapter 517 Laws of Kenya and the Labour Rights

Much of the Health and Safety labour rights problems experienced at the EPZs in Kenya emanates from the way the EPZ Act was drafted and the clamour for globalisation.

3.3.1 Introduction:

The Export Processing Zones Authority is established by section 3 of the Export Processing Zones Act Chapter 517 laws of Kenya.

The commencement date of the Export Processing Zones Act Chapter 517 of the laws of Kenya is 23rd November 1990. It was established by an Act of Parliament to provide for the establishment of export processing zones and the Export Processing Zone Authority, to provide

for promotion and facilitation of export oriented investments and the development of an enabling environment for such investments.

The Act is divided into 8 parts. All the 8 parts and the provisions therein focus mainly on authority and investors. Part 1 deals with preliminary issues, part 2 the Export Processing Zone Authority, part 3 the Export Processing Zones, part 4 the licensing provisions, part 5, the Export Processing Zones Operators and Developers, part 6, Benefits to Export processing Zone Enterprises, while the final part contains miscellaneous provisions largely with reference to the minister in Charge of export processing zones.

Part 1 defines the term "**export processing zone**" as "a designated part of Kenya where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory but are duly restricted by controlled access and wherein the benefits provided under this Act apply".

Members of the Export Zones Authority consist of the following appointees:

- a) A chairman to be appointed by the president;
- b) A representative of Kenya Association of manufacturers;
- c) A representative of the National Chamber of Commerce and Industry;
- d) Four other members appointed by the minister from the private sector, who in his opinion, have experience and expertise in

manufacturing or export trade or commercial and financial matters;

- e) The Permanent Secretary to the Treasury;
- f) The Permanent Secretary to the ministry for the time being responsible for industry;
- g) The Governor of the Central Bank of Kenya;
- h) The Commissioner of Customs and Excise;
- i) The Commissioner of Lands;
- j) The managing director of the Investment Promotion Centre; and
- k) The Chief Executive of the Authority.⁹³

All the members of the Export Processing Zones Authority other than the representative of the Kenya Association of Manufacturers and a representative of the National Chamber of Commerce are government appointees. This means that the government's influence on the operation of the EPZs is immense. Any abuses of the workers rights as demonstrated in this study are therefore not properly checked.

The Export Processing Zones Act is designed specifically on the premise of encouraging investments in turn for benefits expected, including employment opportunities, technology transfers, backward linkages and diversification of exports.⁹⁴ The Act is silent on the rights of workers and totally ignores the welfare of the workers. The Act fails to provide for a suitable linkage between the Export Processing Zone's Authority and the Ministry of Labour.

The several Acts of parliament governing employment relations in Kenya, i.e. The Employment Act, Regulations of Wages and Conditions of Employment Act, Trade Union Act, The Trade Disputes Act, the

Industrial Training Act, and the Workmen Compensation Act, including the Constitution of Kenya apply at the EPZs, have no direct bearing on the Export Processing Zones.

It is important to note that the Factories Act Chapter 514 Laws of Kenya which govern in detail Health and Safety rights of workers as per international and national standards was for a long time exempted from application in the Export Processing Zones. This was done by virtue of ministerial exemption via a Kenya Gazette notice, which was reversed in 2003. The import of this exemption was that inspectors under the Factories Act were not permitted to inspect factories that were set up under the Export Processing Zones Act.⁹⁵ This meant that infringement of workers labour rights at the EPZs was executed without impunity. Such an act was in contravention to the Constitution of Kenya, as the supreme law in the land guaranteeing fundamental rights of all workers.

3.3.2 The EPZs and Globalisation

Beginning in the late 1960's, and accelerating into the 1990's, a fourth form of transnational economic activity was noted. Global factories began to emerge, sparked by revolution in communication, transportation, and information processing technology. Here the motivation for investment was not the domestic market, nor were the economic activities of these new Multinational Corporations (MNCs) resource or location specific. Rather, new manufacturing activities spread in less developed economies based upon their cheap labour, the near absence of environmental restrictions relating to production activities, the absence of effective unions and labour laws.

International law and institutions have played an extraordinary role in furthering the process of globalisation. Treaty Regimes such as that of the WTO/GATT and operation of international financial institutions such as World Bank and IMF have vigorously and effectively promoted the economic policies and processes associated with globalisation: liberalisation, privatisation, and creation of legal regimes facilitating commercial transactions and foreign investments.⁹⁶

Globalisation poses a number of challenges to human rights and, indeed, to the very assumption power and the role of state, for example on which human rights law is based. The paradigm of Universal Declaration of Human Rights is being steadily supplanted by a trade related, market-friendly, human rights paradigm. This paradigm reverses the notion that universal human rights are designed for the dignity and well being of human beings and insists, instead, upon the promotion and protection of the collective rights of global capital in ways that “justify” corporate well being and dignity over those human persons.⁹⁷

Globalisation is characterised by ambivalence, tensions and inconsistencies - especially if it is compared to positions adopted on questions of human rights, governance, trade and development, regulations in the industrialised countries.⁹⁸

While regulation is perceived as vital feature of the market in the industrialised countries, the international market is the most unencumbered. By far the most prominent illustration of this

inconsistency is treatment of multinational corporations (MNCs), which are the beneficiaries of trade liberalisation.⁹⁹

The dilated power and predominance of Multinational Corporations (MNCs) in global trade combined with pressure from donors and developed countries to adopt a free trade strategy have seen most developing countries shift their economic policies in an effort to attract Foreign Direct Investment (FDI).¹⁰⁰ Nearly one third of the total number of workers employed by Multinational Corporations (MNCs) in the less developed world was employed in the Multinational Corporations (MNCs) operating in the Export Processing Zones (EPZs).¹⁰¹ The Export Processing Zones (EPZs) continue to grow, sometimes very rapidly, for example, by 1995, over 600,000 workers were employed in such zones in Mexico.¹⁰² In Kenya, the EPZ sector had employed 22,447 Kenyans by 2002.¹⁰³

The incentive for nations to establish Export Processing Zones (EPZs) is that they often bring in badly needed foreign exchange, though this typically is limited to labour value added, that is, wage income, in production.

To accomplish the process, most of the developing countries have come up with 'incentives' not only to compete with each other, but to also create a 'conducive or enabling environment' for the investors. These incentives include tax holidays and exemptions, good infrastructure, subsidised services and relaxed labour laws.¹⁰⁴ The labour process under such arrangements is characterised by casual or informal working arrangements and flexible working hours to meet the needs of employers and the business cycle. Wages are pegged to

margins achieved by the business, hence the preference for a workforce that is dispensable. The end result is that the opportunity cost of offering these incentives shifts to become a social cost to the workers.¹⁰⁵ This is because most of the companies operating at the EPZs are privately owned and largely non-accountable, not only in developing but also in developed market economies.¹⁰⁶

The African Growth and Opportunity Act (AGOA) which was signed by the former USA president, Bill Clinton into law on May 18, 2000 as Title 1 of the Trade Development Act 2000 offers tangible incentives for African countries to continue their efforts to open their economies and build free markets.¹⁰⁷ AGOA provides reforming African countries with the most liberal access to the United States (U.S.) market available to any country or region with which the U.S. does not have a Free Trade Agreement. It supports U.S. business by encouraging reform of Africa's economic and commercial regimes, which will build stronger markets and more effective partners for U.S. On December 31, 2002, President Bush approved Kenya as one of the sub-Saharan countries eligible for tariff preferences under the AGOA Act.¹⁰⁸

Most of the U.S. owned garment-producing companies under the AGOA initiative operate at the Kenya EPZs. These companies include JAR Kenya Ltd. and Wild Life Works EPZ Ltd.¹⁰⁹

It is a requirement that under AGOA there should be protection of workers rights. However, AGOA does so without the mechanisms for effective enforcement and also an effective system of involving workers. This leave Kenyan EPZs worker at the mercy of the employer hence, the worker's labour rights are venerable for breach.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

This chapter outlines the summary of findings, conclusions, recommendations and suggestions for further research. The objective of this study was:

- (i) To examine if health and safety labour rights of workers at the Export Processing Zones (EPZs) in Kenya are upheld in reflection to the International Labour Organisations (ILO's) values and the Kenyan Laws governing the protection of such rights.
- (ii) To determine whether the health and safety labour rights of workers enshrined in the Export Processing Zones Act Chapter 517 Laws of Kenya, The Constitution of Kenya, Factories Act Chapter 514 Laws of Kenya, the Workmen Compensation Act Chapter 236 laws of Kenya The Trade Unions Act Chapter 223 laws of Kenya, and the Employment Act Chapter 226 laws of Kenya have been upheld or infringed against workers at the Export Processing Zones (EPZs).

The hypothesis put forward in this paper is that there is failure by factories at the EPZs to provide workers with a healthy and safe working environment thereby exposing them to the risk of injuries and illnesses.

It is also the hypothesis of this paper that companies in Kenyan EPZs do not comply with international and national labour standards in matters of health and safety.

4.2 CONCLUSIONS

The need to introduce the rights of workers in the Export Processing Zones Act Chapter 517 Laws of Kenya cannot be overemphasised. As stated in the introductory part of this paper, the Export Processing Zones Authority (which is established under the Export Processing Zone Act Chapter 517 Laws of Kenya) is primarily concerned with investors comfort and not workers rights. There is lack of proper representation of both private and public sector in the Export Zones Authority. The composition and appointment of members to the Export Zones Authority is purely a government affair.

Protection of workers against diseases, sickness and injury is poor. Not only does this contravene the provisions of the International Labour Organisations' establishing international labour standards on matters pertaining to health and safety of workers, it also offends the Universal Declaration of Human Rights Charter under the International Bill of Human Rights. It further contravenes the provisions of the Kenyan laws governing protection of employees from disease, sickness and injury. There is blatant infringement of Factories Act Chapter 514 laws of Kenya, the Employment Act Chapter 226 laws of Kenya and the Workmen Compensation Act Chapter 236 laws of Kenya.

Denying workers maternity leave and protection is a clear breach of the Universal Declaration of Human Rights Charter under the International Bill of Human Rights. The Kenyan laws have therefore been ineffective in protecting workers at the Export Processing Zones on matters of leave.

This study has established that there is lack of a compensation scheme for occupational injuries and illness at the Kenyan EPZs. Furthermore not all deaths of the workmen are reported to the labour officer in the area as required by law. The absence of the two provisions directly affects the health and safety rights of the workers at the Kenya EPZs and offends the provisions of the Workmen Compensation Act Chapter 236 Laws of Kenya.

There is inadequate provision of protective clothing and other gear and appliances and transmissions' machines and dangerous parts of the machinery are not secured or properly fenced. This breach leaves workers exposed to the danger of sustaining injuries and diseases in offence to Sections 22 and 23 of Chapter of the Factories Act Chapter 514 laws of Kenya.

Accommodation facilities and/or allowances beside the normal wages are not adequate. This breach is not only in contravention of the Universal Declaration of Human Rights Charter under the International Bill of Human Rights but it is also contrary to the provisions of Section 9 of the Employment Act Chapter 226 laws of Kenya.

The management of most of the companies at the Kenyan EPZs do not enforce laws pertaining to compulsory overtime of the workers. Employees are subjected to work over 45 hours a week. The practice is against Kenyan laws on the Regulation of Wages and Conditions of Employment Act Laws of Kenya. The stipulated working hours per week is 45 hours.

Training and supervision of inexperienced workers is inadequate. Failure to provide training exposes workers to danger of sustaining injuries. This contravenes Section 29 of the Factories Act Chapter 524 Laws of Kenya. It should also be noted that management in most of the EPZ companies do not allow the formation of trade unions. The absence of trade Unions curtails workers rights to freedom of association and the right to collective bargaining as enshrined in the Constitution of Kenya Section 80 and the Industrial Relations Charter. Employees are bound by Section 45 of the Trade and Dispute Act Chapter 234 Laws of Kenya to accept and implement check-of forms. To recognise a Union requires only a simple majority of 5% of the workforce membership. The absence of a union means that health and safety rights of workers are not properly articulated and effectively addressed at the Kenyan EPZs.

The infringement of workers labour rights regarding health and safety in the Export Processing Zones (EPZs) which offends both national laws and international labour standards is not a Kenyan problem alone but also an international one. A study done at a Bulgarian EPZ factory producing exclusively for Puma established that workers had suffered eye damage, varicose veins, back pain, dust allergies, respiratory diseases, and repetitive strain injuries caused by conditions in the factory. This was due to contaminated air, having to stand all day and long hours of work without sufficient rest, water or food. Due to exhaustion after overtime hours many women were found to have had miscarriages of pregnancies.¹¹⁰

In Indonesia, at an EPZ factory producing for Nike, supervisors were found to use stopwatches to count the minutes it takes a worker to

complete the task. Many workers were found to be getting sick because they had to stop themselves from going to the toilets because the targets were so high that they would not meet them if they took this break.¹¹¹

In addition to the two countries mentioned above a study done in China, Cambodia, Thailand and Turkey in an athletic apparel and footwear industry established labour rights infringement in terms of excessively long working hours, forced overtime, lack of job and wages security, poverty wages, denial of the right to unionise, poor health, exhaustion, mental stress, and a dysfunctional family life.¹¹²

The study above established that in Indonesia, (like in Kenya) whereas the law recognises trade union rights but within strong limitations, there was a lot of sanctioned government interference. There were protests and strike actions against the lengthy mediation procedures. Unionists face employer intimidation and unfair dismissal whereas protestors face police violence.

This study concludes that the labour law standards at the Kenyan EPZs need a comprehensive review.

4.3 RECOMMENDATIONS

It is apparent that employers at the Kenyan EPZs are not keeping a health and safe environment in the factories to protect workers from sicknesses and injuries. There is no proper compensation scheme for workers who suffer injuries and illness. Most workers at the EPZs are not provided with reasonable health and safety accommodation or reasonable house allowances. It is recommended that management should adhere to the provisions of the Employment Act Chapter 226 laws of Kenya.

It is recommended that workers should be provided with protective clothing. Transmission machines and dangerous parts of the machinery should be made secure. Workers should be provided with training and supervision of inexperienced workers should be adhered to.

The Kenyan government should streamline labour laws to address the plight of workers at the EPZs. This is by allowing medical officers to inspect the factory facilities. The government should also adopt mechanisms to ensure that workers are protected.

The Government should ensure that the Export Processing Zone Act Chapter 517 Laws of Kenya is amended and harmonised with other labour laws and the Constitution of Kenya to ensure that laws are provided for the establishment of trade unions to protect and defend workers interests at the EPZs. This would provide a means of challenging breaches and gaining reparations for any wrongdoing

caused to the workers through any breach of labour laws by their employers.

The government should put in place several committees to monitor regularly the health and safety standards of employees. These committees should comprise of management officials and representatives of workers in each of the factories. The committees should be given the mandate to make recommendations on how working conditions could be improved. The committees would also organise training programmes for all workers. This training would cover matters of health and safety and related issues and raise awareness on safety regulations at work place.

The government should ensure that factories at EPZs adhere to the existing laws and keep registers detailing cases of accidents at their premises. The Safety and Factory Inspectorate Department should intervene and ensure that the EPZ factories are safe enough for employees. Preventive safety measures should be the Departments priority. The government should ensure that at all times there are enough officers to do this and if the department is lacking in personnel then the government should outsource this activity to guarantee regular inspection of factories at the EPZs. In addition the Government should recruit and approve occupational safety and healthy service advisers and set up training institutions to train plant inspectors.

The government should strictly enforce the labour standards by taking to court factories not observing safety and health guidelines at the workplace. The Workmen's Compensation Act Chapter 238 Laws of

Kenya should be amended to ensure that cases relating to workers compensation that may arise from the breach of the Act on health and safety are tried speedily by way of declaratory suits.

Government should stop trading away workers' rights in law and in practice in the name of wooing foreign investors but should enforce national and international labour law standards in order to guarantee decent conditions of employment for all workers.

The public, civil society and workers should call upon investors at the EPZs to make serious commitments to workers' rights in their factories. They should insist that such investors adopt clear commitments to the internationally recognised labour standards and that national labour laws be respected. They should also demand that companies operating in the EPZs be transparent about their policies on labour practices and the impact of such policies on working conditions.

The investors at the EPZ should develop and implement credible labour practice policies which respect internationally recognised standards, including the right to a regular wage based on a regular working week that does not exceed 45 hours, humane regular working hours with no forced overtime, a safe and healthy workplace free from harassment, provide reasonable accommodation to the workers or remunerate them well to enable them afford decent accommodation and ensure legal employment with labour and social protection.

Finally, the Kenyan government should be encouraged to ratify all international Conventions and Covenants dealing with matters of labour rights on health and safety of workers.

This paper recommends that further research be carried out to ascertain the role courts could play in helping to curtail further infringement of health and safety labour rights in general at the Kenyan EPZs.

Further research should also be done to establish whether Ministry of Labour's compliance officers visit the factories and also determine and document the impact of such visits.

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