



UNIVERSITY OF NAIROBI
SCHOOL OF LAW

**ACCESS TO JUSTICE FOR KENYAN EMIGRANT WORKERS: THE PLIGHT OF
KENYAN DOMESTIC WORKERS IN SAUDI ARABIA**

BY

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G62/12030/2018

**A Dissertation Submitted for Examination in Partial Fulfilment of the
Requirements for Award of the Degree of Master of Laws (LLM)**

JUNE, 2021

DECLARATION

I, Benah Nicole Mukobi, hereby declare that this is my original work. It has not been presented for an award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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APPROVAL

This thesis, titled "*Access to Justice for Kenyan Emigrant Workers: The Plight of Kenyan Domestic Workers*," has been done under my supervision and submitted to the University of Nairobi, School of Law, for examination with my approval as the candidate's supervisor.

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Date: **JUNE 4, 2021.** _____

Supervisor: Dr. Elizabeth Muli

DEDICATION

This work is dedicated to all Kenyan Emigrant Domestic Workers who have suffered human rights abuse while working on Saudi Arabian soil. May it guide and inspire laws and regulations needed to bring these human rights violations to an end.

To my parents, Emmy Kageha and Ignatius Mukobi, who have propelled my academic journey, offered counsel tirelessly, and have been a great source of inspiration.

To my siblings Kristie, Maria, and Michael Mukobi for their light moments.

To Kevin Njau for perennially encouraging me to achieve my goals and having confidence in my capabilities.

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ABSTRACT

Economic migration the world over is a source of employment for both skilled and unskilled workers. The high unemployment rate causes migration in Kenya. Kenya has, over the years, witnessed an increase in domestic workers' emigration to Saudi Arabia in search of employment. This increase has also brought about an increased reporting of incidences of human rights abuse of Kenyan Emigrant Domestic Workers (KEDW). The plight of KEDW in Saudi Arabia has catapulted this study to assess the connection between access to justice and protection of rights. As Martin Luther King, Jr once said: 'Injustice anywhere is a threat to justice everywhere.'

The research aims to look at the plight of the workers by identifying the human rights abuses that they face, looking at the challenges in accessing access to justice, and by examining the laws safeguarding the right to access to justice. To achieve these objectives, the research employed the use of doctrinal research. It comprised of qualitative research methods. Key informant interviews and in-depth interviews were used. Lessons from other jurisdictions, like the Philippines, Indonesia, and Nepal, have been used to analyse how emigrant domestic workers can achieve access to justice. This research took a human rights perspective in looking at access to justice for KEDW.

The findings of this research affirmed the hypothesis that there exists a gap in legislation for KEDW since there is no specific law for emigrant domestic workers. In addition to this, the research found that Saudi Arabia is not a signatory to core international human rights conventions and laws on migration. Therefore, making enforcement of rights and access to justice for KEDW in Saudi Arabia difficult.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
CoK	Constitution of Kenya
EAIHM	East African Institute of Homecare Management
GCC	Gulf Cooperation Countries
ILO	International Labour Organization
IOM	International Organization for Migration
ITUC	International Trade Union Confederation
KDP	Kenya Diaspora Policy
KEDW	Kenya Emigrant Domestic Worker
KES	Kenya Shillings
KNCHR	Kenya National Commission on Human Rights
KSA	Kingdom of Saudi Arabia
KUDHEIHA	Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals, and Allied Workers
NEA	National Employment Authority
OHCHR	Office of the United Nations High Commissioner for Human Rights
SALL	Saudi Arabian Labour Laws
SDGs	Sustainable Development Goals
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly

OPERATIONAL DEFINITION OF TERMS

Domestic Work: This means work performed in, or for, a household or households¹; Domestic work is performed by a domestic worker. Domestic workers conduct their work in private homes, where the domestic worker performs various household tasks, such as cleaning, cooking, gardening, and caring for children or elderly people (the latter are also known as 'care workers').² Domestic work, for this research, is taken in the literal sense of work performed in private households by a domestic worker.

Domestic Worker: The term refers to any person engaged in domestic work within an employment relationship.³ Domestic work began in the globalization period where there was a mass entrance of women into the formal sector of the labour force; this stimulated the demand for the services of paid domestic workers.⁴ For a domestic worker, the job to be done has been described as atavistic, based largely on ascribed status, requires the performance of non-specialized, diffuse menial tasks, and based on particularistic rather than universalistic relations between employer and servant.⁵ To define the term domestic worker, we cannot be constrained to a particular set of diverse tasks, for they are not homogenous.⁶

ILO has restricted the definition of a domestic worker and work as one employed by and providing services for a private household.⁷ In this research, domestic workers are those who

¹ Decent Work for Domestic Workers, Convention 189, Recommendation 201 2011, art 1(a)).

² Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour' (2012) 34(1) Comparative Labour Law and Policy Journal, 137 <https://www.researchgate.net/publication/256028109_Human_Rights_for_Precarious_Workers_The_Legislative_Precariousness_of_Domestic_Labour> accessed 26 August 2019.

³ Domestic Workers Convention 2011 (DWC 2011), art1 (b).

⁴ Pierrette Hondagneu, 'Regulating the Unregulated? Domestic Workers' Social Networks' (1994) 41(1) Cambridge University Press.

⁵ ibid.

⁶ International Labour Office, 'Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection' [2013] Geneva ILO <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf> accessed 24 October 2019.

⁷ ibid.

have worked or are working in private homes. The research excludes those who work within domestic service.

Migrant/ Emigrant: The International Organization for Migration (IOM) defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence. The movement is regardless of; the person's legal status, if movement is voluntary or involuntary, what the causes for the movement are, and the length of stay.⁸ The definition of a migrant is what will be adopted when referring to an emigrant for the present study.

Emigration: Emigration can either be permanent or temporary.⁹ Temporary emigration constitutes movements in and out of the country.¹⁰ In contrast, permanent emigrants include citizens or immigrants who sever their residential ties in their country of origin and acquire permanent residency in another country.¹¹

This research focuses on temporary emigration. Temporary emigrants refer to those who are intending to depart Kenya to go to Saudi Arabia and come back or have returned from working in Saudi Arabia. The research will look at the injustices that temporary emigrants have faced in Saudi Arabia.

⁸ The United Nations, 'Migration' <<https://www.un.org/en/sections/issues-depth/migration/index.html>> accessed 25 August 2019.

⁹ Minister for Industry, 'Population and Family Estimation Methods at Statistics Canada' [2012] Statistics Canada, Demography Division, 58.

¹⁰ *ibid* 59.

¹¹ *ibid* 58-59.

LIST OF LAWS

NATIONAL LAWS

1. The Constitution of Kenya, 2010.
2. The Employment Act, 2007.
3. The Legal Aid Act No. 6 of 2016.
4. The Advocates Act CAP 16.
5. The Labour Institutions Act, 2007.

REGIONAL LAWS

1. African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

INTERNATIONAL LAWS

1. Convention Concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 05 September 2013) 2955 UNTS (Domestic Workers Convention).
2. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
3. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
4. Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 03 September 1981) 1249 UNTS 1 (CEDAW).
5. International Labour Conference, ILO Declaration of Fundamental Principles and Rights at Work and Annex (adopted 18 June 1998) 37 ILM 1233 (1998).
6. International Convention on the Elimination of all Forms of Racial Discrimination (adopted 07 March 1966, entered into force 4 January 1969) 660 UNTS 1.

7. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003)
2220 UNTS 3.

LIST OF CASES

1. Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs and International Relations & 4 others (2013) eKLR.
2. Dry Associates v Capital Markets Authority and Another (2011) eKLR.

CHAPTER ONE: GENERAL OVERVIEW

1.1 INTRODUCTION

Migration is a growing and complex issue. It is the exercise of one's freedom of movement, for everyone has the right to leave any country, including his own, and return to his country.¹²

Various factors influence emigration, and key drivers appear to be access to employment and education.¹³ Migration plays a vital role in the Kenyan economy. The Central Bank of Kenya (CBK) official statistics on diaspora remittances show an increase in Kenya's inward remittance inflows from its global diaspora population.¹⁴ Kenya's 12-month average inflows to August 2019 were USD 231.4 million, which was 8.9% higher than USD 212.5 million over the same period in 2018.¹⁵

In the global estimates on migrant workers, there were 230 million international migrants in the world in 2013.¹⁶ However, this number has since gone up in the global estimates of 2018 to 253 million international migrants in 2017.¹⁷ Of the 230 million migrants, 150 million were economically active.¹⁸ When we narrow it down to domestic work, the difference between migrants and non-migrants is much sharper.¹⁹ Further, in the global estimates, there were 67 million domestic workers in the world in 2013 and that over 11 million were international migrants.²⁰ Translating this into percentages means that as many as 7.7 percent of migrant

¹² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 13(2).

¹³ George Odipo, 'Migration in Kenya: a country profile 2018' (International Organization for Migration 2018) xviii <https://publications.iom.int/system/files/pdf/mp_kenya_2018.pdf> accessed 25 March 2020.

¹⁴ Central Bank of Kenya, Diaspora Remittances <<https://www.centralbank.go.ke/diaspora-remittances-2/>> accessed 29 November 2019.

¹⁵ *ibid.*

¹⁶ ILO, 'Global estimates on migrant workers- Results and methodology; Special focus on migrant domestic workers (International labour office Geneva 2015) 5 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_436343.pdf> accessed 27 March 2020.

¹⁷ ILO, 'Global estimates on migrant workers- Results and methodology' (International labour office Geneva 2017) 2nd edn 5 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_652001.pdf> accessed 19 November 2020 .

¹⁸ ILO (n 16) 5.

¹⁹ *ibid* 7.

²⁰ *ibid* 5.

workers are domestic workers compared with only 1.7 percent of non-migrant workers globally.²¹

Over the past years, labour demand in Gulf Countries, the largest non-Western migrant destination globally, has increased significantly.²² This demand for foreign labour in Gulf countries increases, as the Kafala sponsorship system continues to govern labour migration. The Kafala sponsorship system is a state policy used to organize, govern, and control the migrant population, which is characterized by restrictive labour and mobility rights, particularly for unskilled workers.²³ Some migrant domestic workers may be satisfied with their employers and working conditions; however, numerous studies have constantly reported high levels of exploitation and abuse by employers.²⁴

1.2 BACKGROUND

The emigration of Kenyans in large numbers is a relatively recent phenomenon.²⁵ The first two decades after independence, in 1963, few Kenyans emigrated and lived abroad.²⁶ Kenya, however, experienced deterioration in its economy in the 1980s which led to a shift in migration patterns.²⁷ In the 1990s, there was a negative per capita income growth and worsening income inequality which encouraged out-migration.²⁸

²¹ *ibid* 7.

²² Frolin T. Malit and Ali Al Youha, 'Labor Protection in Gulf Countries: A Comparative Analysis of Kenyan Governmental Dilemmas in Saudi Arabia and the United Arab Emirates'(2016) Cornell University ILR School, Working paper 181, 3 <http://digitalcommons.ilr.cornell.edu/working_papers/181> accessed 28 March 2019.

²³ *ibid* 3.

²⁴ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in the GCC'(Gulf Labour Markets and Migration 2014), 5 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

²⁵ George Odipo and others, 'Emigration Mobility Trends and Patterns in Kenya; A Shift from South-North to South-South Migration' (2015) 3(4) International Journal of Development and Economic Sustainability, 29<<http://www.eajournals.org/wp-content/uploads/Emigration-Mobility-Trends-and-Patterns-in-Kenya.pdf>> accessed 11 March 2020.

²⁶ *ibid* 29.

²⁷ *ibid* 29.

²⁸ *ibid* 29.

Migration to the Middle East for employment in Kenya appears to be trending upwards, particularly to Saudi Arabia.²⁹ The relationship between Kenya and Saudi Arabia was heightened during the early 19th Century and has persisted.³⁰ Counties from the coast province have the highest share of emigrants to Saudi Arabia.³¹ The high rate of emigration from this region dates back to the periods of Arab traders in East Africa, whereby there were frequent movements between the two regions.³² Saudi Arabia is also an attractive destination due to the geographical proximity and accessibility to the Kingdom.³³ Trace Kenya observes that over 70% of international recruitment in Kenya is for domestic work.³⁴

Migrant workers play an essential role in the economy of their countries of origin, yet they endure a number of violations in the host GCC countries.³⁵ Victims of human rights abuse suffer abuse because they have no means of protecting their rights. Lack of knowledge of rights remains a major hindrance to accessing justice.³⁶ In all GCC states, labour and social security legislation explicitly exclude migrant domestic workers, which does not help the situation of abuse..³⁷ Saudi Arabia being one of the GCC states, does not provide domestic workers with the protections offered to other workers in its labour legislation.³⁸ The situation makes domestic

²⁹ *ibid* xix.

³⁰ Odipo and others, 'Emigration Mobility Trends and Patterns in Kenya: A Shift from South-North to South-South Migration' (2015) 3(4) *International Journal of Development and Economic Sustainability*, 42 <<http://www.eajournals.org/wp-content/uploads/Emigration-Mobility-Trends-and-Patterns-in-Kenya.pdf>> accessed 11 March 2020.

³¹ *ibid* 42.

³² *ibid* 43.

³³ Zainab Moroa, 'The Limitations of Bilateral Agreements: An Analysis of the Kenya-Saudi Domestic Workers Agreement' (Masters, The Graduate Institute Geneva 2019), 34.

³⁴ Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018), 29 <https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

³⁵ *ibid* 17.

³⁶ *ibid* 156.

³⁷ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (*Gulf Labour Markets and Migration* 2014), 9 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

³⁸ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017) 16 <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf> accessed 20 January 2019.

workers vulnerable to abuse with limited or no prospects for seeking redress.³⁹ In addition to this, Saudi Arabia has not subscribed to international labour conventions, which expose Kenyan domestic workers in Saudi Arabia to abuse.⁴⁰

The framers of the CoK did well to include the right to access justice. Article 48 of the Constitution states that the State shall ensure access to justice for all persons and if any fee is required it shall be reasonable and shall not impede access to justice.⁴¹ Low-income migrants, particularly domestic workers, suffer from high levels of abuse and exploitation⁴² from their employers. Exploitation and abuse faced by domestic workers include; contract substitution and fundamental changes in the conditions of work, non-payment of wages, unsafe working conditions, inadequate rest, inhumane housing conditions, and confiscation of identity documents.⁴³ In more severe cases, migrant workers suffer physical and sexual abuse.⁴⁴

The Kingdom of Saudi Arabia is one of the wealthiest countries⁴⁵ globally, with one of the largest employers of domestic workers among the Gulf Cooperation Countries (GCC) member states.⁴⁶ The high demand for migrant domestic workers is due to the affluent lifestyles supported by the oil-rich states.⁴⁷ There are, however, no conclusive figures as to the number of male and female Kenyan domestic workers in Saudi Arabia.⁴⁸ It is difficult to establish these

³⁹ *ibid.*

⁴⁰ *Khobesh Agencies Ltd & 32 others v Minister of Foreign Affairs and International Relations and 4 others* (2013) eKLR.

⁴¹ Constitution of Kenya 2010, art 48 (CoK 2010).

⁴² Sarah Paoletti and Others, 'Migrant Workers Access to Justice at Home: Nepal' (2014) University of Pennsylvania Law School Research Paper No. 14-22, 18 <<http://ssrn.com/abstract=2457948>> accessed 8 January 2019.

⁴³ *ibid* 25.

⁴⁴ *ibid* 25.

⁴⁵ Zainab Moroa, 'The Limitations of Bilateral Agreements: An Analysis of the Kenya-Saudi Domestic Workers Agreement' (Masters, The Graduate Institute Geneva 2019) 9.

⁴⁶ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017) 8.

⁴⁷ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration 2014), 4 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

⁴⁸ Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018), 3 <https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

figures as GCC states' authorities often do not want to reveal such information about migration's irregular nature.⁴⁹ However, to get an estimation of the number of possible KEDW in Saudi Arabia, there are approximately 130,000 domestic workers in Saudi Arabia as revealed in a research report.⁵⁰

Unfortunately, the plight of domestic workers in Saudi Arabia is a recurrent issue. Mistreatment of migrants of African and Asian descent employed as domestic workers in the KSA has become an issue of great concern due to the escalating number of reports on deaths, exploitation, mistreatment, and abuse.⁵¹ Female domestic workers, in particular, suffer injustice; as domestic work is traditionally a highly feminized occupation and regarded as women's work that does not require qualifications.⁵² Women migrant domestic workers are not always considered workers with human rights but as helpers or family members who are dependent on the charity of the family they live with.⁵³

There is a need to regulate and protect the recruitment of domestic workers. Kenya is considered the gateway to Saudi Arabia within the East African region due to its geographic proximity and accessibility.⁵⁴ Regulation of the recruitment of domestic workers from Kenya to Saudi Arabia contributes to safeguarding the recruitment of migrant domestic workers from the entire East African region.⁵⁵

⁴⁹ *ibid.*

⁵⁰ Sophia Njiru and Nkirote Laiboni, 'Women's Labour Migration on the Africa-Middle East Corridor: Experiences of Migrant Domestic Workers from Kenya' KUDHEIHA and GAATW (2019) 15.

⁵¹ Zainab Moroa, 'The Limitations of Bilateral Agreements: An Analysis of the Kenya-Saudi Domestic Workers Agreement' (Masters, The Graduate Institute Geneva 2019) 9.

⁵² OHCHR, 'Behind Closed doors; Protection and Promoting the Human Rights of Migrant Domestic Workers in an Irregular Situation', 2015, 15<

https://www.ohchr.org/Documents/Publications/Behind_closed_doors_HR_PUB_15_4_EN.pdf> accessed 5 June 2019.

⁵³ *ibid* 15.

⁵⁴ Moroa (n 51) 10.

⁵⁵ *ibid* 10.

Therefore, this research shall contribute to reducing of the systemic abuse faced by the domestic workers of labour-sending countries.

1.3 STATEMENT OF THE PROBLEM

Although there are several laws in place and institutions established in Kenya concerning employment and migration, nevertheless, incidences of human and labour rights violations against KEDW continue to soar. The violations are because there is a gap in the Kenyan legislation regarding emigration law on domestic workers. The CoK pronounces on access to justice in article 48. However, this research demonstrates that sector-specific legislation is needed to guarantee this right for KEDW.

1.4 HYPOTHESIS

Although Kenya has several laws, policies, and institutions specific to Employment and Migration, the researcher carried out the research on the presumption that there is a gap in legislation for KEDW living and working in Saudi Arabia. KEDW do not enjoy the protection offered by these laws, particularly the right to access justice guaranteed in Article 48 of the Constitution for the lack of law specific to Emigrant Domestic Workers.

1.5 OVERALL OBJECTIVE

The main objective of this study is to critically examine the extent to which non-enforcement of Kenyan Employment Laws, Migration Laws, and laws safeguarding human rights have contributed to the plight of KEDW living and working in Saudi Arabia.

1.6 SPECIFIC OBJECTIVES

- a) To identify the human rights violations faced by KEDWs.
- b) To identify the obstacles to access to justice faced by KEDW in Saudi Arabia.
- c) To examine national and applicable International laws and policies that safeguard the right to access to justice of KEDW.

- d) To recommend possible policy and legal reforms that would promote access to justice of KEDW.

1.7 RESEARCH QUESTIONS

- a) What are the human rights violations faced by KEDW in Saudi Arabia?
- b) What are the obstacles to access to justice faced by KEDW in Saudi Arabia?
- c) What are the existing National and International laws and policies safeguarding or falling short of protecting the right to access to justice of KEDW?
- d) What possible policy and legal reforms may legislators make to promote access to justice of KEDW?

1.8 JUSTIFICATION OF THE STUDY

The diaspora community plays a vital role in the Kenyan economy. There is a high rate of Kenyans migrating to Saudi Arabia for employment opportunities, especially domestic workers. This reliance on emigration for employment calls for the formulation of sector-specific laws protecting KEDW and specific enforcement measures to ensure the implementation of these laws.

Numerous studies have highlighted the physical and psychological abuse faced by migrant domestic workers. The term emigrant domestic worker is, however, not given the much-needed attention as it should be. The laws and policies in place on foreign employment and migration do not adequately speak to the unique position of emigrant domestic workers. Through the International Labour Organization (ILO), the international community has recognized the vulnerability of these workers and formulated the Domestic Workers Convention and Recommendation 201. The C189 has only been ratified by 29 countries worldwide.⁵⁶ Kenya is

⁵⁶ILO<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> accessed 25 March 2020.

not one of the ratifying countries despite the urgent need to protect the rights and freedoms of domestic workers.

There is a need for a specific legal framework and policy to protect and guarantee the rights of KEDW. The study findings of this research are to assist the legislature in understanding the plight of KEDW, which is insightful to the formulation of legislation that specific to them. The findings are to be used by government enforcement authorities such as the National Employment Authority (NEA) to formulate policy. This study further highlights the gaps and loopholes in the existing legal framework on access to justice, a human right guaranteed in the Constitution.

1.9 THEORETICAL FRAMEWORK

1.9.1 Natural Law

Natural law entails basic principles of morals and legislation, which are in some sense or the other, objective, accessible to reason and based on human nature.⁵⁷ Cicero points out three main components of the Natural Law philosophy, which are; universality, immutability (standing as higher law) and discoverability by reason.⁵⁸

One of the values advanced by Plato is that justice has an inherent connection to law and that only law that pursues the idea of justice can be considered right.⁵⁹ For Plato, justice is a universal value that transcends local customs or conventions.⁶⁰

Plato's advancements in the connection between law and justice take this research to the human rights discourse, which relies on natural law to be advanced. In tracing when the concept of

⁵⁷ Jean Porter, 'From Natural Law to Human Rights: or, Why Rights Talk Matters' (1999) 14 Cambridge University Press 77, 77 < <http://www.jstor.org/stable/1051779> > accessed 22 August 2019.

⁵⁸ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, Oxford University press 2015) 21.

⁵⁹ *ibid* 18.

⁶⁰ *ibid* 18.

human rights emerged, some scholars from Michael Willey to Richard Tuck and Annabel Brett argue that the first accounts of natural rights, a term that is interchangeably used with human rights, did not appear until the fourteenth century at the earliest.⁶¹ Natural rights are viewed as expressions of claims and duties which a person has against another by their mutual participation in an objective moral order.⁶² In the development of human rights from Natural Law, we consider the Natural law theorist John Wild.⁶³ He came up with the following three ethical theses that build on the Natural Law Theory;

- a) The moral law applies to all men everywhere because it is based on a common human nature shared by all men;
- b) There exist moral norms founded on nature; and
- c) Human good is the existential fulfilment of the human individual.⁶⁴

Human rights are rights that one possesses by simply being a human being.⁶⁵ For most natural scholars, human rights are entitlements that are, at their core, negative in character and thus are absolute.⁶⁶ These entitlements are based on nature a shortcut that can stand for God, the Universe, reason, or another transcendental source.⁶⁷ Universality of human rights derives its character.⁶⁸ The natural school of thought has traditionally represented the heart of human rights orthodoxy.⁶⁹

⁶¹ Jean Porter, 'From Natural Law to Human Rights: or, Why Rights Talk Matters' (1999) 14 Cambridge University Press 77, 78 < <http://www.jstor.org/stable/1051779> > accessed 22 August 2019.

⁶² *ibid* 77.

⁶³ Richard Gale, 'Natural Law and Human Rights' (1960) 20(4) International Phenomenological Society Philosophy and Phenomenological Research, 521 < <http://www.jstor.org/stable/2104178/> > accessed 20 August 2019.

⁶⁴ *ibid* 522.

⁶⁵ Marie-Benedicte Dembour, 'What are Human Rights? Four Schools of Thought' (2010) 32 The John Hopkins University Press 2 < <https://www.jstor.org/stable/40390000> > accessed 14 March 2019.

⁶⁶ *ibid* 2.

⁶⁷ *ibid* 2-3.

⁶⁸ *ibid* 3.

⁶⁹ *ibid* 3.

Human rights are fundamental freedoms belonging to each individual and not granted by the state,⁷⁰ meaning they are absolute. Saudi Arabia has not ratified most international human rights law instruments and does not have specific legislation protecting migrant domestic workers in their countries. Nonetheless they should respect human rights for their very nature of being entitlements that one has by simply being human.

Human dignity is a concept worth consideration in the human rights discussion. The idea of human dignity is ubiquitous in the contemporary discourse of human rights.⁷¹ Human dignity occupies a prominent place at the beginnings of the UN Charter and the UDHR.⁷² Both international covenants state in identical passages that human rights derive from the inherent dignity of the human person.⁷³ Bringing the concept closer to home, the preamble of the ACHPR, states that ‘freedom, equality, justice, and dignity are essential objectives for the achievement of the legitimate aspirations of the African Peoples.’

Having a sense of dignity includes a concern to achieve and maintain various forms of integrity, attitudes of self-respect, self-esteem, pride, shame, resentment, and indignation.⁷⁴ There is a connection between human dignity and one's perception of justice. The lower the regard one has for the dignity of another, the less perspective he will be of injustices to that other.⁷⁵ The lower a person's regard for his worth of dignity is, the less sensitive he will be to injustices done to him.⁷⁶ The preservation of the dignity of Emigrant domestic workers is the ultimate goal for the push for their access to justice.

⁷⁰ CoK 2010, art 19(3)(a).

⁷¹ Charles R. Beitz, ‘Human Dignity in the Theory of Human Rights: Nothing but a Phrase?’ (2013) 41 Wiley Periodicals, Inc. *Philosophy and Public Affairs*, 259 <<https://doi.org/10.1111/papa.12017>> accessed 7 April 2020.

⁷² *ibid* 265.

⁷³ *ibid* 265.

⁷⁴ Michael S. Pritchard, ‘Human Dignity and Justice Ethics’(1972) 82 *University of Chicago Press*, 300 <<https://jstor.org/stable/2379854>> accessed 19 March 2020.

⁷⁵ *ibid* 301.

⁷⁶ *ibid* 307.

The concept of universality of human rights is relied on in this research. The UDHR is a universal document that applies to countries even though it is not a legally binding document.⁷⁷

While it is true that the UDHR applies universally, some argue that the law is a creation of a particular type of culture.⁷⁸ It is further argued that law in western societies masquerades as universal but, in reality, it is a product of the society it derives.⁷⁹ Therefore, the African Charter on Human and Peoples Rights is looked at in the human rights discourse for a homegrown perspective in advancing the rights of KEDW.

For Africans, the African Charter on Human and People's Rights (ACHPR) is a realistic reflection of Human Rights in Africa.⁸⁰ Human Rights in Africa emerged during African nationalism and pan-Africanism, whereby human rights were an important basis of the struggle for independence.⁸¹ Africans view rights from a communal perspective.⁸² The element of duty underlies the concept of right in the African community.⁸³ The famous words of John Mbiti rightfully resound here on the African view of the person 'I am because we are, and since we are, therefore I am.' The Charter may be regional; however, it is fundamental in formulating Kenya's national legislation.

There are international human rights instruments that should be a guarantee for the protection of the rights of KEDW; however, that is not the case. The argument advanced by Plato that justice is universal and Cicero, when he points out that natural law stands as higher law and is

⁷⁷ Catalina Vasquez, 'What is the relevance of the universal declaration of human rights 70 years after its adoption?' (Amnesty International) < <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> > accessed 7 April 2020.

⁷⁸ Kenneth B. Nunn, 'Law as a Eurocentric Enterprise' (1997) 15 Law Inq 323, 324.

⁷⁹ *ibid* 338.

⁸⁰ El-Obaid Ahmed El Obaid and Kwadwo Appiagyei-Atua, 'Human Rights in Africa- A New Perspective on Linking the Past and the Present' 2016 McGill LJ 819, 819.

⁸¹ *ibid* 823.

⁸² Josiah A. M. Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 Hum Rts Q 309, 311.

⁸³ *ibid* 845.

universal, is used to advance the concept of access to justice of KEDW while they work in Saudi Arabia.

1.9.2 Sociological School of Thought

For the sociological school of thought, the law is concerned with the analysis and interpretation of the role played by law and legal administration in effecting certain observable forms of conduct and behaviour.⁸⁴ Roscoe Pound is a leading exponent of sociological jurisprudence.⁸⁵ Social engineering, for Pound, is tasked to lawyers and legislators..⁸⁶ Jhering, a sociological jurist, emphasised the law functioning as an instrument for serving the needs of human society.⁸⁷ The law protecting certain interests ensures that there is social cohesion. These interests are protected by giving them the status of a legal right.⁸⁸ The claims this research seeks to protect are those of emigrant domestic workers. As Jhering has rightfully put it; in giving interests the status of legal right, there is the protection of rights.

The sociological school of thought is used in this study to use the law as a means of change regarding harmful recruitment practices, accessibility of justice, and reduction of the plight of emigrant domestic workers through law enforcement mechanisms.

1.10 RESEARCH METHODOLOGY

There are several research methods that include qualitative, quantitative, and mixed methods.⁸⁹ This research drew from both quantitative and qualitative methods of research. Under quantitative methods, the study employed the use of secondary data through doctrinal research.

⁸⁴ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, Oxford University Press 2015) 195.

⁸⁵ *ibid* 195.

⁸⁶ *ibid* 196.

⁸⁷ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 704.

⁸⁸ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, Oxford University Press 2015) 196.

⁸⁹ Harvey Bernard Russell, 'Social Research Methods: Qualitative and Quantitative Approaches' 2nd ed (Los Angeles: Sage Publishers, 2013) 68.

While under qualitative methods, the research employed empirical data and used two techniques of key informant interviews and in-depth interviews.

Doctrinal or library-based research asks what the law is in a particular case.⁹⁰ It is concerned with the analysis of the legal doctrine and its development and application.⁹¹ One of the merits of doctrinal research is that it focuses on jurisprudence; established research is more manageable and results more predictable.⁹² Another advantage is that it may help with meeting deadlines and contain surprises for a postgraduate studies researcher.⁹³

On the flip side, there are disadvantages to this research method; first, doctrinal research is perceived to be highly theoretical and technical, uncritical, conservative, trivial, and without due consideration of the social, economic, and political importance of the legal process.⁹⁴ In employing the doctrinal research design, the research looked at statutory material, legal history, international and regional conventions, national laws and policies, website articles and journals on KEDW.

As mentioned, the study also incorporated the use of empirical data. The techniques used were key informant interviews and in-depth interviews. Key informant interviews are loosely structured, relying on a list of issues to be discussed.⁹⁵ The advantages of key informants are that they provide information from knowledgeable people, provide flexibility to explore new ideas and issues, and they are inexpensive and simple to conduct.⁹⁶

⁹⁰ Salim Ibrahim Ali and Others, 'Legal Research of Doctrinal and Non-doctrinal' (2017) 4 International Journal of Trend in Research Development 493, 493 < <http://www.ijtrd.com/papers/IJTRD6653.pdf>> accessed 20 July 2019.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *ibid.* 493.

⁹⁴ *ibid.* 493-494.

⁹⁵ USAID, 'Performance Monitoring and Evaluation: Tips Conducting Key Informant Interviews' (2011) 1 < https://pdf.usaid.gov/pdf_docs/pnadw102.pdf> accessed 5 May 2020.

⁹⁶ *ibid.* 2.

The disadvantages are that they may be biased if informants are not carefully selected. They are susceptible to interviewer biases, and it may be difficult to prove the validity of findings.⁹⁷

The research conducted key informant interviews to gain insight into the legal framework and institutional protection of domestic workers. The research further conducted in-depth interviews to gain insight into the lived experiences of Kenyan emigrant domestic workers. Snowballing was used to obtain key informants and in-depth interviewees.

Two participants were key informants and included:

- i. A legal officer at Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA); and
- ii. The Chairlady of the domestic workers union at KUDHEIHA.

For the in-depth interviews, there were five participants as follows:

- i. The research conducted two in-depth interviews with returnee domestic workers: one had worked for two years albeit non-continuous years in Saudi Arabia and the other for six broken years in Saudi Arabia;
- ii. Two in-depth interviews with domestic workers still in active employment as domestic workers in Saudi Arabia. One of whom has worked in Saudi Arabia for close to 9 years while the other has worked in Saudi Arabia for over 12 years; and
- iii. One returnee domestic worker from Lebanon. She had worked in Lebanon for 3 years before returning to Kenya.

Initially, face-to-face interviews were to be used; however, in light of the COVID19 pandemic, a different approach had to be taken in conducting the interviews. The new approach involved the use of telephone interviews. The two key informant interviews were face to face as their

⁹⁷ *ibid.*

offices had to be physically visited. Two in-depth interviews were face to face, while the other three were telephone interviews.

Telephone interviews, which are an accepted and well-studied approach for quantitative data collection,⁹⁸ were utilized in this research. Although used less often than face-to-face interviews in qualitative research, telephone interviews may be a versatile data collection tool.⁹⁹ Qualitative telephone data have been judged to be rich, vivid, detailed, and of high quality.¹⁰⁰ The reported advantages of telephone interviews include; decreased cost of travel, ability to reach geographically dispersed respondents, ability to oversee interviewers, and enhanced interviewer safety.¹⁰¹ The safety of the interviewer and interviewee was of paramount consideration during the pandemic. The reported drawbacks include; limited telephone coverage in certain areas, lower response rates, need for short interview duration, and absence of visual or nonverbal cues.¹⁰² The researcher attempted to use email to collect data; however, the response rate was very low to none to use email as a data collection method.

The use of doctrinal research counters the deficiency of key informant interview bias and difficulty in proving the validity of findings. The researcher did extensive doctrinal research. Key informant interviews were used to enrich the information obtained and explore any new ideas that the researcher may not have foreseen in the doctrinal research.

While the researcher may have used other research methods to conduct the research, such as in-depth interviews; doctrinal research suffices. The main focus of the research is on the legal

⁹⁸ Gina Novick, 'Is There a Bias against Telephone Interviews in Qualitative Research' (2018) Yale School of Nursing, 1 < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3238794/pdf/nihms337774.pdf> > accessed 4 May 2020.

⁹⁹ *ibid* 3.

¹⁰⁰ *ibid* 4.

¹⁰¹ *ibid* 1.

¹⁰² *ibid*.

framework surrounding emigrant domestic workers. Besides, there is literature on the actual violations individuals face and the obstacles they encounter in accessing justice.

1.11 LITERATURE REVIEW

1.11.1 Labour Rights and Human Rights

Labour rights are entitlements that relate specifically to the role of being a worker.¹⁰³ In exploring the intersection between labour rights and human rights, Virginia Mantouvalou uses three different approaches: the positivistic approach, the instrumental approach, and the normative approach.¹⁰⁴ The positivistic approach to the question depends on what the drafters of a particular document decided and varies from one country or region to the other.¹⁰⁵ The instrumental approach to whether labour rights are human rights looks at various documents containing human and labour rights and assessing whether labour rights are promoted under the rubric of human rights.¹⁰⁶ As per Mantouvalou's observation, there is a clear-cut difference between labour rights and human rights within the instrumental approach.¹⁰⁷ The normative approach to the question looks at the issue as a matter of moral truth.¹⁰⁸

In her conclusion, Mantouvalou notes that certain labour rights are compelling, stringent, universal, and timeless entitlements, as much as rights such as the prohibition of torture or the right to privacy.¹⁰⁹ Also, the recognition that certain labour rights are human rights, to conclude, does not imply that human rights exhaust labour law as a field of study.¹¹⁰ In as much as Mantouvalou states that some labour rights are universal, this does not explain why migrant domestic workers' rights are violated and not recognized in many jurisdictions. This research,

¹⁰³ Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151, 152 <<https://doi.org/10.1177%2F201395251200300204>> accessed 25 August 2019.

¹⁰⁴ *ibid* 152.

¹⁰⁵ *ibid* 155.

¹⁰⁶ *ibid* 156.

¹⁰⁷ *ibid* 161.

¹⁰⁸ *ibid* 163.

¹⁰⁹ *ibid* 172.

¹¹⁰ *ibid* 172.

however, agrees with her view that human rights are not exhaustive of labour law. The study does differ with Mantouvalou on the recognition that only certain labour rights are human rights.

As mentioned before and as reiterated by Cesar F. Rosado Marzan, human rights are those rights that individuals have by the sole fact that they are human beings.¹¹¹ On the other hand, labour rights are ascribed to persons because of their status as workers, a class that is understood as subordinated and dependent on employment relations.¹¹² Marzan noted that Virginia Leary observes that labour rights and human rights' run on tracks that are sometimes parallel and rarely meet.¹¹³ Marzan points out that while labour rights activists have focused on remedies for workers' unequal bargaining relationship with private employers, human rights organizations concentrate primarily on civil and political rights abuses perpetrated by the state against individuals.¹¹⁴ He further points out that human rights centre on individual rights, while labour rights centre on individual and collective rights.¹¹⁵

Marzan takes the position that the international human rights movement is not fundamentally committed to examining and questioning fundamental economic relationships in society, nor is it committed in direct action as a method or workplace democracy as a goal to the same extent as the labour movement.¹¹⁶ In his opinion, human rights and labour rights do not sit comfortably next to each other, for human rights frames can carry a movement forward but not all of the way.¹¹⁷

¹¹¹ Cesar F Rosado Marzan, 'The Limits of Human Rights for Labour Rights: A Retrospective Look at the Case of Chile' in Jill M Jensen and Nelson Lichtenstein (eds), *The ILO from Geneva to the Pacific Rim: West Meets East* (ILO 2016)207.

¹¹² *ibid.*

¹¹³ *ibid* 209.

¹¹⁴ *ibid* 209.

¹¹⁵ *ibid* 209.

¹¹⁶ *ibid* 209.

¹¹⁷ *ibid* 225.

Marzan disagrees with taking labour rights to be human rights and outlines the reasons for doing so. His view is used in this study to analyse the difference between labour rights and human rights. His work also helped in comparing the human rights movement and the labour rights movement. This analysis guided the study in taking a position in labour rights and human rights.

Sigrun I Skogly offers an exciting view in her article on *Extraterritoriality: Universal Human rights without universal obligations?* In the article, she argues that the concept of universalism has been rather one-sided: it concerns human rights enjoyment, but not human rights obligations.¹¹⁸ Skogly further posits that while all individuals everywhere are considered to have the same rights based on international law, the obligation-holders (normally states) do not have the same obligations with regard to individuals everywhere.¹¹⁹ Skogly's article brings us to the concept of state sovereignty. In as much as Kenya may ratify international human rights instruments and Saudi Arabia does not do so, Kenya cannot compel the Saudi Arabian government to follow the provisions of the instruments. Saudi being the host country subsequently, the obligation holder is at liberty.

The article by Skogly informed this study of the limitations of human rights law. In as much as human rights are provided for in international human rights instruments, and there is no enforcement on the rights, they remain rights in theory and not in practice. Additionally, ratification is a factor in creating the instrument's binding character; if one state adopts a statute and the other does not, it creates a situation of a barking dog that seldom bites. Revelation of

¹¹⁸ Sigrun I Skogly, 'Extraterritoriality: Universal Human Rights without Universal Obligations?' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights* (Edward Elgar Publishing Limited 2010) 71.

¹¹⁹ *ibid* 71.

the limitations of human rights helped look at how access to justice for KEDW has is hampered by issues such as extraterritoriality.

The UNGA holds that labour rights are human rights and the ability to exercise those rights in the workplace is a prerequisite for workers to enjoy a broad range of other rights.¹²⁰ The UN General Assembly further states that for there to be effective protection of labour rights, the distinction between labour rights and human rights should be generally removed.¹²¹ The report by the Assembly goes on to further state that labour rights are workers' human rights.¹²² It is recognized in the report that states fail to protect or enforce those fundamental rights and often do not create an enabling environment for even the minimum exercise of those rights, disenfranchising millions of workers.¹²³

The position taken by the UNGA is contested, contestation of which has been reviewed in this research. The importance of looking at the position taken by the Assembly is to discuss labour rights and human rights. This research, however, disagrees with the position taken by the UNGA for labour rights and human rights are concepts that are purposed to protect particular interests. The strengths of these concepts will be utilized in protecting the rights of KEDW.

Before delving into the contested views to the stand taken by the UNGA, it is interesting to look at one author, Judy Fudge, who supports this stand in her article *Labour rights as human rights: Turning slogans into claims*. Fudge states that the core component of the project to recast labour rights as international human rights is to elevate their moral appeal.¹²⁴ She looks at the interaction of labour rights and human rights by analysing the freedom of association, which is both a labour right and a human right.

¹²⁰ UNGA, 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association' (14 September 2016) 71st Session UN Doc (A71/150) 3 par 2.

¹²¹ *ibid* 6 par 17.

¹²² *ibid* 3 par 2.

¹²³ *ibid* 3 par 4.

¹²⁴ Judy Fudge, 'Labour Rights as Human Rights: Turning Slogans into Claims' (2014) 37 *Dalhousie LJ* 601, 609.

Freedom of association is a fundamental labour right protected by the International Covenant on Civil and Political rights, which are individual rights against the state¹²⁵ and the International Covenant for Social, Economic and Cultural Rights, whose rights require positive action.¹²⁶ She looks at the role of courts in labour rights as legal rights. Here she assesses how judges have interpreted freedom of association under the law and how their decisions have either built this freedom or limited it. For Fudge, if courts are left to continuously interpret freedom of association to protect labour rights, employees will be most favoured.¹²⁷ The solution for her and of which she concludes her writing is to recognize that labour rights are human rights deserving of constitutional protection and, in doing so, plant a substantive notion of equal respect and protection in common law.¹²⁸

Fudge bases her article in the context of Canadian and common law. Her study is relevant to this research because the constitution of Kenya has taken the approach of recognizing labour rights are human rights by Fudge's standards. It has done so by including labour relations in the Bill of Rights. Every person has the right to fair labour practices under article 41 of the CoK.¹²⁹ Every worker has the right to fair remuneration,¹³⁰ reasonable working conditions,¹³¹ to form, join or participate in the activities and programmes of a trade union¹³², and go on strike.¹³³ Fudge, in her article, saw this inclusion as a solution to the labour rights movement. This research used this assumption to investigate if, the constitutional protection of labour rights has led to the actual protection of these rights.

¹²⁵ *ibid* 609.

¹²⁶ *ibid* 609.

¹²⁷ *ibid* 619.

¹²⁸ *ibid* 619.

¹²⁹ CoK, art 41(1).

¹³⁰ *ibid* art 41(2)(a).

¹³¹ *ibid* art 41(2)(b).

¹³² *ibid* art 41(2)(c).

¹³³ *ibid* art 41(2)(d).

The idea of there being no distinction between labour rights and human rights does not sit well with Kevin Kolben. For him, what constitutes a labour right and which labour rights raise to the level of universal human rights is contested.¹³⁴ Kolben sees that framing labour rights as human rights shifts the labour discourse from economics and special interest politics to ethics and morality.¹³⁵ There are differences between the labour rights movement and the human rights movement as discussed by Kolben. One important distinction that has been reiterated by the likes of Jay Youngdahl and Cesar Marzan is that labour rights primarily affect private actors while human rights primarily affect states.¹³⁶ Another fundamental distinction is that labour rights guarantee workers' ability to engage fairly with employers in market economies.¹³⁷

On the other hand, human rights do not focus on this private market sphere, nor is doing so their purpose.¹³⁸ An ethos of individualism substantially grounds human rights, which take the individual as the primary subject.¹³⁹ Labour rights, on the other hand, particularly freedom of association rights, emphasize the collective means of individual emancipation.¹⁴⁰

Kolben's distinction between the labour rights movement and the human rights movement helped this research to make an informed choice on which approach to take when advocating for labour rights. That is, whether the labour movement should advance its agenda, whether it should join hands with the human rights movement or if it should be absorbed into the human rights movement.

Jay Youngdahl also critiques the position of labour rights being perceived as human rights. In his article, he argues that the reliance on reframing labour struggles as, first and foremost,

¹³⁴ Kevin Kolben, 'Labor Rights as Human Rights?'(2010) 50 Virginia Journal of International Law 449, 454.

¹³⁵ *ibid* 462.

¹³⁶ *ibid* 469.

¹³⁷ *ibid* 470.

¹³⁸ *ibid* 470.

¹³⁹ *ibid* 470.

¹⁴⁰ *ibid* 471.

human rights struggles is misplaced.¹⁴¹ He further contends that the rights discourse individualizes the struggle at work.¹⁴² The union movement, however, was built on and nourished by solidarity and community.¹⁴³ For him fighting individually, workers lose; fighting together, workers win.¹⁴⁴ Youngdahl believes that elevating human rights to the dominant position within the labour ideology will eviscerate support for the common concerns of all workers that is the keystone of labour solidarity.¹⁴⁵ He believes that the human rights approach promotes atomism, which is the priority of the individual and his rights over society.¹⁴⁶

After examining his work, this research believes that Youngdahl fails to strike a balance between individualism and the collaborative approach to human rights. His conception of rights is majorly a western conception of rights which focuses on the individual. Human rights from an African perspective, embraced in this research, embraces life's communal aspect. Within the African perspective, there is a progression from individual rights to community rights.¹⁴⁷ This research will consider both the individual and the communal perspective of rights in the labour rights discourse, ensuring all needs are catered for.

This research agrees to some degree with the arguments presented by Jay Youngdahl in that the labour rights movement and the human rights movement promote different interests per the needs of each. However, as pointed out by Kolben, the traditional method of labour organizations has been to organize workers, usually in the formal sector, to form unions to

¹⁴¹ Jay Youngdahl, 'Solidarity first: Labor Rights are not the same as Human Rights' (2009) 18(1) New Labor Forum, 31 <<https://www.jstor.org/stable/40342789>> accessed 10 April 2020.

¹⁴² *ibid* 31.

¹⁴³ *ibid* 31.

¹⁴⁴ *ibid* 32.

¹⁴⁵ *ibid* 32.

¹⁴⁶ *ibid* 33.

¹⁴⁷ El-Obaid Ahmed and Kwadwo Appiagyei-Atua, 'Human Rights in Africa- A New Perspective on Linking the Past to the Present' (1996) 41 McGill LJ 819, 837.

address workplace concerns while also using work actions, strikes and public outreach to compel employers to accede to demands.¹⁴⁸

He rightfully points out that direct organizing in developing countries is often very difficult, and consequently, unions are underdeveloped.¹⁴⁹ To address violations of workers' rights in poor regulatory environments, activists have resorted to advocacy methods more traditionally associated with human rights movements.¹⁵⁰ This research advocates for the helping hand given by the human rights movement to the labour rights movement . The research believes that labour law is indeed a movement of its own, so is the human rights movement. However, the two movements are taken to work in conjunction for the best interest of the domestic workers; for united we stand divided we fall.

1.11.2 Access to Justice

Access to justice is a fundamental right that allows individuals to use legal tools and mechanisms to protect their rights.¹⁵¹ Valesca Lima and Miriam Gomez, in their article, *Access to Justice: Promoting the Legal System as a Human Right*, indicate that proper access to justice allows individuals to protect themselves from violations of their rights.¹⁵² The authors emphasize that people cannot make their voices heard without access to justice, exercise their rights, cope with discrimination or hold decision-makers accountable.¹⁵³

Access to justice is both a right and a means of restoring the exercise of rights that have been disregarded or violated.¹⁵⁴ Economic, structural, and institutional factors hinder justice, which

¹⁴⁸ Kevin Kolben, 'Labor Rights as Human Rights?'(2010) 50 Virginia Journal of International Law 449, 467.

¹⁴⁹ *ibid* 467.

¹⁵⁰ *ibid*.

¹⁵¹ Valesca Lima and Miriam Gomez, 'Access to Justice: Promoting the Legal System as a Human Right' 2020 ResearchGate<https://www.academia.edu/7748764/Rethinking_The_Convergence_of_Human_Rights_and_Labour_Rights_in_International_Law_Depoliticisation_and_Excess> accessed 22 April 2020.

¹⁵² *ibid* 1.

¹⁵³ *ibid* 2.

¹⁵⁴ *ibid* 3.

affects the poor and marginalized groups, especially, from accessing justice.¹⁵⁵ The gap in this research is that the research does not discuss alternative methods of access to justice outside the courts, which can be used to access justice as discussed in this research.

Marcus Manuel and Clare Manuel in *Achieving access to justice for all by 2030: Lessons from global funds*, looks at access to justice from the point of Sustainable Development Goals (SDGs). They recognize that SDG 16.3 commits the international community to provide the rule of law at the national and international levels and ensure equal access to justice by 2030.¹⁵⁶ In this working paper, the authors viewed that access to justice is associated with economic growth and investment and equity and social justice.¹⁵⁷ Likeike Valesca Lima and Miriam Gomez, the authors identify that legal advice and assistance are inaccessible for millions of people.¹⁵⁸

Some of the reasons identified for the inaccessibility are lack of an organized legal aid system, the limited number of lawyers to cover legal aid needs, geographical inaccessibility and lack of awareness of the availability of legal advice and assistance.¹⁵⁹ Limited funding is a challenge faced by legal advice and assistance programmes and national institutional frameworks.¹⁶⁰ The research focuses on access to justice as a means of economic elevation. It does not look at how access to justice can safeguard human rights and improve workers' lives an inquiry that this present research sought to find out.

¹⁵⁵ *ibid* 7.

¹⁵⁶ Marcus Manuel and Clare Manuel, 'Achieving Access to Justice for all by 2030: Lessons from Global Funds' (2018) Overseas Development Institute Working Paper 537, 8<<https://www.odi.org/sites/odi.org.uk/files/resource-documents/12307.pdf>> accessed 29 April 2020.

¹⁵⁷ *ibid* 8.

¹⁵⁸ *ibid* 9.

¹⁵⁹ *ibid* 9.

¹⁶⁰ *ibid* 10.

In an article *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for all*, Open Society Foundation, also looked at access to justice in line with the SDGs. The article pointed out that SDG 16.3 recognizes the intrinsic link between access to justice, poverty reduction, and inclusive growth.¹⁶¹ Open Society Foundation stated that the inability to access justice services could be both a result and a cause of poverty.¹⁶² Typically, people who are more vulnerable to social exclusion report more justice problems than other groups.¹⁶³ The article goes on to look at people-focused access to justice. The examples of people focused access to justice include legal empowerment interventions,¹⁶⁴ facilitating a continuum of legal assistance and justice services,¹⁶⁵ providing targeted, timely, and appropriate legal assistance services,¹⁶⁶ new developments in technology¹⁶⁷ and new financing models.¹⁶⁸

The research done by the Open Society Foundation is essential to this research. It informed the study on how justice can be made accessible by going beyond the formal justice system, the importance of the informal justice system and the means of reducing legal costs. As identified in the article, people will often turn to non-court-based processes and even non-legal services when faced with legal problems.¹⁶⁹

Bassina Farberiblum and Others carried out a study focused in Indonesia on migrant workers' access to justice at home. The study took a human rights approach in assessing access to justice for migrant workers. In doing so, the study emphasized that international human rights law imposes on states the obligation to respect, protect and fulfill human rights of all who are within

¹⁶¹ Open Society Foundations and OECD, 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for all'(2016) 3.

¹⁶² *ibid* 6.

¹⁶³ *ibid* 6.

¹⁶⁴ *ibid* 12.

¹⁶⁵ *ibid* 15.

¹⁶⁶ *ibid* 16.

¹⁶⁷ *ibid* 17.

¹⁶⁸ *ibid* 18.

¹⁶⁹ *ibid* 11.

its jurisdiction.¹⁷⁰ Concerning countries of origin vis-à-vis their obligations to their citizens travelling abroad for work, this requires taking affirmative measures at the outset to protect the rights of their migrant workers.¹⁷¹ The study further pointed out that access to justice is essential for the enforcement of contractual rights, particularly relevant to migrant workers who enter into private contracts with recruitment agencies, insurers, and sometimes employers throughout the migration process.¹⁷² It strengthens the rule of law by increasing transparency and ensuring the accountability of private and government actors, often addressing systemic gaps in rights protections.¹⁷³

The research, however, fails to look into how collaboration between the origin and host country can boost access to justice for the migrant domestic worker. This research looked into how the joint efforts of the origin and host country have contributed to the enhanced access to justice for migrant domestic workers.

The International Organization on Migration defines access to justice as the ability of persons to make full use of the existing legal processes designed formally or informally to protect their rights in accordance with substantive standards of fairness and justice.¹⁷⁴ The IOM further notes that it is the possibility to make use of the processes established to provide redress where rights have been violated.¹⁷⁵

¹⁷⁰ Bassina Farbenblum, Sarah Paoletti and Eleanor Taylor-Nicholson, 'Migrant Workers' Access to Justice at Home: Indonesia' (Open Society Foundation 2013) 29 <https://www.researchgate.net/publication/280570050_Migrant_Workers'_Access_to_Justice_at_Home_Indonesia> accessed 28 April 2020.

¹⁷¹ *ibid* 29.

¹⁷² *ibid* 31.

¹⁷³ *ibid* 31.

¹⁷⁴ International Organization on Migration, 'Access to justice: A migrant's right' (2019) IML Information note, 2 <https://www.iom.int/sites/default/files/our_work/ICP/IML/iml-infonote-access-to-justice.pdf> accessed 12 April 2020.

¹⁷⁵ *ibid* 2.

The IOM's emphasis is on setting out why equal, effective and meaningful access to justice is particularly critical for international migrants.¹⁷⁶ The core elements of the right to access to justice as outlined in the information note include: (1) The recognition as a person before the law, (2) the equality before the courts and tribunal, (3) the right to a fair trial and due process guarantees and, (4) the right to an effective remedy.¹⁷⁷ States must uphold international human rights standards, including access to justice, for anyone over whom the state exercises jurisdiction, even when that jurisdiction is extraterritorial.¹⁷⁸

The research conducted by the IOM recognizes the unique position that temporary migrants find themselves in when it comes to access to justice. In looking at access to justice, the challenges addressed by other articles are those faced by those who are assumed not to have a limitation of time when it comes to residency. Therefore, this research is fundamental to the study in analysing how returnee migrant workers can still access justice in their country of origin.

1.11.3 Obstacles to Access to Justice

Sarah Paoletti and others discuss 'Access to Justice for Migrant Workers' in Nepal.¹⁷⁹ The study, albeit focused on Migrant workers from Nepal, is insightful especially concerning the challenges migrants face in accessing justice. The study further offers recommendations to overcome those challenges. Some of the factors identified that undermine workers' ability to access justice are the lack of transparency, government oversight and accountability in the private recruitment and placement of migrant workers by recruitment agencies.¹⁸⁰

¹⁷⁶ *ibid* 2.

¹⁷⁷ *ibid* 4.

¹⁷⁸ *ibid* 7.

¹⁷⁹ Sarah Paoletti and Others, 'Migrant Workers' Access to Justice at Home: Nepal' (2014) University of Pennsylvania Law School Research Paper No. 14-22, 18 <<http://ssrn.com/abstract=2457948>> accessed 8 January 2019.

¹⁸⁰ *ibid* 18.

The insight offered by this research when it comes to accessing justice by migrant workers against recruitment agencies was fundamental to this research in dealing with recruitment agencies being one of the perpetrators of injustice to these workers. The Nepalese government took further measures to improve their laws on migrant workers. The Kenyan government can use these measures to formulate laws and policies to safeguard access to justice for emigrant domestic workers.

Malit and Youha, in the same breath, have done a comprehensive analysis of Kenyan Governmental Dilemmas in Saudi Arabia and the United Arab Emirates. The paper examined the Kenyan government's challenge in extending labour protections to unskilled Kenyan migrants in Saudi Arabia and UAE.¹⁸¹ Malit and Youha argued that illegal and unethical recruitment practices contribute to the government not extending protection to unskilled migrants.¹⁸²

The paper further argued that unscrupulous practices executed on the domestic workers pre-departure hinder the protection of migrant workers and subsequent hindrance to accessing justice. There is also bureaucratic corruption¹⁸³ and contract substitution.¹⁸⁴ The study identified macro-factors, which were Gulf countries' bilateral trade with Kenya, humanitarian aid assistance and open immigration policy systems, which constrained Kenyan governments' abilities to protect their nationals in the host countries.¹⁸⁵

This research agreed with the findings of Malit and Youha on the micro- factors that hinder and make the Kenyan government turn a blind eye or both when it comes to addressing the

¹⁸¹ Froilan T. Malit and Ali Al Youha, 'Labour Protection in the Gulf Countries: A Comprehensive Analysis of Kenyan Governmental Dilemmas in Saudi Arabia and the United Arab Emirates' (2016) Cornell University ILR School, Working Paper 181, 4<<http://digitalcommons.ilr.cornell.edu/workingpapers/181>> accessed 28 March 2019.

¹⁸² *ibid* 11.

¹⁸³ *ibid* 16.

¹⁸⁴ *ibid* 14.

¹⁸⁵ *ibid* 2.

violations faced by KEDW in Saudi Arabia. The research conducted by Malit and Youha was, however, done before Kenya and Saudi Arabia negotiated a bilateral agreement. The study was also concluded before there was an overhaul of the recruitment agencies in Kenya. Therefore, it is interesting to compare the situation when Malit and Youha did their research and now when there is a negotiated bilateral agreement. This comparison helped in analysing whether the problem is getting better or worse for Kenyan Domestic Workers.

Moroa did a study on the limitations of bilateral agreements which contributes to the obstacles of access to justice for KEDW. Her case study was the Kenya-Saudi Domestic Workers Agreement. Malit and Youha pointed out that the absence of bilateral labour agreements placed Kenyan migrants in a more vulnerable position in the host countries.¹⁸⁶ However, since Malit and Youha concluded their study before the implementation of the bilateral agreement, Moroa offers helpful insight as to if the agreement made the situation better for KEDW.

Both Kenya and Saudi Arabia signed their first bilateral agreement in 2016 and in January 2019, both governments officially enforced the agreement.¹⁸⁷ Moroa notes that bilateral agreements have become the principal mode through which the trade of labour is regulated between labour sending states and labour receiving states.¹⁸⁸ She, however, noted that there are several limitations of using bilateral agreements as a principal regulatory framework for the trade of labour.¹⁸⁹

She noted that regulation of labour migration between developing labour-sending states and wealthy labour-receiving states through bilateral agreements can be lopsided. This regulation

¹⁸⁶ Froilan T. Malit and Ali Al Youha, 'Labour Protection in the Gulf Countries: A Comprehensive Analysis of Kenyan Governmental Dilemmas in Saudi Arabia and the United Arab Emirates' (2016) Cornell University ILR School Working Paper 181, 17 <<http://digitalcommons.ilr.cornell.edu/workingpapers/181>> accessed 28 March 2019.

¹⁸⁷ Zainab C. Moroa, 'The Limitations of Bilateral Agreements: An Analysis of the Kenya-Saudi Domestic Workers Agreement' (Masters Thesis, Graduate Institute Geneva 2019) 13.

¹⁸⁸ *ibid* 7.

¹⁸⁹ *ibid*.

is usually favouring the interests of the rich labour-receiving states for the developing labour-sending state party to the agreement to maintain the trade agreement.¹⁹⁰ In her dissertation, Moroa notes that the bilateral agreement between Kenya and Saudi Arabia has not addressed the abolition of Saudi's Kafala system nor the discrepancies in Saudi Arabia's national labour laws covering domestic workers.¹⁹¹

Morua notes that there is violation of migrant domestic workers under the existing domestic laws of Saudi Arabia. Yet, the agreement stipulates that Saudi Arabia shall endeavour to respect the domestic laws of the Kingdom.¹⁹² The laws have thus far greatly favoured the employer who is a Saudi national over the migrant workers.¹⁹³ These policy gaps have therefore enabled employers to mistreat, exploit and abuse the rights of migrant workers.¹⁹⁴

The observations made by Morua in her dissertation are essential. However, in as much as she advocates for multilateral negotiations to achieve better protection, the first step is to strategically use bilateral agreements as countries with common interests of labour migration can come to a common ground and negotiate as one voice. The dissertation has helped the study by making an informed assessment of bilateral agreements and their role in access to justice for KEDW.

Patricia Mbote and Migai Akech make their contribution to the conversation on the obstacles to access to justice.¹⁹⁵ Their report examined the Kenyan justice sector and the rule of law. Chapter 7 of the report is on access to justice which was of particular interest to this study. This chapter discussed the hindrances to access to justice. The report's results reveal that lack of

¹⁹⁰ *ibid* 8.

¹⁹¹ *ibid* 27.

¹⁹² *ibid* 51.

¹⁹³ *ibid*.

¹⁹⁴ *ibid*.

¹⁹⁵ Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law' (Open Society Initiative of Eastern Africa 2011) <<https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf>> accessed 9 July 2019.

knowledge of rights, especially among the poor, vulnerable and the uneducated, is a major hindrance in accessing justice.¹⁹⁶ Secondly, the court structure regarding its physical accessibility, does not afford equal justice for all as most courts are located in urban areas.¹⁹⁷ Third, court fees are high for the ordinary citizen; therefore, many litigants shy away from going to court.¹⁹⁸ Fourth, there is a reasonable delay in prosecuting a civil case that occasions great injustice as some people's rights remain unadjudicated.¹⁹⁹ The report recommends various measures that can be undertaken to improve access to justice.

This research looked at access to justice from a global view. There are two jurisdictions involved, and Mbote and Aketch do not address the issue of migrant workers. The problems that affect access to justice that they outlined are of national application. This research seeks to address the gap on access to justice of KEDW.

While knowledge of rights and legal resources is vital in accessing justice, Bethany Hastie argues that it is an insufficient and incomplete response.²⁰⁰ This position taken differs slightly from Mbote and Aketch. Haste uses the capabilities approach in relation to access to justice which is concerned with asking what legal rights individuals have and the practical access or opportunities individuals have to use those rights to achieve valuable functionings.²⁰¹ For Bethany, the distribution of knowledge as a resource, is not adequate for migrant workers to access justice because there remain distinct obstacles in converting that knowledge into action.²⁰²

¹⁹⁶ *ibid* 156.

¹⁹⁷ *ibid* 157.

¹⁹⁸ *ibid* 158

¹⁹⁹ *ibid* 169.

²⁰⁰ Bethany Hastie, 'The Inaccessibility of Justice for Migrant Workers: A Capabilities-based Perspective' (2017) Windsor, 28.

²⁰¹ *ibid* 25.

²⁰² *ibid* 28.

Access to knowledge on its own does not reflect the totality of the causes leading to abusive or unlawful treatment.²⁰³ There are risks associated with voicing a complaint or using legal vehicles for redress or remedy in the face of rights violations.²⁰⁴ These risks result from the employer-specific work permit that creates significant dependence on the employer²⁰⁵ and can prevent a migrant worker from freely circulating in the labour market.²⁰⁶

Hastie also looked at the power imbalance between the employer and migrant worker. She notes that the work permit system creates a power imbalance. This imbalance has been described as 'the baseline of precariousness' for migrant workers.²⁰⁷ She acknowledged that procedural aspects of enforcing rights and remedies through legal mechanisms create additional obstacles for migrant workers due to the time and the resources required to carry out legal measures.²⁰⁸

The contributions made by Bethany Hastie in her study of Canada's Temporary Foreign Worker Programme, were beneficial as it looks at the obstacles to accessing justice and what practical opportunities individuals have to use those rights to access justice. This research supports the position taken by Hastie in looking deeper than the right on paper but also looking at factors influencing the taking of an action by migrant workers. This research echoes Hastie on the abolishment of employer-specific work permits, which in Saudi Arabia may be equated to the Kafala system to reduce power imbalance.

²⁰³ *ibid* 29.

²⁰⁴ *ibid* 31.

²⁰⁵ *ibid* 31.

²⁰⁶ *ibid* 32.

²⁰⁷ *ibid* 32.

²⁰⁸ *ibid* 34.

The International Trade Union Confederation (ITUC) released a 2017 update that reviewed the labour laws on migrant domestic workers in Gulf Cooperation Council Countries.²⁰⁹ The update looked at the laws in Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. The study acknowledged that human rights violations were meted on migrant workers in looking at these countries.

The report acknowledged that migrants have limited access to justice mechanisms. This limited access to justice is due to several factors mainly due to; language barriers, lack of material resources, lack of legal assistance, prospects of lengthy court proceedings, the exclusion of migrants from the general labour law as well as the use of the Kafala sponsorship system.

The findings identified on the factors that hinder access to justice for migrant workers are used in this research to understand the plight of KEDW in Saudi Arabia. This study used the report to understand the legal framework of the host countries and the role the host country plays in guaranteeing the rights of migrant domestic workers within their jurisdiction.

The African Regional Organisation of the International Trade Union Confederation report compiled by Kennedy Atong, Emmanuel Mayah, and Akhator Odigie was a case study of labour migration from Ghana, Kenya, Nigeria and Uganda to the GCC states. The report argued that the abuse and exploitation faced by African migrants start from the point of departure to their workplaces and in their efforts to return home.²¹⁰ The report further discussed how recruitment agencies play a significant role in exploitation and abuse. The Kafala sponsorship

²⁰⁹ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017) <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf> accessed 5 June 2019.

²¹⁰ Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018) vii <https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

system and limited information and knowledge on safe migration on the part of potential labour migrants affect their ability to access justice.²¹¹

The research showed that African governments offer little protection in embassies as they have little expertise and competence to deal with labour migration-related cases.²¹² The research also outlined the challenges and experiences of returnees. This research used the report to highlight the plight of KEDW as well as make recommendations.

The work of Bina Fernandez offered helpful insight into the investigation on the obstacles to access to justice for KEDW. In her paper, it was apparent that many international conventions of the United Nations and the International Labour Organization provide a framework for improved national legislation within GCC countries to protect migrant domestic workers.²¹³ Most of these countries were reluctant to ratify or implement legislation that was specific to migrant domestic workers.²¹⁴

Fernandez pointed out that domestic and international organisations' pressure had intensified the need for GCC states to improve their national legislative frameworks to protect migrant domestic workers.²¹⁵ The paper focused on the steps taken by GCC states in ensuring that there was protection of rights and access to justice for migrant domestic workers. However, unlike what this research has done, the paper did not explore the cooperation between labour sending and labour receiving countries in the protection of the rights of migrant domestic workers.

²¹¹ *ibid.*

²¹² *ibid* viii.

²¹³ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration 2014), 3 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

²¹⁴ *ibid.*

²¹⁵ *ibid* 9.

Antoinette Vlieger was another author who contributed to access to justice for domestic workers in Saudi Arabia.²¹⁶ Antoinette discussed access to justice in chapter 8 of her research. Antoinette considered the enforcement or conflict resolution mechanisms in Saudi Arabia and Emirates. In her research, she also delved into other possible enforcement and conflict resolution mechanisms such as friends, family, agencies, shelters, NGOs and embassies.²¹⁷ For Antoinette, the necessity of access to justice and the consequence of its absence for domestic workers in Saudi Arabia and Emirates were of fundamental consideration.

Judy Fudge's paper on *Making Claims for Migrant Workers: Human rights and Citizenship* analysed how Citizenship and national sovereignty over immigration had a bearing on access to justice. Fudge noted that a distinctive feature of temporary migration programmes for low-skilled workers is that these workers are often not entitled to the same rights as nationals of the host state.²¹⁸ The lack of entitlement is because migrant workers are subject to a range of mobility, employment and residence restrictions in the country in which they are working that do not pertain to workers who enjoy their permanent resident or citizenship status in the host state.²¹⁹

These restrictions on migrant worker's rights are permitted because both the ILO and the UN accept the principle of national sovereignty over immigration.²²⁰ Judy Fudge quotes Hannah Arendt's conception of citizenship which is the right to have rights' to illustrate the inability of rights claims to get to the root of the problem of migrant workers lack of citizenship.²²¹

²¹⁶ Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and Emirates: A Social-Legal Study on Conflicts, Access to Justice' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-49 <<http://ssrn.com/abstract=1967425>> accessed 12 February 2019.

²¹⁷ *ibid* 180.

²¹⁸ Judy Fudge, 'Making Claims for Migrant Workers: Human rights and Citizenship' (Citizenship Studies, 2014) 29.

²¹⁹ *ibid* 30.

²²⁰ *ibid* 34.

²²¹ *ibid* 36.

Fudge's research was necessary in looking at how the Kenyan government can intervene in terms of laws and policies, bearing in mind the sovereignty of the labour importing country. Fudge did not only stop at identifying citizenship status as a limitation but also went ahead to offer solutions on how this issue can be navigated to ensure the rights of migrant workers were protected.

Deborah Rhode's ²²² study is based in America. Her research, even though her study on access to justice is based in America, her research looked at the barriers in the civil justice system in accessing justice. The barriers discussed include financial, political, doctrinal and structural barriers. This study used Rhode's work to examine the financial barriers in assessing the challenges faced in accessing justice. She stated that money may not be the root of all evil but that it is responsible for much of what ails the current legal aid system.²²³

She looked at financing of legal suits not just as a problem faced by individuals but the state's allocation of resources for legal aid.²²⁴ She argued that the less a country would spend on legal aid, the more people are priced out of the legal system.²²⁵ Rhode's contribution to the research was to show the importance of legal assistance financing and the State's contribution to facilitating legal aid.

1.12 LIMITATIONS OF THE STUDY

Access to justice for Emigrant Domestic workers in Kenya is a relatively new field. The research referred to other jurisdictions. Making reference was necessary to have a comparative analysis and localize the solutions and propose their assimilation into the Kenyan context. Due to the time restrictions in conducting this study, the researcher formulated a work plan to ensure

²²² Deborah Rhode, 'Access to Justice; A Roadmap for Reform' 41 Fordham Urb LJ 1227(2014) <<https://ir.lawnet.fordham.edu/ul/vol41/iss4/7/>> accessed 4 July 2019.

²²³ *ibid* 1228.

²²⁴ *ibid* 1229.

²²⁵ *ibid* 1229.

the research responsibilities were carried out in a time cautious manner. The researcher collected data early enough to gather as much information as possible.

There were financial constraints in conducting the study. Finances were required to acquire a research permit, print questionnaires, and facilitate meetings with key informants and in-depth interviewees. The researcher minimized the financial burden by meeting key informants in their office premises, conducting interviews on my own, and printing the questionnaires' on cheap available paper. The global pandemic of COVID-19 slowed down the carrying out of interviews. However, telephone calls and online platforms such as WhatsApp were utilized during the pandemic.

1.13 CHAPTER BREAKDOWN

1.13.1 Chapter One

This chapter is introductory and provides background information on domestic workers. It discusses the statement of the problem, hypothesis, statement of objectives, research questions, the conceptual framework, the theoretical framework, justification of the study, literature review and the study's limitation.

1.13.2 Chapter Two

This chapter will discuss the human rights violations faced by KEDW in Saudi Arabia. It discusses the violations of human rights using a human rights perspective and sociological theoretical view. This chapter assesses the abuse of the rights faced by workers pre-departure, while in the host countries and on return.

1.13.3 Chapter Three

It will discuss the obstacles to accessing justice by KEDW. In the challenges identified, the chapter looks into the Kafala sponsorship system, financial barriers, political and economic factors that influence access to justice, knowledge of rights is yet another challenge identified,

the pervasive unregulated system of individual agents is discussed, recruitment agencies, the centralization of redress mechanisms, insufficient human resource and training for government agencies assisting migrant workers. In addition, this chapter looks at some of the legal measures taken by Indonesia, the Philippines, and Nepal on access to justice for migrant domestic workers.

1.13.4 Chapter Four

This chapter undertakes an analysis of the law applicable to KEDW at the national, regional and international levels. The laws looked at include; the Constitution of Kenya 2010, the Employment Act 2007, the Labour Institutions Regulations 2016, the African Charter on Human and Peoples Rights, the Domestic Workers Convention, the Universal Declaration of Human Rights. The chapter also looks into the bilateral agreement between Kenya and Saudi Arabia on Kenya's Domestic Workers. It highlights the Saudi Arabian Labour Laws that apply to migrant domestic workers and highlights the gaps in legislation in SALL and Kenyan laws.

1.13.5 Chapter Five

In chapter five discusses the conclusions, summary of findings and recommendations. The conclusion provides an overview of the critical points of the research. The findings discuss the outcome of assessing the legal framework in Kenya concerning employment, immigration and human rights and the interviews conducted. The recommendations are what the research proposes as legal and social solutions to access to justice for KEDW.

CHAPTER TWO: HUMAN RIGHTS VIOLATIONS FACED BY KENYAN EMIGRANT DOMESTIC WORKERS IN SAUDI ARABIA

2.1 INTRODUCTION

This chapter discusses the plight of KEDW in Saudi Arabia in light of International and Regional law instruments ratified in Kenya and its national laws on human rights. It further discusses the legal framework of the KSA and how it is in breach of international human rights and the gaps in the law. The research chose to focus on human rights violations due to the rise in abuse reports by Kenyan domestic workers in the KSA. Despite this fact, recruitment and placement of workers to the region continues.

The discussion on the human rights violations employed secondary and empirical data in obtaining information on the human rights abuse faced by KEDW. In light of the COVID-19 pandemic, some of the interview methods had to change to suit the current situation. The researcher conducted face-to-face interviews with two key informants and two returnee in-depth interview participants. Telephone interviews were conducted with three in-depth interview participants. From the three telephone interviews conducted, the researcher also did two telephone interviews with two KEDWs who were still working in Saudi Arabia. The researcher did these via the mobile application, WhatsApp messenger.

For the researcher and the identified domestic workers to hold a conversation WhatsApp, the KEDW had to take extra precautions and use VPN (Virtual Private Network). The use of VPN, as explained by the KEDW, was so that the communication would not be tapped. They stated that there was heavy surveillance of individual communications in Saudi Arabia.

The researcher did face-to-face interviews with a legal officer from KUDHEIHA and with the Chairlady of the domestic workers union within KUDHEIHA during the information gathering

stage of the research. Since the interview participants were referred to the researcher by snowballing, a returnee domestic worker, one of the in-depth interviewees referred me to was from Lebanon.

To protect the identities of both the returnee and domestic workers currently working in Saudi Arabia, the ladies are named as in-depth interviewee 1 to 5 the order of the numbering does not necessarily depict the order in which the interviews were carried out. A brief description of the participants is as follows:

In-depth interviewee 1 is currently taking a nursing course in Nairobi. She appeared to be in her early to mid-20s. She sought employment in Saudi after high school because she wanted to save money for her college fees, the high level of unemployment in Kenya, and her agent promised her good pay if she worked there. She first went to Saudi in the year 2015. She had gotten a two-year contract at that time. However, due to the high level of mistreatment she faced, she served her contract for 11 months and returned home. One may think that once beaten twice shy, but the dire situation faced by Key informant 1 propelled her to try her luck again in Saudi as a domestic worker. In the year 2017, she sought employment in Saudi Arabia, where she stayed for close to a year but was not lucky and had to run away from her employer and come back to Kenya.

In-depth interviewee 2 is a mother and resides within Nairobi. She worked in Saudi for six years, albeit not continuously. The first time she left for Saudi was in 2011 where she only worked for 9 months. She did not complete her two-year contract because of the unbearable working conditions. She came back to Kenya. However, due to her growing financial needs back home, she decided to go back and work in the KSA. Her return was in 2014. She worked there until 2018, when she returned to Kenya.

In-depth interviewee 3 is still in employment in Saudi Arabia. She began working in Saudi Arabia in early 2009. Her growing financial obligations pushed her to seek employment in the KSA. She has worked in Saudi Arabia ever since for now close to 12 years. For the 12 years she has worked in Saudi Arabia, she has worked for the same family for 11 years. She has connected other workers to Saudi Arabia during her stay there, although they have not been as successful as her, the casing point being key informant 1.

In-depth interviewee 4 is a domestic worker who has worked in Saudi since the year 2012. She is still working in Saudi Arabia as a domestic worker. Like her companions, she sought employment in Saudi due to the higher pay for the same work offered in Kenya. She stated that her salary was not as high as promised in the employment contract, although it was much better than it would have been if she was in Kenya.

Key informant 1 is the National Chairlady of the domestic workers union within KUDHEIHA. Before getting to that position, she formerly worked as a domestic worker in the suburbs of Nairobi for 7 years. She has been championing the rights of Kenyan domestic workers both nationally and internationally. She is actively involved with KEDWs who have worked or are still working in Saudi Arabia.

In-depth interviewee 5 is formerly a domestic worker who worked in Lebanon. She is currently working as a marketer within Nairobi. She sought employment in Lebanon because of the high pay promised as a domestic worker. She worked as a domestic worker between the years 2015 to 2018.

Last but not least is Key informant 2, who is the legal officer at KUDHEIHA. She helped in the navigation of the legal landscape when it came to domestic workers.

2.2 STATE RESPONSIBILITY IN THE PROTECTION OF HUMAN RIGHTS

Due to the numerous media reports that many Kenyans were being mistreated while in Saudi Arabia,²²⁶ the government of Kenya intervened in the situation. The government of Kenya first banned from going to the Middle East in June 2012. The foreign affairs ministry stated that unscrupulous agents duped Kenyans with the promise non-existent jobs.²²⁷ Kenya took this step to minimalize the abuse.²²⁸ The government lifted the ban in November of 2013.²²⁹ This lift in the ban was short-lived, for, in 2014, Kenya placed a ban on its citizens working in the Gulf because of abuses.²³⁰

The ban was in force for three years, and in 2017, following the signing of a bilateral agreement with the KSA, there were considerations in lifting the ban.²³¹ The government of Kenya eventually lifted the ban in 2017. However, the exportation of labour could only resume once the government had re-vetted the recruitment agencies first.²³²

The state has an obligation to protect its citizens as enshrined in article 21(1) of the CoK, which provides that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights.

²²⁶ BBC, 'Kenya Maids Barred from the Middle-East' *BBC news* (Nairobi, 22 June 2012) <<https://www.bbc.com/news/world-africa-18552155>> accessed 7 October 2019.

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ Katy Migiro, 'Kenyan Domestic Worker Stabbed, Burned by Saudi Employer-Report' *Thomson Reuters Foundation* (Nairobi, 2 September 2014) <<http://news.trust.org/item/20140902142724-oget4/>> accessed 7 October 2019.

²³⁰ Annie Mange'ra, 'Fears of Fresh Abuse of Migrants in the Middle East as Kenya Set to Lift Ban' *Thomson Reuters Foundation* (Nairobi, 10 January 2018) <<https://www.reuters.com/article/us-kenya-labour-trafficking/fears-of-fresh-abuse-of-migrants-in-middle-east-as-kenya-set-to-lift-ban-idUSKBN1EZ0HS>> accessed 7 October 2019.

²³¹ *ibid.*

²³² Aggrey Mutambo, 'State Clears the Way for Kenyans to Work in Saudi Arabia' *Daily Nation* (Nairobi, 21 January 2019) <<https://www.nation.co.ke/news/State-clears-the-way-for-Kenyans-to-work-in-Saudi/1056-4945078-7kotwb/index.html>> accessed 2 March 2019.

The case of *Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs and International Relations & 4 others*²³³ provides insight into State's responsibility where Justice Odunga, in paragraph 33, stated that:

The executive is under a duty to ensure the welfare of its citizens is to be found in Article 21(1), which provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. For the Government to knowingly permit its citizens to leave the country either voluntarily or forcefully to face cruel, inhuman, and degrading treatment abroad would be an abdication on the part of the Government of its obligation under Article 21(1) of the Constitution.

Justice Odunga further states in paragraph 32 of the judgement... 'That the government has the obligation to take the necessary steps to protect the rights and interest of its citizens within and outside the country.' He continued by stating 'the well-being of the people of Kenya is not just limited to their well-being when within the country but also their well-being when outside the country as long as they are within the law.'

This synopsis brings the research to a discussion on human rights violations faced by KEDW that caused the government of Kenya to intervene by a moratorium. The violations are examined from the pre-departure stage to when the domestic worker is undertaking their employment in Saudi Arabia. Finally, we look at the international human rights law violated by Saudi Arabia and their national legal framework.

²³³ (2013) eKLR.

2.3 HUMAN RIGHTS VIOLATIONS

2.3.1 Charging of Unapproved Fees

At the pre-departure stage, the unfair labour practice includes exploiting potential domestic workers by requiring them to pay a high introduction fee for work placement by the recruitment agency. In contrast, the employer is required to pay for expenses pertaining to the importation of a domestic worker.²³⁴ This high recruitment fee leads to debt bondage.²³⁵

In-depth interviewee 2 stated:

For the times I was recruited to work in Saudi, my recruiter demanded that I pay him a recruitment fee of Kshs. 45,000. This fee was not to be paid at the point of recruitment as I did not have the money. I agreed with my agent that I would pay him this money within the first three months of employment in Saudi. I would receive the equivalent of Kshs. 16,000 per month as my salary. Within the first three months, I had accumulated Kshs. 48,000. However, before the three months were over I would receive frequent calls from my recruiter reminding me that I owed him. In addition to calling me, he would also call my mother informing her that I owe him money. The constant calls he would make to me and my mother made me very stressed. I do not like borrowing money or owing people money. Once the three months were over, I sent my mother the Kshs. 48,000, whereby she only took Kshs. 5000 for her needs and my children's needs, the rest of the money she forwarded to the recruiter. It was as if I did not receive any money as I had to settle my debt first. That was when I finally got a sigh of relief.²³⁶

²³⁴ Caroline Gikuru, 'The Plight of Kenyan Domestic Workers in Gulf Countries' (Master's Thesis, University of San Francisco 2013) 16.

²³⁵ ILO, 'The Migrant Recruitment Industry: Profitability and Unethical Business Practices in Nepal, Paraguay and Kenya' (2017) 50.

²³⁶ Interview with KEDW currently working in Saudi Arabia (4 May 2020)

2.3.2 Deception of the Terms and Conditions of Work

The recruiters deceive potential migrant domestic workers as to the nature and conditions of work.

In-depth interviewee 2 stated;

Her recruiter informed her that she was being contracted to work as a caregiver for an older man. On arrival at the home, she found that the older man had a loose bladder and that she would have to clean after him. He would pass urine uncontrollably, and since the house was fully carpeted, it would smell. She was required to wash the carpets by hand without gloves. In addition to this, the wife of the older man was verbally abusive, which made her work there unbearable.

2.3.3 Deception of Expected Remuneration

Fraudulent misrepresentations are statements that one makes knowing it to be untrue or are made recklessly, not caring whether it be true or false.²³⁷ These statements are often made to domestic workers by recruitment agencies and individual agents to persuade them to apply for employment.

In-depth interviewee 1 stated that:

My recruiter promised me that I would receive a good salary when I go to work as a domestic worker in Saudi Arabia. My agent promised that I would get paid 2000 riyal per month (which is approximately Kshs. 57,910). However, when I arrived in Saudi Arabia, the terms of my contract were varied, and my employer reduced my salary to 800 riyal (which is approximately Kshs. 23,160).²³⁸

²³⁷ R. W. Hodgkin, *Law of Contract in East Africa* (Kenya Literature Bureau 2006)115-116.

²³⁸ Interview with returnee emigrant domestic worker from Saudi Arabia(Nairobi, 28 September 2019).

Key informant 2 reiterated the sentiments of Key informant 1 and stated that:

I did not go to an official recruitment agency. However, I was linked to an agent who knew of the prospects of employment in Saudi Arabia. The agent informed me that I would be paid 1,500 Riyal as my monthly salary. When I arrived in Saudi Arabia, my employer said that no such agreement was made and that she would pay me a monthly salary of 800 riyal. Since I was already in the country, I could do nothing else but accept what my employer was offering me.²³⁹

In-depth interviewee 4 had the same narrative:

When I left Kenya to come work in Saudi, my agent promised that my employer would pay me 1000 riyal. However, on arrival in Saudi, my employer reduced my salary to 800 riyal. I could not do anything about it as I had already arrived to work in the country.

2.3.4 Discrimination

The Human Rights Committee describes discrimination as used in the Covenant, that is, the ICCPR, should be understood to imply any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This distinction has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms.²⁴⁰

While conducting interviews with key informants, discrimination based on race was one of the issues that came up. One of the informants shared, ‘I experienced racism while I worked in

²³⁹ Interview with returnee emigrant domestic worker from Saudi Arabia (Nairobi, 4 May 2020).

²⁴⁰ UNHCR ‘General Comment 18’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (1994) UN Doc HRI/GEN/1/REV.1 , 26 par 7<[https://www.equalrightstrust.org/ertdocumentbank/Human%20Rights%20Committee.%20General%20Comm ent%2018.pdf](https://www.equalrightstrust.org/ertdocumentbank/Human%20Rights%20Committee.%20General%20Comment%2018.pdf)> accessed 5 October 2020.

Saudi Arabia. The Philippine and Ethiopian migrant domestic workers within the same household that I worked were treated much better than I was.’²⁴¹

The same sentiments were echoed in a separate interview where the informant revealed, ‘Many returnee workers from Saudi report to have experienced racial discrimination because Saudi’s view themselves to be of high social standing than the migrant domestic workers.’²⁴²

2.3.5 Limitation of Freedom of Movement

Some domestic workers are ‘overtly restricted using locks, bars, and chains or less conspicuously (but not less effectively) restricted by confiscation of their passport and travel documents...’²⁴³

In-depth interviewee 1 stated;

Passport confiscation is common. At the point of entry into Saudi Arabia, my passport was retained by the immigration officer when checked in to the country. My passport was then to be given to my employer when they arrive at the airport to pick me. My employer is the one who maintained custody of my passport throughout my stay in Saudi Arabia. Without my passport, I could not move from one place to another within the country, for I would need to produce my passport upon request by any official.

In-depth interviewee 2 echoed similar sentiments for she stated that;

When I arrived in Saudi Arabia, my employer confiscated my passport, who subsequently lost it. I only discovered this when I was to leave the country. At that time, my employer told the officials at the airport that I was an escapee migrant domestic

²⁴¹ In-depth interviewee 1.

²⁴² Key informant 1.

²⁴³ Adam J. Hiller and Leah E. Saxtein ‘Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search or Legislative Protection’ (2009) 27 Hofstra Labor and Employment Law Journal 233, 247-248 < <https://scholarlycommons.law.hofstra.edu/hlelj/vol27/iss1/8>> accessed 4 June 2019.

worker and that they were doing what was right by ensuring that I was sent back to my country, explaining why they did not have my passport.

2.3.6 Restriction on the Ability to Change Employers

The system of employment used in the KSA is the Kafala system. In this system, the employer is the one who is responsible for the workers' recruitment fees, completion of medical exams and possession of their identity card.²⁴⁴ The employer usually has to obtain residency papers for the migrant domestic worker from the Ministry of Interior.²⁴⁵

The residency papers usually bind the kafeel (sponsor-employer), giving the latter powers to cancel the worker's residency at will and prevent workers from leaving or changing employment.²⁴⁶ The kafeel effectively does this by confiscating the passport of the migrant domestic worker.²⁴⁷

In-depth interviewee 3 stated;

Domestic workers, unfortunately, find themselves in the hands of abusive employers and see running away as the only solution to their problem. When they run away, they are no longer under the care of their employer. Since there has been no official changing of employers, the domestic worker becomes completely unprotected by law. If these workers get lucky and are employed in other households, it is against the law as they still have an existing contract with the employer from whom they have run away. 'Black-market' employment arises. The current employer may mistreat them as they

²⁴⁴ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017)7.

²⁴⁵ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration 2014), 5 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

know that the worker cannot forward them to authorities since their stay is not regularized.

2.3.7 Restriction of Communication

Migrant domestic workers have their correspondence with their family and friends through telephone calls restricted or all together, forbidden.

In-depth interviewee 1 stated:

My mobile phone was taken from me when I arrived at my employer's house. However, before travelling to Saudi Arabia, I had been in touch with some migrant domestic workers who told me to carry a backup phone that I would hide from my employer. I did that and was able to keep in touch with my family secretly.

In-depth interviewee 4 revealed that 'for me, communication is a problem as the internet connection in the house is restricted. That is the primary way to communicate with my family back home, as normal mobile service is very expensive.'

Key informant 1 stated that;

Most distress calls that I receive from migrant domestic workers in Saudi Arabia are made to me at odd hours of the night and when the domestic worker is in the toilet for fear of being heard and the phone confiscated.

2.3.8 Provision of Inadequate Food

Employers punish domestic workers using food, as revealed by some of the informants interviewed. Due to the physically demanding nature of domestic work, food is fundamental for the execution of duties by the domestic worker.

In-depth interviewee 1 revealed that:

I was tired of the working conditions of my employer in Saudi Arabia. I then told the madam of the house that I wish to leave and that she should pay me the money that I had worked for. When I made this request for payment of the money owed to me, she locked me up in a room for three days and nights, with no food, water, toilet and worst of all, I was menstruating at this time.

In-depth interviewee 4 stated:

The food provided by my employers is not sufficient; however, over my years of working in Saudi Arabia, I have devised new ways of coping with the lack of sufficient food. I survive by stealing milk from the fridge so that I may stay hunger for some time until I am provided for my next meal. I do this due to the stomach pain that I experience.

Also, in-depth interviewee 2 stated:

My employer used to give me little food as a means of punishment. I, however, have never had a big appetite. So when she would ration food for us, the migrant domestic workers, and I would not complain she thought that I had a problem, she, however, came to find out that I am a poor eater and therefore she could not use food as a means of punishment for me.

2.3.9 Lack of Adequate Rest

Migrant workers are tirelessly worked only to get inadequate resting time.

In-depth interviewee 4 revealed that ‘I work for a long duration of hours without rest only getting a few hours to sleep as there is a lot of work to be done.’

The sentiments of in-depth interviewee 4 are echoed by in-depth interviewee 1 when she states:

There was no rest from work. I would work from Sunday to Sunday. My day would start at 4.00 am and end at 1.00 am the next day when everybody was asleep. I would not get any chance to rest during the day as I was allocated a lot of work.

2.3.10 Withholding of Payment

In the course of interviewing the informants who had worked in Saudi Arabia, they revealed that there were instances where they had worked, and the employer either withheld their salary or failed to compensate them for the work done or even both.

While some have been assisted to claim their wages and return home, in other cases, workers have been forcibly returned to abusive situations or subjected to specious counter complaints by their employers.²⁴⁸ In worst cases, workers are beaten, imprisoned, or issued with a death sentence.²⁴⁹

In-depth interviewee 1 revealed:

For the first three months of my contract, I was under probation and did not receive any salary for the work I had done within the household. When I asked for payment, my employer informed me that the money was to go towards the repayment of the expenses of my visa and travel costs to Saudi Arabia. After the three months, I asked for my salary and I was not given any money. My employer told me that I would be paid at the end of my two-year contract. I did not agree to this as I had my immediate needs and had to urgently send money home for my siblings' education. I, however, continued to work without pay in the hope that I would be paid. I did this until my 11th month of working without pay, when I decided enough was enough.

²⁴⁸ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017), 19.

²⁴⁹ *ibid.*

2.3.11 Sexual Harassment

One of the domestic workers interviewed had the unfortunate occurrence of being sexually harassed by her employer's sons.

In-depth interviewee 1 stated:

My employer had me sleep in the laundry area which did not have a door. The laundry area was located in a common area and so when the sons of my employer would pass to go to their room, they would stop over the laundry area. They would come into the laundry room and roll over my blanket when I was asleep. They would then take turns to sleep with me and touch me inappropriately. I could not do anything but comply with their demands.

2.4 INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Saudi Arabia has acceded to several international instruments to which it generates obligations.

As per the UN treaty database,²⁵⁰ Saudi Arabia has ratified the following international conventions;

1. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
2. Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment
3. International Convention on the Elimination of All Forms of Racial Discrimination

In addition to these instruments, Saudi being a member of the ILO, has ratified the following conventions relating to the rights of migrant domestic workers; Convention no. 29 on Forced

²⁵⁰<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=152&Lang=EN> accessed 15 May 2020.

Labour; Convention no. 100 on Equal Remuneration; Convention no. 105 on Abolition of Forced Labour; Convention no. 111 on Discrimination (Employment and Occupation).

Saudi Arabia has, however, tended to enter broad reservations upon accession to international treaties.²⁵¹ Taking the instance of CEDAW, the Saudi government entered a blanket reservation upon ratification of CEDAW, stating that ‘In case of contradiction between any term of the Convention and the norms of Islamic law, the kingdom is not under obligation to observe the contradictory terms of the Convention.’²⁵² Reservations to CEDAW show the state’s unwillingness to accept women’s rights and ensure continued subjugation of women in that country.²⁵³ The reservations have a bearing on KEDW as the Arab States host the highest number of women migrant domestic workers estimated at 1.6 million. However, other estimates put the number much higher.²⁵⁴

The human rights violations faced by KEDW in Saudi Arabia go against the provisions of the UDHR, which is considered customary international law.²⁵⁵

Some of the rights breached that have been discussed include;

a) The right to rest

Everyone has the right to rest and leisure, including reasonable working hours and periodic holidays with pay.²⁵⁶

²⁵¹ *ibid* 17.

²⁵² Human Rights Watch, ‘ Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia’ (Human Rights Watch, April 2008)

34 <<https://www.hrw.org/reports/2008/saudi-arabia0408/5.htm>> accessed 18 May 2020

²⁵³ Linda Keller, ‘The Impact of State Parties’ Reservations to the Convention on the Elimination of all Forms of Discrimination against Women’ 2014 Mich. St. L. Review. 309 <

<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1080&context=lr>> accessed 30 September 2020

²⁵⁴ Sophia Kagan, ‘Domestic Workers and Employers in the Arab States: Promising practices and innovative models for a productive working relationship’ (2017) International Labour Organization White Paper, 3 <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_619661.pdf> accessed 15 July 2020

²⁵⁵ *ibid* 35.

²⁵⁶ UDHR art 24.

b) Right to just and favourable conditions of work and remuneration.

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.²⁵⁷ This provision applies to the working conditions of KEDW as well as the withholding of their salaries.

c) Right to freedom of movement and residence within the borders of each State.²⁵⁸

Everyone has the right to leave any country, including his own, and return to his country.²⁵⁹ Employers breach this provision when they confiscate the passports of KEDW.

d) The UDHR provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁶⁰ Furthermore, an individual shall not make a distinction based on the political, jurisdictional, or international status of the country or territory to which another belongs.

e) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, inter alia food.²⁶¹

2.5 GAPS AND OMISSIONS IN SAUDI ARABIAN LAW

Saudi Arabia is a member state of the ILO; however, it has not taken positive steps in eliminating discrimination in the employment of migrant domestic workers. One way the law propagates discrimination is the exclusion of migrant domestic workers from SALL. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work provides that all members,

²⁵⁷ UDHR art 23(3).

²⁵⁸ *ibid* art 13(1).

²⁵⁹ *ibid* art 13(2).

²⁶⁰ UDHR, art 2.

²⁶¹ *ibid* art. 25.

even if they have not ratified the convention, have an obligation arising from the very fact of membership in the organization. The members have an obligation to respect, promote, and realize in good faith the principles concerning the fundamental rights, namely, inter alia, the elimination of discrimination in respect of employment and occupation.²⁶²

The UDHR, in like terms, provides ‘all are equal before the law and are entitled without any discrimination to equal protection of the law.’²⁶³

Article 7(2) of the Saudi Arabian Labour Laws (SALL) provides that domestic helpers and the like are exempted from the implementation of the provisions of the labour law. The article states that the ministry shall, in coordination with the competent authorities, draft regulations for domestic helpers and the like to govern their relations with their employers and specify the rights and duties of each party.

The exclusion of domestic helpers from the labour law means that they are not accorded the same rights and benefits that other workers enjoy in Saudi Arabia. Their labour rights are therefore limited to regulations outside of SALL. Exclusion from the law makes migrant domestic workers vulnerable and susceptible to abuse and only propagates the precarious nature of the work that they undertake. For the human rights of KEDW to be protected, there must be equal protection of their labour rights, for labour rights are human rights although not exhaustive.²⁶⁴

Decision no. 310 of 1434 on Domestic workers was adopted on 15 July 2013.²⁶⁵ This provision is what governs migrant domestic workers as they work in Saudi Arabia. Article 3 of the

²⁶² International Labour Conference, ‘ILO Declaration of Fundamental Principles and Rights at Work and Annex’ (adapted 18 June 1998) 37 ILM 1233 (1998), art 2(d).

²⁶³ UDHR ,art 7.

²⁶⁴ Text to n 110 in ch 1.

²⁶⁵ Gulf Labour Markets and Migration < <https://gulfmigration.org/decision-no-310-of-1434-on-domestic-workers/>> accessed 13 May 2020.

regulations stipulates that the relationship between the employer and the domestic worker is regulated by the contract between them.

This provision is limiting as some migrant domestic workers are not given contracts, or cannot read their contracts due to the language used.

This was revealed by in-depth interviewee 2 when she said:

The last time that I was employed in Saudi Arabia, I was not given a contract and was not brought into the country under a work visa, but rather I was taken to Saudi on a free visa that is meant to be renewed after one year.

In addition, in-depth interviewee 5 stated, ‘I had a contract of employment; however, the provisions of the contract were in Arabic, and therefore I could not understand what was provided for in the contract.’

Article 8 of decision no. 310 of 1434 provides that a domestic worker is allocated one weekly rest day as stipulated in the contract. Further, under article 10, the domestic worker is entitled to up to one month paid leave after two years of service if the contract is renewed. There is a contrast in the provisions of the decision on domestic workers and SALL.

SALL under article 101 provides that working hours and rest periods during the day shall be scheduled so that no worker shall work for more than five consecutive hours without a break of no less than thirty minutes. Provided that a worker shall not remain at the workplace for more than 11 hours a day. Further, under article 109, it is provided that a worker is entitled to a prepaid annual leave of not less than 21 days and that the worker shall enjoy his leave in the year due.

This contrast between the rights of domestic workers as per decision 310 of 1434 and the rights of other workers only adds to the plethora of abuse faced by migrant workers.

2.6 CONCLUSION

The human rights violations faced by some KEDW call to attention the need for the enforcement of the existing laws and the enactment of sector-specific legislation that may ensure that their rights are guaranteed while seeking employment and while employed in Saudi Arabia. The KEDW, due to the high unemployment rate in the country, are faced with desperation, and are willing to take the risk and travel to Saudi Arabia in search of greener pastures.

The state has an obligation to respect, protect and fulfil the human rights of these workers.²⁶⁶ Legislative measures are indispensable in protecting all human rights, including economic, social, and cultural rights, since a sound legislative foundation provides a firm basis to protect such rights and enforce them in the case of violations.²⁶⁷ However, while legislation is essential, it is not enough per se to realize economic, social, and cultural rights.²⁶⁸ A workable solution that will guarantee the rights of these workers has, therefore, to be formulated.

The next chapter will discuss the obstacles faced by KEDW in accessing justice. In addition, it will look at some of the legal measures in place by labour sending countries that have enabled them to protect and ensure there is access to justice for their migrant workers. This comparison will then form a basis to enable the research to make suggestions and recommendations to ensure compliance with the set law and regulations. Also, some of the practices followed in these countries that have enhanced access to justice for migrant domestic workers may be suggested for adoption.

²⁶⁶ text to n 233.

²⁶⁷ Manisuli Ssenyonjo, 'Economic, Social and Cultural Rights: An Examination of State Obligations' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing Limited 2010) 45.

²⁶⁸ *ibid.*

CHAPTER THREE: OBSTACLES TO ACCESS TO JUSTICE

3.1 INTRODUCTION

Access to justice is a broad concept with international recognition as laid down in several international instruments such as declarations, principles, rules, recommendations and guidelines.²⁶⁹ Effective access to justice is the most basic human right of a modern, egalitarian legal system that purports to guarantee and not merely proclaim the legal rights of all.²⁷⁰

Access to justice is a fundamental right contained in the Bill of Rights of the CoK. It stipulates, ‘The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.’²⁷¹ The inclusion of the right to access to justice in the Bill of Rights gives credence to it as a right that guarantees the protection of other fundamental rights and freedoms. Furthermore, article 2 of the CoK transposes access to justice as recognized by international instruments and the Kenyan jurisdiction.²⁷²

Access to justice may be said to revolve around the ease with which ordinary citizens can make use of laws, legal procedures, and legal institutions to resolve their problems in general and particularly to secure their rights.²⁷³ It is an essential component of the system of protection

²⁶⁹ KNCHR, ‘Human Rights the Elusive Mirage?’ (KNCHR 2015), 18<<http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>> accessed 26 August 2019.

²⁷⁰Grath Bryant and Cappelletti Mauro, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) *Articles by Maurer Faculty* 1142, 185 <https://www.repository.law.indiana.edu/facpub/1142?utm_source=www.repository.law.indiana.edu%2Ffacpub%2F1142&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 31 May 2019

²⁷¹ COK 2010, art 48.

²⁷² KNCHR, ‘Human Rights the Elusive Mirage?’ (KNCHR 2015), 18.<<http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>> accessed 26 August 2019.

²⁷³KNCHR, ‘Human Rights the Elusive Mirage?’ (KNCHR 2015), 82 <<http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>> accessed 26 August 2019.

and enforcement of human rights.²⁷⁴ Human rights would be futile without an effective redress for their breach.²⁷⁵

The case of *Dry Associates v Capital Markets Authority and Another*²⁷⁶ expounded the term access to justice where Justice D.S. Majanja, in paragraph 110, stated that:

Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system, particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.

Beyond the Constitution of Kenya and national legislation, access to justice is guaranteed as a legal right in virtually all universal and regional human rights instruments since the 1948 UDHR. The UDHR stipulates that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'²⁷⁷ Other national and international legal instruments safeguard the right to access to justice discussed at length in the subsequent chapter.

Some of the essential components to access to justice include; laws that are fair and accessible to the citizens in their form and language, the availability of a variety of easily accessible and

²⁷⁴ Francesco Francioni (ed), *Access to Justice as a Human Right: The Rights of Access to Justice under Customary International Law* (Oxford University Press Inc New York 2007) 31.

²⁷⁵ KNCHR, 'Human Rights the Elusive Mirage?' (KNCHR 2015), 82
<<http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>> accessed 26 August 2019.

²⁷⁶ (2011) eKLR.

²⁷⁷ UDHR 1948) art 8.

effective mechanisms for resolving disputes that are adequately resourced and organized, simple and affordable procedures for achieving justice, fairness in the results of dispute resolution process and knowledge on the part of the citizens to enable them to easily use the law and legal institutions.²⁷⁸

In this research, the researcher viewed access to justice from the point of using the law and legal procedures and institutions in securing rights. The study looked at the human rights violations faced by KEDW, which are closely linked to the obstacles faced by these workers in accessing justice. The obstacles to access to justice are generally discussed, bearing in mind what access to justice entails. The researcher narrows down the discussion to specific obstacles faced by KEDW.

3.2 LEGAL FRAMEWORK OF LABOUR EXPORTING COUNTRIES

This section of the chapter looks at some of the legal measures taken by Indonesia, the Philippines and Nepal on access to justice for migrant domestic workers. Indonesia has been one of the leading exporters of migrant labour since 1980.²⁷⁹ 59% of all overseas workers from Indonesia chose to migrate to Saudi Arabia, and the majority of these workers were women employed as domestic servants.²⁸⁰

In the Philippines, domestic workers have long constituted a significant component of transnational labour migration, with the Gulf region and East and Southeast Asia as major

²⁷⁸ KNCHR, 'Human Rights the Elusive Mirage?' (KNCHR 2015), 82
<<http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>> accessed 26 August 2019.

²⁷⁹ Anam Arisari and others, 'Educating Against Vulnerability; An Integrated Approach to Addressing the Exploitation of Female Migrant Workers' (Geneva International Contest for Graduate Studies: Women Empowerment 2014), 4 <<https://www.graduateinstitute.ch/sites/internet/files/2019-01>> accessed 16 November 2020.

²⁸⁰ *ibid* 6.

labour markets.²⁸¹ Nepal, on the other hand, sends the most workers abroad per capita in Asia.²⁸²

3.2.1 Legal Measures in Place in Indonesia

Indonesia has enacted national law on the placement and protection of Indonesian Overseas Workers.²⁸³ The national law mainly governs the relationship between the recruiter and the potential migrant domestic worker.

There are also presidential instructions passed, such as the National Body for the Placement and Protection of Indonesian Migrant Workers.²⁸⁴ The Indonesian embassies and consulates abroad have representatives who can provide legal aid for Indonesian citizens with legal problems.²⁸⁵ Advocacy and litigation by hiring retainer lawyers for the migrant workers' task force greatly helped in improving the protection of Indonesian migrant workers.²⁸⁶

During the placement stage, the protection responsibility is given to the embassy based on the regulations of the destination countries, which include supervising and monitoring, diplomatic/consular protection, giving legal assistance, and defend to get the Indonesian workers 'rights overseas.'²⁸⁷ To protect its migrant workers abroad, the government of Indonesia has also signed a Memorandum of Understanding (MOU) with the Kingdom of Saudi

²⁸¹ Graziano Battistella, Jung Soo Park, Maruja Asis, 'Protecting Filipino Transnational Domestic Workers: Government Regulations and their Outcomes' (2011) Philippine Institute for Development Studies Discussion Paper Series, No. 2011-12, 6 <<http://hdl.handle.net/10419/126839>> accessed 17 November 2020

²⁸² Sarah Paoletti and others, 'Migrant Workers' Access to Justice at Home: Nepal' (2014) University of Pennsylvania Law School Research Paper No. 14-22, 18 <<http://ssrn.com/abstract=2457948>> accessed 8 January 2019.

²⁸³ Anam Arisari and others, 'Educating Against Vulnerability; An Integrated Approach to Addressing the Exploitation of Female Migrant Workers' (Geneva International Contest for Graduate Studies: Women Empowerment 2014), 13 <<https://www.graduateinstitute.ch/sites/internet/files/2019-01>> accessed 16 November 2020.

²⁸⁴ *ibid.*

²⁸⁵ *ibid.* 14.

²⁸⁶ Jihan Sidik and Witri Elvianti, 'The Consignment of Indonesian Migrant Workers in Saudi Arabia and its Resilience: Examining the Impact of Indonesia's Moratorium Policy (2011-2015)' (2018) *Andalas Journal of International Studies* 1, 22 <<https://doi.org/10.25077/ajis.7.1.14-31.2018>> accessed 16 November 2020.

²⁸⁷ *ibid.* 23.

Arabia.²⁸⁸ However, before the signing of the MOU, the government of Indonesia had put in place a moratorium policy which was an urgent decision related to the migrant workers' issues.²⁸⁹ This policy became a tool to influence the Saudi government to sign the MOU on the protection of Indonesian domestic workers.²⁹⁰

Despite Indonesian embassies and consulates abroad having representatives who can provide legal aid for Indonesian citizens with legal problems, they are often under-funded and unable to help all the people who require assistance.²⁹¹

The provision of legal aid is fundamental to access to justice; this is despite there being challenges in its enforcement, it is a step in the right direction.

3.2.2 Legal Measures in Place in the Philippines

The Philippines has a robust legal regime to protect domestic workers.²⁹² They have placed a minimum age requirement for departing domestic workers.²⁹³ In addition, before leaving the country, all workers must attend a pre-departure orientation seminar.²⁹⁴ Onsite resource centres are present in several destination countries. These centres serve as a shelter for distressed

²⁸⁸ *ibid* 24.

²⁸⁹ *ibid*.

²⁹⁰ *ibid*.

²⁹¹ Anam Arisari and others, 'Educating Against Vulnerability; An Integrated Approach to Addressing the Exploitation of Female Migrant Workers' (Geneva International Contest for Graduate Studies: Women Empowerment 2014), 14 <<https://www.graduateinstitute.ch/sites/internet/files/2019-01>> accessed 16 November 2020.

²⁹² International Human Rights Clinic, 'The Protection of the Rights of Migrant Domestic Workers in a Country of Origin and a Country of Destination: Case Studies of the Philippines and Kuwait' (2013) John Hopkins School of Advanced International Studies, 43 <http://christusliberat.org/journal/wp-content/uploads/2017/10/Domestic-Workers-Report-2013_Electronic-Version.pdf> accessed 18 November 2020.

²⁹³ Anam Arisari and others, 'Educating Against Vulnerability; An Integrated Approach to Addressing the Exploitation of Female Migrant Workers' (Geneva International Contest for Graduate Studies: Women Empowerment 2014), 9 <<https://www.graduateinstitute.ch/sites/internet/files/2019-01>> accessed 16 November 2020,

²⁹⁴ *ibid*

workers.²⁹⁵ The government also deploys labour attachés and welfare officers in major countries of destination to support migrant domestic workers.²⁹⁶

In 2012 the Philippines ratified the Domestic Workers Convention.²⁹⁷ Further nationally, the Philippines have enacted the Domestic Workers Act.²⁹⁸ The Act protects domestic workers against abuse, debt bondage and the worst form of child labour.²⁹⁹ Concerning migrant workers, the Philippines have in place a Migrant Workers and Overseas Filipinos Act of 1995.³⁰⁰ This Act guarantees important rights for migrant workers and sets up an institutional framework to monitor and enforce those rights.³⁰¹

The ratification of the Domestic Workers Convention is a decision that labour-sending states should emulate. It ensures that the rights of domestic workers and migrant domestic workers are protected and access to justice is achieved.

3.2.3 Legal Measures in Nepal

Nepal significantly strengthened its labour migration governance by introducing a new Foreign Employment Act in 2007 and Rules in 2008, and, recently, the Foreign Employment Policy 2012.³⁰² The laws introduced were intended to make foreign employment safe, managed and decent and to protect the rights and interests of both the workers who go for foreign

²⁹⁵ *ibid*

²⁹⁶ *ibid.*

²⁹⁷ International Labour Organization <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> accessed 17 November 2020.

²⁹⁸ International Labour Office Geneva, ‘Philippines Enact New Laws Protecting Domestic Workers’(2013), 1 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/>accessed 17 November 2020

²⁹⁹ *ibid.*

³⁰⁰ International Human Rights Clinic, ‘The Protection of the Rights of Migrant Domestic Workers in a Country of Origin and a Country of Destination: Case Studies of the Philippines and Kuwait’(2013) John Hopkins School of Advanced International Studies, 71<http://christusliberat.org/journal/wp-content/uploads/2017/10/Domestic-Workers-Report-2013_Electronic-Version.pdf> accessed 18 November 2020

³⁰¹ *ibid.*

³⁰² Sarah Paoletti and others, ‘Migrant Workers’ Access to Justice at Home: Nepal’ (2014) University of Pennsylvania Law School Research Paper No. 14-22, 79 <<http://ssrn.com/abstract=2457948>> accessed 8 January 2019.

employment and recruitment agencies.³⁰³ The act also established two mechanisms through which migrant workers can file criminal complaints against recruitment agencies and individual agents. There is the provision of a complaints investigation unit within the Department of Foreign Employment and a Foreign Employment Tribunal.³⁰⁴

Furthermore, the Nepal government has engaged in the signing of bilateral agreements and MOUs with destination countries.³⁰⁵ They have also established a department of foreign complaint.³⁰⁶ The measures taken by these countries are in a bid to protect the rights of migrant domestic workers from their origin country.

3.3 GENERAL OBSTACLES TO ACCESS TO JUSTICE

3.3.1 Lack of Knowledge of Rights

There is a legal principle that ignorance is no defence. It is, however, critical to note that Kenyans remain unaware of their basic rights.³⁰⁷ Lack of knowledge of rights remains a significant hindrance to accessing justice, especially among the poor, vulnerable and uneducated people.³⁰⁸ By knowing which rights are protected, individuals can determine which route to follow to pursue their protection or determination.³⁰⁹

Knowledge of rights is closely linked to literacy and education. Literacy and education empower individuals, increasing their capacity to understand and insist on the enforcement of their rights.³¹⁰ Low levels of literacy and education reduce access to economic resources and

³⁰³ *ibid.*

³⁰⁴ *ibid* 92.

³⁰⁵ *ibid* 86.

³⁰⁶ *ibid* 88.

³⁰⁷ Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law' (Open Society Initiative of Eastern Africa 2011) 156 < <https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf>> accessed 9 July 2019.

³⁰⁸ *ibid* 156.

³⁰⁹ *ibid* 156.

³¹⁰ Julinda Beqiraj and Lawrence McNamara, 'International Access to Justice: Barriers and Solutions' (Bingham Centre for the rule of law report, October 2014) 17<https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1> accessed 20 March 2020.

the capacity to understand and enforce rights resulting in lower levels of access to justice.³¹¹ Further, illiterate people are intimidated by the formal legal systems and engage only with the informal systems they are familiar with.³¹² A basic understanding of the law is not forthcoming in many areas. The lack of understanding only presents a danger of unwittingly breaking the law but also through ignorance over civil and human rights.³¹³

Also, there is a lack of sufficient educational programmes to keep the public aware of their rights.³¹⁴

3.3.2 Lack of Finances

Justice may be defined as one's access to lawyers and therefore, those who cannot afford lawyers are unable to access justice.³¹⁵ The cost of litigation is high, mainly applying to the attorney's fees.³¹⁶ The high cost of litigation does not help reduce financial barriers in accessing justice which locks out the poor from accessing lawyers who are equated to accessing justice.³¹⁷

In looking at financial access in Kenya, court fees are very high for an ordinary citizen, and hence most litigants shy away from going to court due to these costs.³¹⁸ Legal costs are high

³¹¹ *ibid* 17.

³¹² Richard Bowd, 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' (2009) Institute for Security Studies, 2 <<https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf>> accessed 29 May 2020.

³¹³ *ibid* 2.

³¹⁴ Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law' (Open Society Initiative of Eastern Africa 2011) 157 <<https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf>> accessed 9 July 2019.

³¹⁵ Grath Bryant and Cappelletti Mauro, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) *Articles by Maurer Faculty* 1142 <https://www.repository.law.indiana.edu/facpub/1142?utm_source=www.repository.law.indiana.edu%2Ffacpub%2F1142&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 31 May 2019

³¹⁶ Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and Emirates: A Social-Legal Study on Conflicts, Access to Justice' (2011) *Amsterdam Law School Legal Studies Research Paper No. 2011-49* <<http://ssrn.com/abstract=1967425>> accessed 12 February 2019.

³¹⁷ *ibid* 180.

³¹⁸ Deborah Rhode, 'Access to Justice; A Roadmap for Reform' 41 *Fordham Urb LJ* 1227(2014) <<https://ir.lawnet.fordham.edu/ul/vol41/iss4/7/>> accessed 4 July 2019.

³¹⁸ Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law' (Open Society Initiative of Eastern Africa 2011) 158 <<https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf>> accessed 9 July 2019.

for a country like Kenya where over 60% of the people live in poverty.³¹⁹ In its bid to ensure that justice is accessed by most, the Legal Aid Act no. 6 of 2016 was established. The main objective of the act is to provide affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons.³²⁰ The Act acknowledges that the affordability of legal services is a hurdle in accessing justice.

Through the amended Advocates (Remuneration) Order of 2014, the Advocates Act,³²¹ provides for the minimum amount that an advocate can charge, failure to which the advocate will be liable to have committed the offence of undercutting.³²² This minimum chargeable fee is still a hindrance to many being able to engage a legal practitioner. Also, opportunity costs such as time off work and transportation inhibit citizens' action from resolving their legal problems.³²³

Poverty is a barrier to accessing justice. It represents the most significant challenge concerning access to justice.³²⁴ The state's poverty exacerbates the problems faced by individuals. Chronic under-resourcing and corruption aggravate the challenges of weak delivery institutions and inadequate human resources.³²⁵ Further, the reduced financial and human resource allocations to justice institutions produce failures in the justice system.³²⁶

³¹⁹ *ibid* 158.

³²⁰ Legal Aid Act No. 6 of 2016, s 3(a).

³²¹ Chapter 16 of the Laws of Kenya.

³²² Advocates Act, CAP 16, Laws of Kenya, s 36.

³²³ OECD, 'Equal Access to Justice' (OECD, Paris, 7 October 2015) 5<<http://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf>> accessed 4 September 2019.

³²⁴ Richard Bowd, 'Access to Justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia.' (2009) Institute for Security Studies, 3< <https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf> > accessed 29 May 2020

³²⁵ *ibid* 3.

³²⁶ Julinda Beqiraj and Lawrence McNamara, 'International Access to Justice: Barriers and Solutions' (Bingham Centre for the rule of law report, October 2014) 14 <https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1> accessed 20 March 2020.

3.3.3 Delay in Justice Delivery

Justice delayed is justice denied. To counter this saying, the CoK provides that ‘in exercising judicial authority courts and tribunals shall be guided by the principles inter alia that justice shall not be delayed.’³²⁷ Additionally, regional conventions speak of trials within a reasonable time, the ICCPR speaks of a trial without undue delay.³²⁸ There is a need for the speedy conclusion of suits, and for a balance to be struck between not rushing the trial process, which may lead to an unjust outcome, and not delaying the case unreasonably.

A person charged with an offence must have adequate time and facilities to prepare for a defence.³²⁹ Moreover, a trial may not be unreasonably short, resulting in the parties not having time for adequate preparation and defence.³³⁰ The guarantee of undue delay relates not only to the time by which a trial should commence but also the time by which it should end and judgment to render; all stages must occur without undue delay.³³¹ Nonetheless, the dragging of a suit from its institution to completion is an obstacle to access to justice. Civil cases in Kenya take different durations of time depending on the parties to the dispute.³³² Delays in civil trials are caused mainly by adjournments by any party either by mutual consent or if one of the parties cannot continue with the case at a given time.³³³ Delays occasion great injustice to people whose legal rights remain unadjudicated because of the adjournments of cases.³³⁴ The

³²⁷ CoK 2010, art 159 (2) (b).

³²⁸ Icelandic Human Rights Centre ‘Efficiency of Justice: Providing Final Judgments within a Reasonable Time’ <<http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process/efficiency-of-justice-providing-final-judgements-within-a-reasonable-time>> accessed 14 August 2020

³²⁹ *ibid.*

³³⁰ *ibid.*

³³¹ Human Rights Committee, General Comment No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (CCPR) (1984) par 10

³³² Patricia Mbote and Migai Akech, ‘Kenya Justice Sector and the Rule of Law’ (Open Society Initiative of Eastern Africa 2011) 169 <<https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf>> accessed 9 July 2019 .

³³³ *ibid.*

³³⁴ *ibid.*

delays also serve as impediments to access to justice, with most people unwilling to undertake the enormous expense of instituting a claim.³³⁵

Undue delay is a major problem in the majority of national justice systems.³³⁶

3.4 OBSTACLES TO ACCESS TO JUSTICE FOR KEDW

Having looked at the general obstacles to access to justice affecting citizens, the specific obstacles to access to justice of KEDW are now discussed. The general obstacles also apply to KEDW and are discussed further, focusing on emigrant domestic workers.

3.4.1 Kafala Sponsorship System

The Kafala sponsorship system is a system that was historically based on principles of hospitality governing the treatment and protection of foreign guests.³³⁷ Under this system, employers are *Kafeels* (sponsors), who determine their demand for labour and meet it either by direct recruitment or through intermediaries.³³⁸ The employer is the one who is responsible for the workers' recruitment fees, completion of medical exams and possession of identity card.³³⁹ This essentially leads to the high cost of hiring a migrant domestic worker.³⁴⁰ The ILO estimates that the total cost of employing a live-in domestic worker is between two to three times the annual salary of a migrant domestic worker.³⁴¹

³³⁵ *ibid.*

³³⁶ Icelandic Human Rights Centre 'Efficiency of Justice: Providing Final Judgments within a Reasonable Time' <<http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process/efficiency-of-justice-providing-final-judgements-within-a-reasonable-time>> accessed 14 August 2020.

³³⁷ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (ITUC 2017), 7 <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf> accessed 5 June 2019

³³⁸ *ibid.*

³³⁹ *ibid.* 17.

³⁴⁰ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration, 2014), 5 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

³⁴¹ *ibid.*

A migrant workers' immigration status, that is, their entry, residence and exit, is tied to an individual sponsor for their contract period.³⁴² The employer obtains the residence papers.³⁴³ The residence paper binds the migrant worker to the *Kafeel*, giving the latter powers to cancel the worker's residency at will and prevent workers from leaving or changing employment without consent.³⁴⁴

The *Kafeel* does this by confiscating the passport of the migrant domestic worker.³⁴⁵ The *Kafala* is an effective mechanism by which the state externalises and privatises its surveillance function. It passes the responsibility of policing the vast force of immigration labour within the country.³⁴⁶ Thus, this system has labourers at the mercy of their sponsors, who use this to exploit and subjugate them.³⁴⁷

In the case of *Khobesh Agencies Limited and 32 others v Minister of Foreign affairs and International Relations and 4 others (2013) eKLR*, there was light shed on what happens in a dispute and the employee is under the *Kafala* system. It was stated that there are agencies called *maktabs* which serve as mediation centres for employers and workers when they disagree and the conflict is not resolved, a worker is sold to another willing employer to recover money paid when the employer recruited the worker. The *maktabs* are like auctions where workers are sold, exchanged, or traded until employers recover their money.

Under the *Kafala* system, *Kafeels* can evade legal responsibility of charges, as they can petition the authorities to cancel the workers' residency leading to forcible deportation before a case

³⁴² International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (ITUC 2017), 7 <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf> accessed 5 June 2019.

³⁴³ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration, 2014), 4 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

³⁴⁴ *ibid.*

³⁴⁵ *ibid.*

³⁴⁶ *ibid.*

³⁴⁷ David Onjili, 'Kafala: A Gateway to Modern-Day Slavery' (2019) 11(4) NLM 76.

can be filed or heard.³⁴⁸ Some workers, desperate to earn money and fearing this retaliation, remain and suffer in silence. Others that leave without securing the written consent of the sponsor lose their residency and thus face possible consequences of irregular immigration status, including potential criminal charges, detention and deportation.³⁴⁹

While difficulties with immigration status render individuals particularly vulnerable to legal and justiciable problems, it could also serve as impediments to accessing justice.³⁵⁰ This leads to the criminalisation of worker-related disputes in the absence of accessible and credible dispute resolution mechanisms.³⁵¹ The *Kafala* system provides little means of redress for the violation of migrant workers' rights.³⁵²

In as much as employers perceive the *Kafala* system as necessary to protect the household against financial loss, particularly the loss of recruitment fees already paid, it is recognized that these practices are considered as indicators of forced labour.³⁵³

3.4.2 Discrimination

Ethnic and racial minorities, migrants, and indigenous peoples often face additional obstacles in claiming and enforcing their rights because of formal legal discrimination and informal discrimination or stigmatization.³⁵⁴ Arab tribal culture's discrimination against women has

³⁴⁸ Migrant Forum in Asia Secretariat, 'Policy Brief No. 2: Reform of the *Kafala* (Sponsorship) System' 1 <<https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>> accessed 16 October 2019.

³⁴⁹ *ibid.*

³⁵⁰ Richard Bowd, 'Access to Justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia.' (2009) Institute for Security Studies, 7 <<https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf>> accessed 29 May 2020.

³⁵¹ Migrant Forum in Asia Secretariat, 'Policy Brief No. 2: Reform of the *Kafala* (Sponsorship) System' 4 <<https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>> accessed 16 October 2019.

³⁵² *ibid.*

³⁵³ Sophia Kagan, 'Domestic Workers and Employers in the Arab States: Promising practices and innovative models for a productive working relationship' (2017) International Labour Organization White Paper, 6 <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_619661.pdf> accessed 15 July 2020.

³⁵⁴ Julinda Beqiraj and Lawrence McNamara, 'International Access to Justice: Barriers and Solutions' (Bingham Centre for the rule of law report, October 2014) 16 <https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1> accessed 20 March 2020.

strongly influenced juristic interpretations that establish women's inferiority to men.³⁵⁵ Female migrant workers are largely excluded from the legal system because they are both non-citizens and women.³⁵⁶

Historically there has been discrimination against women who dominate the domestic sector.³⁵⁷ Women are economically and socially excluded.³⁵⁸ Their exclusion from SALL, restricts their ability to access justice due to lack of financial resources to pursue claims or lack of awareness of legal rights and redress options.³⁵⁹

Discrimination by the legal community against women is still evident in the way judges use their discretionary authority to deliver lighter to harsher sentences in cases where a woman is one of the litigants.³⁶⁰ In the KSA, authorities treat adult women as legal minors entitled to little authority over their own lives and well-being.³⁶¹ Also, women are supposed to be represented in law and at police stations by their mahram, a husband, or unmarried male relative (a father, brother, or son).³⁶² Lack of ability to self-represent makes it challenging for migrant domestic workers to access justice. As women, migrants and domestic workers, they are subject to triple discrimination. Domestic workers are often denied access to courts because, as women, they need a mahram, and as migrant workers, they usually do not have one around.³⁶³

³⁵⁵ Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and Emirates: A Social-Legal Study on Conflicts, Access to Justice' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-49, 95 <<http://ssrn.com/abstract=1967425>> accessed 12 February 2019.

³⁵⁶ *ibid.*, 293.

³⁵⁷ Sarah Paoletti and Others, 'Migrant Workers' Access to Justice at Home: Nepal' [2014] University of Pennsylvania Law School Research Paper No. 14-22, 84 <<http://ssrn.com/abstract=2457948>> accessed 8 January 2019.

³⁵⁸ *ibid.*

³⁵⁹ *ibid.* 18.

³⁶⁰ Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and Emirates: A Social-Legal Study on Conflicts, Access to Justice' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-49, 96 <<http://ssrn.com/abstract=1967425>> accessed 12 February 2019.

³⁶¹ *ibid.*

³⁶² *ibid.* 213.

³⁶³ *ibid.*

3.4.3 Political and Economic Factors

In a study conducted by Malit and Youha, they noted that Kenya was reluctant to implement bilateral agreements to safeguard its citizen's interests due to the financial benefits that it is receiving from Saudi Arabia.³⁶⁴ The study further pointed out that the Kenyan government's economic relationship with Gulf countries constrains the government's ability to protect its nationals and address labour abuses faced by Kenyan migrants.

Given the Gulf countries' economic relevance, both in the labour market, trade, and investment opportunities, the Kenyan government has prioritized critical trade relationships with the Gulf countries to maximize its national economic interests abroad.³⁶⁵ Prioritization of critical trade relationship has slowed the pace and zeal with which the Kenyan government seeks to protect the rights of its citizens working in Saudi Arabia.

Also, migration alleviates poverty through increased incomes from remittances.³⁶⁶ The migrants' remittances are the most tangible and least controversial link between migration and development.³⁶⁷ Besides purely monetary gains, migration and remittances allow for higher investment in healthcare and education.³⁶⁸ These perceived positive impacts of migration to the economy make it difficult for the government to intervene in violation of rights.

The dilemma of balancing economic benefits with workers' rights is difficult because the supply of migrant domestic workers from developing countries is steady due to the lack of

³⁶⁴Froilan T. Malit and Ali Al Youha, 'Labour Protection in the Gulf Countries: A Comprehensive Analysis of Kenyan Governmental Dilemmas in Saudi Arabia and the United Arab Emirates' (Cornell University ILR School, 2016, Working Paper 181) 19<<http://digitalcommons.ilr.cornell.edu/workingpapers/181>> accessed 28 March 2019.

³⁶⁵ *ibid.*

³⁶⁶ Dilip Ratha and Others, 'Impact of Migration on Economic and Social Development: A Review of Evidence and Emerging Issues'(2010) Gokhale Institute of Politics and Economics, 2 <<https://doi.org/10.1596/1813-9450-5558>> accessed 20 August 2020.

³⁶⁷ *ibid* 2.

³⁶⁸ *ibid* 2.

employment opportunities in the sending countries.³⁶⁹ States and households of sending countries benefit from the overseas employment of migrant domestic workers.³⁷⁰ African and Asian countries actively pursue labour emigration policies to generate foreign exchange, relieve domestic unemployment, and simultaneously reduce the need for the state to resource social welfare policy.³⁷¹

The government's political interests place it in a compromising situation where it cannot assert itself in protecting its citizens' interests. It creates a situation where there are gross violations of rights, and the government is either slow to act or chooses not to act to maintain cordial relationships. This situation, as previously elaborated, led to the banning and lifting of the ban on labour exportation to the KSA.³⁷² It did so; however, the government did not put any substantial remedies in place to alleviate the situation. A reprieve was gotten when in 2017 the governments of Kenya and Saudi Arabia signed a bilateral agreement to secure the rights of KEDW as they seek employment in Saudi Arabia.

3.4.4 The Pervasive Unregulated System of Individual Agents

Individual agents facilitate migrant workers finding work and benefit recruitment agencies; they cause much harm to the migrant worker.³⁷³ Unrestricted agents create numerous obstacles to migrant workers obtaining justice in Nepal and abroad.³⁷⁴ The first harm that these individual agents commit is taking money for the promise of work and later disappearing, fraud, and misrepresentation of positions abroad.³⁷⁵

³⁶⁹ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration 2014) 4 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

³⁷⁰ *ibid.*

³⁷¹ *ibid.*

³⁷² Text to n 227 in ch 2.

³⁷³ Sarah Paoletti and others, 'Migrant Workers' Access to Justice at Home: Nepal' (2014) University of Pennsylvania Law School Research Paper No. 14-22, 54 <<http://ssrn.com/abstract=2457948>> accessed 8 January 2019.

³⁷⁴ *ibid* 55.

³⁷⁵ *ibid.*

Recruitment agencies usually use individual agents to do all dealings between them and the migrant worker.³⁷⁶ Individual agents are more challenging to locate. They can abscond more easily than the recruitment agency, and themselves may not have the money to pay the compensation to which the worker is entitled.³⁷⁷

The situation reported in Nepal is not unique, neither a case in isolation. It has happened in Kenya. It is reported that in Kenya and around the developing world, labour brokers haunt villages, towns and cities, preying on women and men trying to support their families and make a better life for their children.³⁷⁸

Unscrupulous labour brokers will not show workers their contracts until they are at the airport or bus station. Frequently, the contracts would be written in Arabic or a language the workers cannot understand.³⁷⁹ When they arrive at their destination, the contracts may even change.³⁸⁰ The practices of the labour brokers lead to a situation where the migrant domestic worker is unable to have avenues to access justice as the actions of the broker tie them.

In *Khobesh Agencies Limited and 32 others v Minister of Foreign Affairs and International Relations and 4 others (2013) eKLR*, a statement by the respondent reveals that employers in Saudi Arabia pay a sum of US\$ 3000, which is shared between the foreign agent and the Kenyan agent to facilitate the travel of domestic workers. On the worker's arrival, the employer would retain the worker's passports to prevent the worker from escaping before recouping the

³⁷⁶ *ibid* 60.

³⁷⁷ *ibid* 108.

³⁷⁸ Tula Connell, 'Kenya Domestic Workers Find Home with Union' (*Solidarity Centre*, 14 July 2017) <<https://www.solidaritycenter.org/kenya-domestic-workers-find-hope-union/>> accessed 6 June 2019.

³⁷⁹ *ibid*.

³⁸⁰ *ibid*.

amount used to get the domestic worker from Kenya. The Kenyan agents do not disclose to the domestic workers that their employer has paid money to bring them to the Middle East.³⁸¹

In conducting interviews with 4 domestic workers who have worked in Saudi Arabia before and one who has worked in Lebanon, none of them used a recruitment agency to facilitate their travel for employment. They all used individual agents who had connections to employment opportunities. In-depth interviewee 3, who has worked and is still currently employed in Saudi Arabia, stated that dealing with individual agents is a problem in safeguarding the rights of KEDW.

In-depth interviewee 2 stated that she was referred to the agent that she used to find work placement in Saudi Arabia through her friend. She said that she did not know if the agent worked for a recruitment agency. She, however, knew that the agent knew people who worked in the Saudi Arabian embassy, who in turn informed him of work opportunities. In-depth interviewee 2 further stated that when she was mistreated while working in Saudi Arabia, she called her agent for help. The agent said that what happened between her and her employer is between them, and he should not be involved.

These stories of KEDW and their experiences dealing with agents are just but a sample size. The agents aggravate the situation of KEDW accessing justice when working in Saudi Arabia.

3.4.5 Recruitment Agencies

Recruitment agencies are a significant hindrance to accessing justice for migrant domestic workers. Bad practices by recruitment agencies in Kenya include deception about the nature and conditions of the job, charging of unapproved fees, and improper travel documents leading

³⁸¹ *Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs and International Relations & 4 others* (2013) eKLR, para 9.

migrant workers to various mistreatments by employers in the Gulf.³⁸² Due to the increased reports of abuse reported in 2014, the Kenyan Government subsequently launched a crackdown on unscrupulous employment agencies to curb the exploitation of workers migrating to the Middle East.³⁸³

Furthermore, Kenya's Ministry of Labour revoked all private employment agencies' licences in the country. It required them to re-apply for their licences and undergo an auditing process by the Ministry.³⁸⁴ Currently, there are 320 accredited private recruitment agencies³⁸⁵ that have met the strict requirements for registering agencies in Kenya. The number of registered agencies are many but still below the thousands of unregulated recruitment agencies shut down in 2014.³⁸⁶ It is a lucrative business hence the need to ensure that the obstacles in accessing justice for KEDW are reduced.

3.4.6 Language Barrier

The complexity of the 'legal' language, which may not be accessible to the broader population, and limited legal information available in 'non-official' languages, impedes access to justice.³⁸⁷ KEDW, more often than not do not emigrate to Saudi Arabia speaking the country's official language. Besides, as indicated by the domestic workers interviewed, their employment contract is usually written in Arabic, a foreign language. Migrants face significant access to

³⁸² Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018), 29<https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

³⁸³ Beate Andrees and others, 'Regulating Labour Recruitment to Prevent Human Trafficking and to Foster Fair Migration: Models, Challenges and Opportunities' (International Labour Organization 2015) 42<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_377813.pdf> accessed 11 June 2020

³⁸⁴ *ibid.*

³⁸⁵ <https://nea.go.ke/web/?page_id=247> accessed 11 June 2020

³⁸⁶ Njeri Rugene and Jillian Keenan, 'Is the Middle East now safe for Kenyans Seeking a Livelihood?' *Daily Nation, DN2* (Nairobi, 29 July 2019)24.

³⁸⁷ OECD, 'Equal Access to Justice' (OECD, Paris, 7 October 2015) 5<<http://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf>> accessed 4 September 2019.

justice barriers wherein multilingual and multi-ethnic societies, they have insufficient knowledge of the language in which legal information is available.³⁸⁸

3.4.7 Insufficient Resources and Training for Government Agencies Assisting Migrant Workers

The case of *Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs and International Relations & 4 others (2013) eKLR* in paragraph 10 of the judgment, Justice Odunga stated ‘According to the deponent’s information, many domestic workers run away from their employers to the Kenyan Embassy in Riyadh who have to facilitate their return home ... the Kenyan embassy’s facilities are limited *vis a vis* the very high number of domestic workers who seek refuge in the Embassy on a daily basis.’

In-depth interviewee 4 harshly criticized the Kenyan embassy in Riyadh, Saudi Arabia. She revealed that the Kenyan embassies in Saudi Arabia are like toothless dogs for they do not help and that she cannot go to them for help should she have a problem. The sentiments of in-depth interviewee 4 are reiterated by in-depth interviewee 3 when she states that she does not find the Kenyan embassy in Saudi Arabia helpful in protecting Kenyan citizens.

Key informant 1 pointed out that the embassy capacity in terms of personnel that can respond to the distress calls of the KEDW is lacking. Shelter houses for abused and run away KEDW are congested due to the high number of Kenyans seeking refuge.

The Kenyan embassy in Saudi Arabia can be said to be the first justice contact. Insufficient financial and human resource allocations to justice institutions create shortcomings in the

³⁸⁸ Julinda Beqiraj and Lawrence McNamara, ‘International Access to Justice: Barriers and Solutions’ (Bingham Centre for the rule of law report, October 2014) 18
<https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1> accessed 20 March 2020.

effective functioning of the justice system and seriously affect access to justice.³⁸⁹ Despite having a land area of about 2,150,000 km² and 13 administrative regions, only one Kenyan embassy is in Saudi Arabia's capital, Riyadh.³⁹⁰ KEDW are posted all over this vast country (figure 1).



Figure 1: A political and administrative map of Saudi Arabia. There is only one embassy in this vast nation, whose location is in Riyadh. There is a need to increase human resource in the Kenyan embassies. The increased human resource can better attend to domestic workers, ensuring access to justice. There needs to be an end to comparing the Kenyan embassies in Saudi Arabia as toothless dogs that seldom bite.

3.4.8 Financial Access for KEDW

Legal redress can be practically impossible if the worker cannot afford the legal fees for representation or cannot locate a pro bono lawyer. Domestic workers are physically prevented

³⁸⁹ Julinda Beqiraj and Lawrence McNamara, 'International Access to Justice: Barriers and Solutions' (Bingham Centre for the rule of law report, October 2014) 21

<https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1> accessed 20 March 2020.

³⁹⁰ *ibid.*

from filing a complaint due to forced confinement in the house and confiscation of their mobile phone.³⁹¹

Legal representation is traditionally at the heart of access to justice.³⁹² Without legal representation, there are high risks that there will not be equality of arms between parties, trials will not be fair and legal rights will not be adequately protected.³⁹³

3.4.9 Exclusion from the Law

The Saudi Arabian Labour Law (SALL) is the central law governing labour relations, regulating wages, working time, occupational health and safety, social security and dispute resolution mechanisms through the labour courts.³⁹⁴ Within the SALL, among those who are exempted from the implementation of the provisions of the law include domestic helpers and the like.³⁹⁵ The provision of the law states that the ministry shall, in coordination with competent authorities, draft regulations for domestic helpers and the like to govern their relations with their employers.³⁹⁶

The provisions of separate legislation or regulations for domestic workers are commonly lower than those of the general labour law.³⁹⁷ Therefore, in the absence of effective legislation, many countries leave regulation of the employment relationship to the coverage of employment contracts.³⁹⁸ As private contracts between the employer and the worker, the obligations are

³⁹¹ Migrant Forum in Asia Secretariat, 'Policy Brief No. 2: Reform of the Kafala (Sponsorship) System' 4 <<https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>> accessed 16 October 2019.

³⁹² Julinda Beqiraj and Lawrence McNamara, 'International Access to Justice: Barriers and Solutions' (Bingham Centre for the rule of law report, October 2014) 25

<https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1> accessed 20 March 2020.

³⁹³ *ibid.*

³⁹⁴ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (ITUC 2017), 16 <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf> accessed 5 June 2019

³⁹⁵ SALL, art 7(2).

³⁹⁶ *ibid* art 7.

³⁹⁷ Sophia Kagan, 'Domestic Workers and Employers in the Arab States: Promising practices and innovative models for a productive working relationship' (2017) International Labour Organization White Paper, 4 <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_619661.pdf> accessed 15 July 2020.

³⁹⁸ *ibid* 4.

inherently difficult for either party to enforce, particularly the worker.³⁹⁹ Legal exclusion of KEDW from the law and providing separate regulations for migrant workers is the most challenging barrier in upholding access to justice for these workers.

3.5 CONCLUSION

Henry Ford stated that ‘Obstacles are those frightful things you see when you take your eyes off your goal’. The goal here is to ensure that there is access to justice for KEDW, which is achievable as long as these obstacles do not diminish one’s hope of achieving this goal.

These obstacles highlighted may not be entirely done away with as life is full of ups and downs. How we choose to deal with the challenges will determine if access to justice for KEDW is a mere thought or may indeed be a reality for these workers. The next chapter now looks at the legal provisions that may enable KEDW to access justice.

³⁹⁹ *ibid* 4.

CHAPTER FOUR: REVIEW OF THE LEGAL FRAMEWORK ON ACCESS TO JUSTICE FOR KEDW

4.1 INTRODUCTION

The legal framework on access to justice for KEDW is a complex issue as it involves both the Kenyan government's legal and policy framework and that of the KSA. Kenyan law applies to potential KEDW pre-departure, necessitating its analysis. Saudi Arabia is the destination country for KEDW. It is, therefore, fundamental to analyse its legal framework on access to justice for migrant domestic workers.

Reviewing these laws, regulations, and policies will help solve the study question posed in chapter one; What are the existing national and international laws and policies safeguarding or falling short of safeguarding the right to access to justice for KEDW. Laws that are already in place in the respective countries will be looked at and existing international laws relating to domestic workers that may not be necessarily applicable in these study countries.

In looking at the legal framework, the researcher will identify the successes and gaps in the law and a comparison drawn between the national laws of the KSA and the Domestic Workers Convention. Finally, a conclusion will be drawn from the analysis and a way forward suggested.

4.2 KENYA'S NATIONAL LEGAL FRAMEWORK

4.2.1 The Constitution of Kenya, 2010

The CoK guarantees access to justice by stating that the State shall ensure access to justice for all persons. If any fee is required, it shall be reasonable and shall not impede access to justice.⁴⁰⁰

⁴⁰⁰ CoK, art 48.

The obligations and ability of KEDW to enjoy the right to access to justice is limited to state cooperation with the labour receiving state, administrative and cost considerations.⁴⁰¹ Therefore, the constitutional right to access justice does not necessarily translate into to access justice for KEDW.

The protection of the right to access to justice provided in the Constitution of Kenya is not limited to when its citizens are within the Kenyan jurisdiction but also applies when they are outside the jurisdiction. Justice Odunga illustrated this position in the case of *Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs and International Relations & 4 others*⁴⁰²; in paragraph 32 of the judgement, Justice Odunga stated ... ‘that the government has the obligation to take the necessary steps to protect the rights and interest of its citizens within and outside the country.’ Therefore, for access to justice provided in article 48 to be experienced by KEDW, Kenya must make intentional efforts outside its jurisdiction to ensure this.

From the interviews conducted, in asking how the government can ensure access to justice for KEDW, these are some of the responses received;

Key informant 1 stated;

For the government to effectively ensure that access to justice for domestic workers is realized, embassy capacity in terms of the personnel who can respond to distress calls from the domestic workers needs to be increased. Labour attaches in the Kenyan embassies also need to be increased. There is a need for an increase in shelter houses for abused domestic workers who have run away from their employers. Currently, there

⁴⁰¹ Koesrianti , ‘An Overview of Indonesia’s Protection on Women Migrant Worker’(2016) ResearchGate, 10 < https://www.researchgate.net/publication/305449595_An_Overview_of_Indonesia's_Protection_on_Women_Migrant_Workers> accessed 3 November 2020.

⁴⁰² (2013) eKLR.

are few shelter houses that are also in poor condition. Having a haven for domestic workers to stay as they seek help is fundamental in the justice system.

In-depth interviewee 1 stated;

While I worked in Saudi Arabia, the main issue that prevented me from accessing justice was the distance between the labour attaché and the private home in which I worked. The labour attaché was located in Riyadh while I got employed in a home that was far from Riyadh, a town known as Jiddah. In addition to the geographical distance from the house that I worked to the labour attaché offices, I was also locked up in my employer's house and my passport confiscated; therefore, I could not run away to seek help. I only wished that there could be some arrangement for homes located in the interior parts of Saudi Arabia to have someone who would often come to trace the domestic workers and know how they are faring.

For in-depth interviewee 4, on the subject of what the government can do to improve access to justice for KEDW, she stated, 'The Kenyan embassy personnel need training on how to assist migrant domestic workers in the instance that their rights are violated. The Kenyan embassies are like toothless dogs that do not help.'

Similar sentiments were echoed by in-depth interviewee 2. She stated that when she went to the embassy to get assistance for the mistreatment she faced from her employer, the person at the desk asked her how old she was and how old her employer was and informed that her and her employer were age mates and that confrontation was bound to happen. In-depth interviewee 2 was not pleased with the response and would advocate for the training and changing of the embassy personnel.

4.2.2 Legal Aid Act No. 6 of 2016

Legislatures drafted the Legal Aid Act to give effect inter alia to Article 48 of the Constitution and facilitate access to justice and social justice. The object of the Act is to establish a legal and institutional framework to promote access to justice.⁴⁰³ The Act further outlines the persons who are eligible to receive legal aid services if the person is indigent, resident in Kenya and is;⁴⁰⁴

1. A citizen of Kenya
2. A child
3. A refugee
4. A victim of human trafficking
5. An internally displaced person
6. A stateless person

As much as the Legal Aid Act may be perceived as a gain in actualizing the right to access to justice, it has its limitations. KEDW who have emigrated to Saudi Arabia for employment are not eligible for legal aid as they are temporarily not resident in Kenya. Therefore, this limits their ability to access legal assistance while working in Saudi Arabia. KEDW are Kenyan citizens and probably classified as indigent. However, their immigration status limits their enjoyment of the law.

4.2.3 Employment Act, 2007

Among the objectives of the Employment Act is to define the fundamental rights of employees and provide the basic condition of employment of employees. The Employment Act in Part XI provides for foreign contracts of service. It is provided that a foreign contract of service shall

⁴⁰³ Legal Aid Act, s 3.

⁴⁰⁴ *ibid* s 36(1).

be in the prescribed form, signed by the parties thereto, and shall be attested by a labour officer.⁴⁰⁵

In essence, the labour officer acts as a ‘gateman’ of contracts. He or she is the one who allows or disallows foreign contracts of service. This provision, however, does not guarantee the securing of rights of an emigrant domestic worker. From the interviews conducted with some returnee domestic workers, it was clear that service contracts were not given to some. Therefore, the provisions of the law did not apply to them, leaving them vulnerable and outside of the legal sphere.

Within the Employment Act, it is provided that where an employer does not reside in the country and enters into a foreign contract of service, then the employer is obliged to give a security bond in the prescribed form as well as have two Kenyan sureties.⁴⁰⁶ This section of the Act goes on to state that this is to ensure the due performance of the contract.⁴⁰⁷

Furthermore, where the employer has an authorized agent resident in Kenya, then the ministry may require the agent to deposit the required security bond and that the agent will be personally bound by the terms of the bond notwithstanding the disclosure of its principle.⁴⁰⁸ The provision of a security bond is a provision that KEDW should celebrate as one that protects their rights. However, nobody enforces this provision, and the domestic workers' agents' do not tell the workers of this provision.⁴⁰⁹

⁴⁰⁵ Employment Act 2007, EA, s 83.

⁴⁰⁶ EA, s 85(1).

⁴⁰⁷ *ibid* s 85(1).

⁴⁰⁸ *ibid* s 85(2).

⁴⁰⁹ Kennedy Atong and others, ‘Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda’ (Africa Regional Organization of the ITUC 2018), 57 <https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

To protect the rights of migrant workers, the Act provides for an offence of inducing a person to proceed abroad under an informal contract.⁴¹⁰ Under this offence, one shall be liable on conviction to a fine not exceeding Kshs. 200,000 or to imprisonment of not more than 6 months or both.⁴¹¹ Despite this, the findings in a study conducted by the International Trade Confederation Africa in Ghana, Kenya, Nigeria and Uganda the study's investigative work revealed that the violations endured by migrants take place in the host country and involve contract alteration or substitution upon arrival.⁴¹² One of the key informants stated that with Kenya, the problem is not the laws but how they are implemented and the relative impunity under which recruitment firms are allowed to operate.⁴¹³

For dispute settlement which is a significant factor in access to justice, there is a saving provision for foreign contracts. The Act provides that nothing in the Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya. Still, the parties' respective rights under that contract and against each other as against third parties invading those rights may be enforced in the same manner as other contracts.⁴¹⁴

The legal framework for one to enforce their rights is there; however, it is difficult to do so. As previously noted, when it comes to private contracts between the employer and the employee, the obligations are difficult to enforce. Also, the lack of finances to seek justice may discourage KEDW from seeking the remedies contemplated in the Act. As much as there are

⁴¹⁰ EA, s 86.

⁴¹¹ *ibid* s 86.

⁴¹² Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018), 17<https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

⁴¹³ *ibid* 57.

⁴¹⁴ EA, s 89(1).

spelt out provisions to ensure the validity of a foreign contract before the worker's departure to the destination country, implementation of the provisions is not happening.

4.2.4 The Labour Institutions (Private Employment Agencies) Regulations 2016

In a bid to regulate the operations of private recruitment agencies, the government adopted the Labour Institutions (private employment agencies) Regulations (2016). Within the regulations, there are stringent measures provided for the incorporation and running of a recruitment agency.⁴¹⁵ The high demands placed by the government for the operation of a recruitment agency aim to avoid mushrooming of recruitment agencies, hopefully minimizing the plight of migrant workers.

For an employment agency to be registered, it must be eligible for registration as provided under Regulation 3. The specifications for registration go as far as regulating the shareholding in the company, the education levels of the directors and managers, the physical office space, the director's criminal status and the guarantee to be deposited in the bank if there should be any repatriation of a worker.

In addition to this, regulation 5(2) of the Labour Institutions Regulations provides that the registration certificate issued is valid for one year, after which the recruitment agency renews it. In the instance of a private agency that deals with recruitment for the foreign labour market, the annual renewal fee for a company is KES. 250,000.00 as provided in the second schedule of the regulations on fees.

The regulation provides that the agencies shall charge a service fee to their principals (an employer hiring Kenyans for employment through a registered employment agency⁴¹⁶) for the

⁴¹⁵ Part II of the Labour Institutions (Private Employment Agencies) Regulations, 2016.

⁴¹⁶ The Labour Institutions (Private Employment Agencies) Regulations, 2016, reg 2.

recruitment, documentation and placement of workers.⁴¹⁷ The regulations specify that the agent or employer in a foreign contract of employment shall be responsible for the visa fee, airfare and medical examination.⁴¹⁸ Furthermore, the regulations allow for charging reasonable administrative costs by the agent to the prospective employee regarding trade tests, occupational tests, and administrative fees that shall not exceed the job seeker's proposed one month's salary.⁴¹⁹

In an interview conducted with in-depth interviewee 2, she revealed that the administrative fee charged to her was up to three times her proposed monthly salary. During her first three months of employment, she worked for her employer; however, all the money she earned went to the payment of the money owed to the recruitment agent, putting her needs on hold.⁴²⁰

The increased reports of abuse occurring in cross-border recruitment perpetrated by unscrupulous Kenyan private agencies and their counterparts in destination countries accelerated the adoption of these regulations.⁴²¹ Despite the acceleration in adopting the regulations, recruitment agencies are still perpetuating abuse while recruiting workers for employment in Saudi Arabia.

4.2.5 Kenya Diaspora Policy, 2014

Policies are not laws but documents. Since Kenya has not enacted a national migration framework, it is fundamental to explore the Kenya Diaspora Policy, 2014, as policies are expressions of the state will.⁴²² In the present instance, it is the state's will to harness and

⁴¹⁷ *ibid* reg 7.

⁴¹⁸ *ibid* reg 8.

⁴¹⁹ *ibid* reg 8.

⁴²⁰ Text to n 236 in ch 2.

⁴²¹ Beate Andrees, Alix Nasri and Peter Swiniarski, 'Regulating Labour Recruitment to Prevent Human Trafficking and to Foster Fair Migration: Models, Challenges and Opportunities' (2015) International Labour Organization Working Paper 1/2015, 42 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_377813.pdf> accessed 11 June 2020.

⁴²² Theodore Lowi, 'Law Vs. Public Policy: A Critical Exploration' (2003) 12 Cornell Journal of Law and Public Policy 496 <<http://scholarship.law.cornell.edu/cjlp/vol12/iss3/2>> accessed 15 October 2020.

maximize the potential of Kenyans abroad to contribute to Kenya's transformation agenda while at the same time meeting their needs and expectations through a mutually beneficial and lasting partnership.⁴²³

Kenyans abroad play an integral part in the development of our nation.⁴²⁴ The policy notes that both skilled and unskilled Kenyans are exposed to unsuitable working conditions due to the lack of a national labour migration framework.⁴²⁵

The policy seeks to develop measures to enhance the protection of Kenyans abroad.⁴²⁶ The policy goes on to outline how the Kenyan government will ensure that Kenyans abroad are protected. It proposes to do so by the government having to enhance the capacity of Kenya missions abroad by deploying additional staff to missions in countries with a high concentration of Kenyans and expanding their diplomatic presence.⁴²⁷

Moreover, the government commits to protect its nationals by negotiating and signing bilateral labour agreements with employment agencies, review the Labour Institutions Act, conduct pre-departure training for migrant workers, conduct awareness creation for migrants going abroad through travel advisories, facilitate registration of Kenyans through diplomatic missions and revamp the existing labour recruitment system.⁴²⁸ Another effort to enhance Kenyan's protection abroad is that the government will review the Labour Institutions Act, 2007, to make provisions for Kenyan private employment agencies. The government will further gazette

⁴²³ Kenya Diaspora Policy 2014 (KDP 2014) 13<<http://www.mfa.go.ke/wp-content/uploads/2016/09/Kenya-Diaspora-Policy.pdf>> accessed 17 July 2019.

⁴²⁴ Kenya Diaspora Policy 2014 (KDP 2014) 8<<http://www.mfa.go.ke/wp-content/uploads/2016/09/Kenya-Diaspora-Policy.pdf>> accessed 17 July 2019.

⁴²⁵ KDP 2014, 10.

⁴²⁶ *ibid* 14.

⁴²⁷ *ibid* 15.

⁴²⁸ *ibid* 16.

regulations and guidelines on operations of private employment agencies and attestation of foreign contracts of service.⁴²⁹

The policy seeks to develop mechanisms for dialogue and partnership with Kenyans abroad.⁴³⁰ For this to be done, the government will develop and operationalize an interactive diaspora web portal and offer online consular services at the ministry headquarters and diplomatic missions abroad.⁴³¹

Finally, one of the policy objectives is to establish the necessary institutional mechanisms for the coordination and administration of Kenyans' issues abroad. The strategy that is to be adopted to realise this objective is to harmonize and conduct pre-departure training.⁴³²

In reviewing how the government has performed in achieving what it had set out to do in the policy, for KEDW, some of the policy objectives have been met, such as negotiating bilateral agreements and conducting pre-departure training. There is the development of an integrated diaspora information system for emigrant domestic workers. The Kenyan Migrant Worker information system⁴³³ is a web portal launched on 24th January 2019.⁴³⁴

The migrant worker portal is in partnership with the International Organization for Migration, Verité fair labour worldwide, the Kenya Association of Private Employment Agencies, and skilled migrant agencies.⁴³⁵ On the website, one can find the experiences of some migrants who have worked in the Gulf. It provides tips on working and living in the Gulf, particularly in the

⁴²⁹ *ibid* 17.

⁴³⁰ *ibid* 13-14.

⁴³¹ *ibid* 17.

⁴³² *ibid* 17.

⁴³³ Kenya Migrant Worker, 'Kenya Labour Migration Information' < <https://kenyamigrantworker.org>> accessed 8 October 2019.

⁴³⁴ National Employment Authority 'Launch of Kenya Worker Migrant Website' (24 January 2019) <http://www.nea.go.ke/web/?page_id=301> accessed 8 October 2019.

⁴³⁵ *ibid*.

United Arab Emirates (UAE), Saudi Arabia and Qatar. There are cautionary notes on what to avoid in the Gulf within the website, and guidelines on returning home.

The website provides the helplines for embassies in Riyadh, Saudi Arabia and Doha, Qatar and consulate services in Dubai, UAE. The physical address, telephone number, fax, email, office hours, and the head of mission of the embassy and consulate services are also indicated. There is also information on the relevant government ministries and departments to contact: NEA, the Ministry of Labour, and the Ministry of Foreign Affairs. In a bid to protect Kenyans abroad, the government employs the strategy of harmonizing and conducting pre-departure training.⁴³⁶

For KEDW, the Homecare Management Course⁴³⁷ was developed through a joint effort of the National Employment Authority and the National Industrial Training Authority.⁴³⁸ The course was developed and published in June of 2018 to reduce incidences of human rights violations of migrant domestic workers.⁴³⁹ It provides basic skills in home care, home nursing, childcare, life skills, and pre-departure training.⁴⁴⁰ Of interest to this study is the pre-departure training.

The pre-departure training offers training on; travel document processing, destination country, travel process, work ethic, government and recruitment agencies in labour migration, support services for migrants (labour, attaches services, diaspora associations) and consular offices to migrant workers.⁴⁴¹

⁴³⁶ KDP 2014, 17.

⁴³⁷ National Employment Authority, '*Homecare Management Course, Syllabus and Regulations*' (2018) National Employment Authority.

⁴³⁸ *ibid.*

⁴³⁹ *ibid.*

⁴⁴⁰ David Onjili, 'Kafala: A Gateway to Modern-Day Slavery' (2019) 11(4) NLM 76.

⁴⁴¹ *ibid.*

These are all positive steps in the realization of some of the action points contained in the policy. However, despite these initiatives, there are reservations as to the actual impact.⁴⁴² In a study conducted in Kenya by the African Regional Organization of the International Trade Union Confederation (ITUC-Africa), interviews with both the unions and migrants showed that the challenge was how migrants became aware of these initiatives and accessing them and not their mere existence.⁴⁴³

Further to this, a key informant from Kenyan Plantation and Agriculture Workers' Union (KEPAWU) noted that Bilateral Labour Agreements between Kenya and the GCC States benefited both and created a loophole that does not address the abuses of migrants.⁴⁴⁴ He added that bilateral labour agreements are more business-oriented and do not ensure the safety of our people.⁴⁴⁵

4.3 INTERNATIONAL LAWS AND AGREEMENTS

The CoK gives more latitude in the scope of the national laws concerning migrants by incorporating international laws.⁴⁴⁶ Some of the treaties ratified by the Kenyan government concerning labour migration are the ILO's Migration for Employment Convention of 1949 and the Migrant Workers' (Supplementary Provisions) Convention.

The Migrant Workers' Convention unfortunately only applies to the migrants who have come into the territory of Kenya to seek employment and does not protect Kenyans migrating to other countries to seek employment. As for the Migration for Employment Convention, it places

⁴⁴² Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018), 58 <https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> accessed 20 May 2019.

⁴⁴² EA, s 86.

⁴⁴³ Kennedy Atong and others, 'Africa Labour Migration on the GCC States: A Case of Ghana, Kenya, Nigeria and Uganda' (Africa Regional Organization of the ITUC 2018), 58 <https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf> 20 May 2019.

⁴⁴⁴ *ibid* 58.

⁴⁴⁵ *ibid*.

⁴⁴⁶ CoK, art 2(6).

considerable responsibility on national governments in ensuring that there are national policies and regulations relating to emigration, special provisions concerning migration for employment, and the conditions of work and livelihood of migrants for employment.

These provisions, however, appear to be guidelines as they do not have enforcement mechanisms for the convention's provisions.

4.4 SAUDI ARABIA'S NATIONAL LEGAL FRAMEWORK

4.4.1 The Basic Law of Governance

One can read access to justice within the Basic Law of Governance through the right to litigation. The Basic Law of Governance provides that the right to litigation shall be guaranteed equally for both citizens and residents in the Kingdom.⁴⁴⁷ Despite the law guaranteeing the right to litigation, it is difficult for migrant domestic workers to enforce the provision. The primary cause for the inability to access the right to litigation is language problems and the lack of knowledge of the legal system.⁴⁴⁸ Also, there is no legal aid available to domestic workers.⁴⁴⁹ An average-case, such as a divorce, costs about 15,000 Saudi Riyal (according to a Saudi lawyer), which is approximately the entire amount a domestic worker can expect to earn during her two-year contract.⁴⁵⁰

Additionally, the courts rely on the mahram system limiting the ability of KEDW to access the courts.⁴⁵¹ Therefore, this legal right does not translate into a tangible right so long as these other factors hinder access to justice for migrant domestic workers.

⁴⁴⁷ *ibid* art 41.

⁴⁴⁸ Antoinette Vlioger, 'Domestic Workers in Saudi Arabia and Emirates: A Social-Legal Study on Conflicts, Access to Justice' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011-49, 188<. <http://ssrn.com/abstract=1967425>> accessed 12 February 2019.

⁴⁴⁸ *ibid* 180.

⁴⁴⁹ *ibid* 188.

⁴⁵⁰ *ibid*.

⁴⁵¹ Text to n 334 in ch 3.

4.4.2 Saudi Arabian Labour Laws

Saudi Arabian Labour Laws (SALL) is the central law governing labour relations in Saudi Arabia.⁴⁵² Article 7 states, among other things, that domestic helpers and the like are excluded from the provisions of SALL.

In a bid to cushion the exclusion of migrant domestic workers from the law, article 7 further provides that the Ministry shall draft regulations for domestic helpers to govern their relations with their employers and specify the rights and duties of each party.⁴⁵³ The non-inclusion of domestic helpers in SALL means that KEDW cannot rely on the laws to access justice.

4.4.3 Ministerial Decision No. 310 of 1434

In July 2013, Ministerial Decision no 310 of 1434 on Domestic Workers was adopted.⁴⁵⁴ The Decision provides that the relationship between the employer and the domestic worker is regulated by the work contract between them and that the Arabic version is the binding one.⁴⁵⁵ It guarantees suitable accommodation, paid sick leave,⁴⁵⁶ one month of paid annual leave after two years of work⁴⁵⁷, and service compensation equal to one month's salary after four years of work.⁴⁵⁸ Also, the domestic worker is allocated one weekly rest day as stipulated in the contract.⁴⁵⁹

The daily working time for migrant domestic workers under the Decision is up to 15 hours a day, including breaks. Break time is not specified, but the total rest period should be at least 9

⁴⁵² International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017) <https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf> accessed 5 June 2019.

⁴⁵³ *ibid.*

⁴⁵⁴ Gulf Labour Markets and Migration <<https://gulfmigration.org/decision-no-310-of-1434-on-domestic-workers/>> accessed 13 May 2020.

⁴⁵⁵ Decision no. 310 of 2013, art 3.

⁴⁵⁶ Decision no. 310 of 2013, art 11.

⁴⁵⁷ Decision no. 310 of 2013, art 10.

⁴⁵⁸ *ibid* art 16.

⁴⁵⁹ *ibid* art 8.

hours.⁴⁶⁰ The daily working time for migrant domestic workers is a provision that KEDW employers regularly flaunt. Among the human rights violations was that KEDW would work for hours on end. Key informant 1 provided a vivid description of her state of affairs when she stated that her day would usually begin at 4 am and end at 1 am.

Decision no. 310 of 1434 on Domestic Workers is silent on passport confiscation, which is a common rights violation faced by KEDW. Also, it does not provide a minimum wage for migrant domestic workers.

Although the law is an improvement from no legislation, several gaps render the legislation weak.⁴⁶¹ In particular, the legislation fails to recognize the rights of migrant domestic workers to organize in unions and fails to acknowledge private homes as workplaces that can be subject to inspection.⁴⁶² As much as the Decision can help promote the rights of migrant domestic workers, it is no substitute for national legislation on binding labour rights.

In addition to the explicit exclusion of migrant domestic workers from SALL, the KSA has not subscribed to international laws providing for the rights of migrant domestic workers.

4.5 INTERNATIONAL LAWS APPLICABLE IN SAUDI ARABIA

The Basic Law of Governance of the Kingdom of Saudi Arabia decries that the constitution of the Kingdom of Saudi Arabia is Almighty God's Book, the Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH).⁴⁶³ The government derives its authority from the Book of

⁴⁶⁰ ILO, Regulatory framework governing migrant workers (2019) <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---robeirut/documents/legaldocument/wcms_728262.pdf> accessed 3 November 2020.

⁴⁶¹ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration 2014), 3 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

⁴⁶² *ibid.*

⁴⁶³ Basic Law of Governance, art 1.

God and the Sunna of the Prophet, which are the ultimate sources of reference for the Basic Law of Governance and other state laws.⁴⁶⁴

Further, when it comes to laws, international agreements, treaties, and concessions, they shall be approved and amended by Royal Decrees.⁴⁶⁵ This provision implies that international laws must be transformed into national laws.⁴⁶⁶ This approach in transforming laws into national laws is dualistic.⁴⁶⁷ Therefore, international conventions do not immediately obtain the force of law upon ratification.⁴⁶⁸ In addition to the complex system of incorporation of international laws into its national laws, the KSA has not ratified core human rights conventions.⁴⁶⁹ In terms of vulnerable populations, women's rights receive greater protection compared to those of migrant domestic workers because the Kingdom of Saudi Arabia has ratified CEDAW; however, the Kingdom of Saudi Arabia has not ratified conventions concerning the rights of migrant workers.⁴⁷⁰

As noted, the KSA has not ratified any conventions related to migrant workers formulated by the ILO and the UN. These conventions include; the International Convention of the Protection of the Rights of all Migrant Workers and Members of their Families, Migration for Employment Convention, and Migrant Workers Convention.⁴⁷¹ Despite Kenya ratifying the ILO conventions on migration, namely; Migration for Employment and Migrant Workers Convention, they cannot apply to Saudi Arabia as they have not consented to be bound by these treaties.

⁴⁶⁴ *ibid* art 7.

⁴⁶⁵ *ibid* art 70.

⁴⁶⁶ Abdullah Almutairi, 'The Domestic Application of International Human Rights Conventions in Saudi Arabia and the Need to Ratify Conventions on Migrant Workers' (2018) 54 Middle Eastern Studies, 50 <<https://doi.org/10.1080/00263206.2017.1361934>> accessed 14 October 2020.

⁴⁶⁷ *ibid* 51.

⁴⁶⁸ *ibid* 52.

⁴⁶⁹ *ibid* 52.

⁴⁷⁰ *ibid* 52.

⁴⁷¹ *ibid* 48.

Kenya and Saudi Arabia made a bilateral agreement in 2017.⁴⁷² In January 2019, the agreement between the Kenyan government and the KSA on domestic workers' recruitment officially came into effect.

The bilateral agreement provides a basis for cooperation between the Government of Kenya and the Government of Saudi Arabia⁴⁷³ in protecting the rights of the emigrant domestic workers and their employers' rights.⁴⁷⁴ The parties to the agreement undertake to cooperate in various issues and of particular interest; recruitment of Kenyan domestic workers,⁴⁷⁵ cooperation in streamlining the recruitment process,⁴⁷⁶ and ensuring domestic workers are recruited through recruitment agencies, offices, or companies licenced by their respective governments.⁴⁷⁷

According to the agreement, the Kenyan government has several commitments, such as ensuring that qualified and medically fit workers needed by the Saudi Kingdom, according to the job specifications and credentials are provided.⁴⁷⁸ It should ensure that prospective workers have no criminal record.⁴⁷⁹ Additionally, that prospective workers are trained in housework in specialized institutions. They have received the necessary orientation on the Saudi customs and traditions, lifestyle and living costs, and on the contract's nature and terms.⁴⁸⁰ Furthermore, the government should ensure that domestic workers sign the standard employment contracts

⁴⁷² National Employment Authority, <<http://www.nea.go.ke/web/wp-content/uploads/2019/01/Saudi-Arabia-Agreement.pdf>> accessed 10 July 2019.

⁴⁷³ Agreement between the Government of the Republic of Kenya and the Kingdom of Saudi Arabia on Recruitment of Domestic Workers, art 1 <<http://www.nea.go.ke/web/wp-content/uploads/2019/01/Saudi-Arabia-Agreement.pdf>> accessed 10 October 2019.

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid* art 4(a).

⁴⁷⁶ *ibid* art 4(d).

⁴⁷⁷ *ibid* art 4(f).

⁴⁷⁸ *ibid* art 5(a).

⁴⁷⁹ *ibid* art 5(b).

⁴⁸⁰ *ibid* art 5(c).

before departure. This contract will be written in English, Swahili and Arabic languages and signed by the employer, domestic worker, and the recruitment agencies.⁴⁸¹

The obligations of the Kingdom of Saudi Arabia include; To ensure that the recruitment, hiring, and placement of domestic workers under the Agreement shall be per the relevant laws, rules, and regulations,⁴⁸² to take measures to ensure that the welfare and rights of employers and domestic workers employed in the Kingdom of Saudi Arabia are promoted and protected under the applicable laws, rules, and regulations.⁴⁸³ The Saudi Arabian government is to take measures to ensure implementation of the employment contract between the employer and the domestic worker.⁴⁸⁴ They are also to endeavour to establish a mechanism that will provide 24-hour assistance to the domestic workers,⁴⁸⁵ and endeavour to facilitate expeditious settlement of contractual disputes and other cases filed before the appropriate Saudi authorities/ courts.⁴⁸⁶

Despite the existence of a bilateral agreement, violation of KEDW rights continues under the existing domestic laws of Saudi Arabia. Yet, the agreement stipulates that Saudi Arabia shall endeavour to respect the terms of the agreement per the domestic laws of the Kingdom.⁴⁸⁷ Furthermore, domestic laws in Saudi Arabia make it difficult to enforce the terms agreed in bilateral agreements properly.⁴⁸⁸

Bilateral agreements cannot directly give protection to migrant workers individually as they cannot replace the national labour law of destination states.⁴⁸⁹ For example, the provision of a

⁴⁸¹ *ibid* art 5(d).

⁴⁸² *ibid* art 6(a).

⁴⁸³ *ibid* art 6(b).

⁴⁸⁴ *ibid* art 6(c).

⁴⁸⁵ *ibid* art 6(d).

⁴⁸⁶ *ibid* art 6(e).

⁴⁸⁷ Zainab Moroa, 'The Limitations of Bilateral Agreements: An Analysis of the Kenya-Saudi Domestic Workers Agreement' (Masters, The Graduate Institute Geneva 2019), 51.

⁴⁸⁸ *ibid*.

⁴⁸⁹ Koesrianti, 'An Overview of Indonesia's Protection on Women Migrant Worker' (2016) ResearchGate, 10 <https://www.researchgate.net/publication/305449595_An_Overview_of_Indonesia's_Protection_on_Women_Migrant_Workers> accessed 3 November 2020.

minimum wage in the bilateral agreement cannot materialize if the national labour law silent about minimum wage.⁴⁹⁰ Indeed, most bilateral agreements concern with and are designed to provide the standard of regulations and the administrative works of placement and acceptance of migrant workers in receiving states and excluded the protection of migrant workers.⁴⁹¹ However, that is not to say that it is not beneficial to have a bilateral agreement. It is a step in the right direction in putting in place some form of legal framework to protect the rights of KEDW. The legal safeguards of KEDW in Saudi Arabia are limited. Nonetheless, there have been strides to improve the situation, although the government can do more.

There is the Domestic Workers Convention that neither Kenya nor Saudi Arabia has ratified in looking at international laws.⁴⁹² This law is of fundamental importance when it comes to the rights of domestic workers, more so the rights of migrant domestic workers.

4.6 DOMESTIC WORKERS CONVENTION, C189

There is a crucial piece of legislation for domestic workers; the ILO Domestic Workers Convention, C189. This convention has 29 ratifications worldwide, and in Africa, only three countries have ratified the convention. These countries are South Africa, which ratified the convention on 20th June 2013, Guinea, which ratified the convention on 25th April 2017. Madagascar ratified the convention on 11th June 2019 set to enter into force on 11th June 2020.⁴⁹³

⁴⁹⁰ *ibid.*

⁴⁹¹ *ibid.*

⁴⁹² International Labour Organization, 'Ratifications of C189-Domestic Workers Convention' (2019) ILO <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> accessed 9 October 2019.

⁴⁹³ *ibid.*

The Domestic Workers Convention was enacted because many governments have denied domestic workers key labour protections enjoyed by other workers.⁴⁹⁴ In the Convention's preamble, it is recognized that domestic work continues to be undervalued, is invisible and is mainly carried out by women and girls, many of whom are migrants vulnerable to discrimination regarding employment and other human right abuses.⁴⁹⁵

The Convention calls for active participation of the ratifying state in ensuring that the rights of domestic workers are protected.⁴⁹⁶ One way in which this active participation is ensured is through regular reports on the implementation of national laws and regulations on domestic work.⁴⁹⁷ Furthermore, in the protection of domestic workers, including migrant domestic workers recruited by private employment agencies, there is a call on the member state to regulate private employment agencies recruiting or placing domestic workers.⁴⁹⁸ Laws concerning recruitment agencies are to be put in place.⁴⁹⁹ There is also a need for concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment.⁵⁰⁰

Since the KSA is the country in which KEDW seek employment, it is interesting to compare how their national laws relating to migrant domestic workers compare to international standards set by C 189.

⁴⁹⁴ Human Rights Watch 'The Domestic Workers Convention: Turning New Global Labour Standards into Change on the Ground'.
<https://www.hrw.org/sites/default/files/related_material/The%20Domestic%20Workers%20Convention%20-%20Turning%20New%20Global%20Labor%20Standards%20into%20Change%20on%20the%20Ground_0.pdf> accessed 19 July 2019.

⁴⁹⁵ Convention Concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 05 September 2013) 2955 UNTS (Domestic Workers Convention) preamble.

⁴⁹⁶ *ibid* art 3(1)

⁴⁹⁷ *ibid* art 14.

⁴⁹⁸ *ibid* art 15 (1) (a).

⁴⁹⁹ *ibid* art 15 (1) (c).

⁵⁰⁰ *ibid* art 15(1) (d).

4.7 COMPARISON OF SALL AND THE DOMESTIC WORKERS CONVENTION

To begin with, the SALL fails to respect, promote and realize the fundamental principles and rights at work for migrant workers as set out in article 3 of the Convention.⁵⁰¹ In reviewing SALL, it was noted that domestic workers are excluded from the provisions of the labour laws.⁵⁰²

Exclusion of domestic workers from SALL contravenes Article 3(2) (d) of the Convention which provides for the elimination of discrimination in respect of employment and occupation. The exclusion of domestic workers from SALL contravenes Article 10(1) of the Convention. It provides that members shall take measures towards ensuring equal treatment between domestic workers and workers generally concerning normal hours of work, overtime compensation, periods of daily and weekly rest, and paid annual leave under national laws, regulations, or collective agreements.

In addition to SALL, which excludes the applicability of the law to domestic workers, labour policies such as the Kafala system is a major contributor to the violation of the rights of domestic workers in Saudi Arabia and its Gulf counterparts.⁵⁰³ Within the Kafala system, the practice of confiscation of passports and travel documents of migrant domestic workers by their employers is widely practised; this is in contravention with the C189 that provides that members are to ensure that domestic workers are entitled to keep in their possession their travel and identity documents.⁵⁰⁴

⁵⁰¹ International Trade Union Confederation, 'Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries' (International Trade Union Confederation 2017) 17.

⁵⁰² Saudi Arabian Labour Laws, article 7.

⁵⁰³ Zainab Moroa, 'The Limitations of Bilateral Agreements: An Analysis of the Kenya-Saudi Domestic Workers Agreement' (Masters, The Graduate Institute Geneva 2019), 51.

⁵⁰⁴ The Domestic Workers Convention, art 9(c).

The Convention provides for weekly rest of at least 24 consecutive hours.⁵⁰⁵ Weekly rest is not guaranteed for migrant domestic workers in Saudi Arabia; most workers are kept under lock and key. Employers fear that they would lose the investment they had made to bring the worker to the country of destination if they permit the workers freedom of movement.⁵⁰⁶

The SALL falls short of the international standards set for the protection of rights of Domestic Workers under C189.

4.8 CONCLUSION

Having walked through the legal landscape of both Kenya and the KSA, it is apparent that both countries have excluded domestic workers from their labour laws. Saudi Arabia has expressly done so while Kenya is silent on it. From the analysis above, Kenya has good employment law: the Employment Act. It also has a Legal Aid Act and a Labour Institutions Act, that have elaborate provisions on access to justice. Kenya has also enshrined the right to access to justice in article 48 of the constitution. However, these laws have failed to ensure access to justice for KEDW.

In some of the laws, such as the Employment Act and the Labour Institutions Act, the major stumbling block, is lack of enforcement mechanisms. Additionally, the Legal Aid Act fails to cover emigrant workers due to their emigrant status. The Saudi Arabian legal framework on migrant domestic workers and access to justice is worse. From the analysis SALL does not protect domestic workers; the Basic Law of Governance, under article 47 provides for the right to litigate for residents but does not address the cost implications and self-representation of women in court. The chapter's analysis of how Saudi Arabia's laws compare to international

⁵⁰⁵ *ibid* art 10(2).

⁵⁰⁶ Sophia Kagan, 'Domestic Workers and Employers in the Arab States: Promising practices and innovative models for a productive working relationship' (2017) International Labour Organization White Paper, 5 <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_619661.pdf> accessed 15 July 2020.

laws, the KSA performed dismally in the ratification of international labour law agreements.

All these shortfalls have exacerbated the lack of access to justice for KEDW.

The next chapter looks at a summary of the research findings, conclusions, and recommendations.

CHAPTER FIVE: SUMMARY OF RESEARCH FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

5.1 INTRODUCTION

From the study conducted, the researcher identified that the Kenyan government and the Kingdom of Saudi Arabia have to collaborate to ensure the realization of access to justice for KEDW. The research identified the human rights violations faced by KEDW based on interviews conducted and supported by various literature on the plight of migrant domestic workers. It also identified the obstacles and legal guarantees to access to justice for KEDW, This chapter, therefore, seeks to summarize the research findings and make conclusions. Finally, within the chapter, recommendations are made on the problems identified, and lessons learnt from other countries on the protection of migrant domestic workers.

5.2 SUMMARY OF RESEARCH FINDINGS AND CONCLUSIONS

This research was premised and set out to prove the hypothesis that although Kenya has several laws, policies, and institutions specific to employment and migration nevertheless, there exists a gap in legislation for KEDW. This gap exists because KEDW do not enjoy the protection offered by these laws and particularly the right to access to justice guaranteed in Article 48 of the Constitution because there is no law specific to Emigrant Domestic Workers. The researcher used the research hypothesis to come up with the research questions that guided the research.

The researcher got the findings on research question one on the human rights violations faced by KEDW by conducting in-depth interviews and key informant interviews. In addition to interviews, the researcher examined literature that identified the human rights violations faced by migrant domestic workers in Saudi Arabia. In looking into the violations, it stood out that Saudi Arabia is not signatory to fundamental international human rights conventions; therefore,

the ratified international human rights conventions in Kenya are non-applicable in Saudi Arabia.⁵⁰⁷ Secondly, the researcher noted that inasmuch as legislation is vital for the guarantee of rights, it was not enough to realize economic, social and cultural rights. The law does not operate in a vacuum. Other players need to join in to ensure that rights are enforced and protected, especially in the country of origin of the domestic workers, Kenya.

To answer question two, the researcher looked at the obstacles faced by KEDW in accessing justice. Other than the law, which is a significant factor in ensuring access to justice for KEDW, economic and social factors were identified to affect access to justice. The researcher looked at and identified economic factors such as the cost of paying for an advocate and the cost of instituting legal proceedings, social obstacles such as discrimination,⁵⁰⁸ the use of the Kafala sponsorship system⁵⁰⁹ and language barriers. Some of these factors, such as the Kafala sponsorship system, are left outside the purview of the law to regulate, which is the antithesis of the protection of the rights of migrant workers.⁵¹⁰

The findings on research question three are that enforcement of the law was a major challenge in Kenya, particularly for foreign contracts of service provided for in the employment act.⁵¹¹

The researcher further noted that Saudi Arabia is not signatory to core international laws on migration; hence international laws on migration do not apply to them.⁵¹² In addition to this, the research established that migrant domestic workers are excluded from SALL.⁵¹³ The contracts of service given to KEDW become the legal protection for the workers, which are more often than not altered by their employers. Kenya and the Kingdom of Saudi Arabia have

⁵⁰⁷ Text to n 442 in ch 4.

⁵⁰⁸ Text to no 329 in ch 3.

⁵⁰⁹ Text to no 320 in ch 3.

⁵¹⁰ *ibid.*

⁵¹¹ Text to no 385 in ch 4.

⁵¹² Text to no 443 in ch 4.

⁵¹³ Text to no 425 in ch 4.

signed a bilateral agreement. It is one of the legal instruments relied on to enforce the rights of KEDW. However, as has been seen, enforcement of the bilateral agreement is also wanting.⁵¹⁴

The hypothesis, therefore, holds that there exists a gap in legislation for KEDW in Kenya, especially since there is no specific legislation on domestic workers. However, for the protection of KEDW rights in Saudi Arabia, there should not only be national laws in place, but also binding international treaties in which both Kenya and Saudi Arabia are signatories. Both countries have initiated this by signing a bilateral agreement of which enforcement should be top of the agenda.

Additionally, as seen, human rights law has its limitations in the protection of human rights. Saudi Arabia has to be willing to work with Kenya to ensure that domestic workers' rights are protected. The bilateral agreement looks good on pen and paper, but the reality is that the key players are not enforcing it, therefore the need for political will to protect the rights of KEDW.

Finally, Kenya and Saudi Arabia should look at how they can balance their power relations. Saudi Arabia has more say in the relationship that it has with Kenya. It should use this upper hand to protect the rights of KEDW.

The next section of this chapter seeks to briefly look at the legal protections placed by other jurisdictions for their migrant domestic workers.

5.3 RECOMMENDATIONS

5.3.1 Formulation and Enactment of an Emigrant Domestic Workers Law by Parliament

There is a need to formulate particular legislation on Emigrant Domestic Workers. Their needs and interest vary from the needs of other workers. The need for a national labour migration legal framework is overdue as KEDW contribute significantly to the Kenyan economy through

⁵¹⁴ Text to n 460 in ch 4.

their remittances. For low-skilled workers such as emigrant domestic workers, this piece of legislation will reduce the unsuitable working conditions that recruitment agencies, agents, and their employers expose them to. It will also dignify their work.

5.3.2 Ratification of the Domestic Workers Convention, 2011 and the Domestic Workers Recommendation, 2011 (R 201)

The ILO formulated the Domestic Workers Convention, C189, and its recommendations in 2011. Since C189 entered into force in 2013, only 29 countries have ratified it, including just 3 African countries.⁵¹⁵ There have been efforts of various stakeholders in Kenya, particularly the Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA), a trade union that has lobbied for ratification of C189.

Its efforts have proved futile as there is no talk of ratifying the convention. Domestic workers are excluded from national labour laws in many countries, leaving them no legal right to limits on their hours of work, minimum wage, or adequate rest.⁵¹⁶ Without any legal protection, domestic workers are at the mercy of their employers.⁵¹⁷ Kenya, unlike Saudi Arabia, has not overtly excluded domestic workers from its labour legislation. However, its legislation remains silent on the needs of these workers as their work poses its unique challenges since it is one carried out within the private confines of a home.

The ratification of this convention in Kenya will help improve the standards of work of domestic workers to global standards of work. The accompanying Domestic Workers

⁵¹⁵ Text to n 465 in ch 4.

⁵¹⁶ Human Rights Watch, 'The ILO Domestic Workers Convention: New Standards to Fight Discrimination, Exploitation and Abuse' (2013) 2
<https://www.hrw.org/sites/default/files/related_material/2013ilo_dw_convention_brochure.pdf> accessed 28 October 2020.

⁵¹⁷ *ibid.*

Recommendation provides a non-binding guidance for strengthening protections for domestic workers and ensuring decent work conditions.⁵¹⁸

5.3.3 Establishment of Follow-up Mechanisms for the Enforcement of Laws, Regulations and Policies

The Labour Institutions (Private Employment Agencies) Regulations intended to protect emigrant workers, especially concerning recruitment agencies, are not observed. There is a need for a follow-up mechanism for the enforcement of the set regulations to ensure the efficiency of the systems in place.

Enforcement of the law ensures that there is compliance with the regulations in place, and the ripple effect is that the rights of the emigrant domestic workers will be protected. It also prevents the mushrooming of black market export of domestic workers to Saudi Arabia. Too often, even when rights exist on paper, enforcement of these standards is weak.⁵¹⁹ Only when a grave incident has happened does the government intervene. The culture of reaction to situations needs to stop, and the government should cultivate a culture of ensuring systems work effectively.

One way that enforcement can be done is by having routine and random check-ups of the recruitment agencies to verify that they have complied with the laws. Additionally, at the point of departure, among the documents to be scrutinized by the immigration officer is the employment contract. In scrutinizing the contract, the immigration officer should ensure its compliance with the provisions of the Employment Act to approve travel. This scrutiny will increase the adherence of recruitment agencies or individual recruitment agents to the set regulations.

⁵¹⁸ *ibid* 7.

⁵¹⁹ ABA, 'Rule of Law Initiative: Promoting Justice, Economic Opportunity and Human Dignity through the Rule of Law' (Programme Book, 2016).

5.3.4 Education and Training

It is a positive step taken in the provision of pre-departure training by the EAIHM. The training instils confidence in the domestic worker of the work that they will be carrying out. In training, it is fundamental that in addition to being trained on the emigrating country's cultures, domestic workers ought to be educated on the laws of their emigration country. It is also fundamental that the bilateral agreement is availed to them. The bilateral agreement will form the basis for the negotiation of the individual contract since Kenya and Saudi Arabia do not have any other common law between them protecting the rights of these workers. Domestic workers must understand what is contained in the document to be able to negotiate their contract.

During the training, it is critical to have qualified legal personnel to take the domestic workers through the national legislation. The legal personnel should also explain to the domestic workers what laws protect them before and after they emigrate to Saudi Arabia. It will be useful in the training to have returnee workers share their experiences and how they were able to navigate various aspects of life as they worked in Saudi Arabia.

5.3.5 National Employment Authority (NEA)

NEA was established in 2016 by an Act of Parliament, the National Employment Authority Act, 2016. Under section 8(a), one of the authority's functions is to advise on the formulation of employment policies and strategies for national and county governments. Further, in section 8(j), the Authority facilitates the employment and placement of job seekers in formal and informal sectors or any other form of employment, locally and internationally. Emigrant domestic workers fall under the category of international job placements.

Most KEDW are recruited by private recruitment agencies and individual agents. There needs to be collaboration between the two ensuring that there is accountability in the recruitment of KEDW.

5.3.6 Penalties for Non-Compliance

The Labour Institutions (Private Employment Agencies) Regulations (2016) has elaborate provisions on the security bonds and registration of licence fee. However, it is silent on the penalties for non-compliance with the provisions of the regulations. With the absence of penalties, even though recruitment agencies may not comply with the registration requirements, they would not fear operating outside the law due to this oversight. Penalties would act as a form of deterrence for recruitment agencies to abuse the rights of the emigrant domestic workers.

5.3.7 Increase Human Resource at the Embassy

Kenya has only one embassy in Saudi Arabia, which is in Riyadh, and even so, it lacks sufficient human resource. This understaffing delays the response time to distress calls from domestic workers. In addition to this, many domestic workers are contracted to work in cities that are far from the capital Riyadh, and this geographical distance makes it difficult for the workers to pursue their rights. It is a significant delay to access to justice, for justice delayed is justice denied. The government needs to increase the number of people working at the embassies and other embassies established across Saudi Arabia to remove the geographical barrier in accessing the embassies.

5.3.8 Regulation of Commission Fee

The Labour Institutions (Private Employment Agencies) Regulations (2016) in regulation 8 points out that provided reasonable administrative costs may be charged by the agent in respect of trade test, occupational test and administrative fees shall not exceed the job seekers proposed

one month's salary. Prospective employers select an applicant and pay recruitment fees ranging from \$1,500 - \$3,500 to cover her airfare, health insurance and the agency charges.⁵²⁰

In addition to the prospective employer paying a recruitment fee, prospective migrants in the source countries will approach (or be approached by) agents and brokers and pay a fee ranging from \$100 - \$1000 to be placed.⁵²¹ Many migrant domestic workers borrow money at exorbitant interest rates from money lenders or are offered 'loans' against their salary by agents to meet the high placement fees.⁵²² The debt burden makes this is a source of vulnerability for the migrant domestic worker as it makes it difficult for the workers to leave or report exploitative or abusive working conditions.⁵²³

The law has provided that this commission should not exceed one month's salary of the worker. However, due to the non-enforcement, desperation, and ignorance of the law, many agents take advantage of the situation faced by these workers and take the chance to charge exorbitant commissions.

5.3.9 Provision of Legal Aid

The Legal Aid Act of Kenya does not cater to the needs of emigrant domestic workers. When in Saudi Arabia, if the domestic worker wants to institute a legal suit against their employer, they are limited to do so since they cannot access legal representation. Indonesia is ahead of the race in the provision of legal aid for its migrant domestic workers.⁵²⁴

In conclusion, the immediate action sought by the researcher in conducting this research is for there to be an end to the abuse of human rights of KEDW by their Saudi employers, recruitment

⁵²⁰ Bina Fernandez, 'Essential yet Invisible: Migrant Domestic Workers in GCC' (Gulf Labour Markets and Migration 2014), 5 <<http://hdl.handle.net/1814/32148>> accessed 6 June 2019.

⁵²¹ *ibid.*

⁵²² *ibid* 6.

⁵²³ *ibid.*

⁵²⁴ Text to n 504 in ch 5.

agencies, and individual agents. The study calls for cooperation between Kenya and Saudi Arabia to have a lasting solution to their plight. As the saying goes, ‘united we stand, divided we fall.’

5.4 AREAS FOR FURTHER RESEARCH

This study was an explorative study on the plight of Kenya migrant domestic workers, which has shown that there is limited scholarly literature on the plight of KEDW. The media plays a crucial role in sensitizing the public of the plight of domestic workers in Saudi Arabia. However, this is not enough, and more studies need to be done on Kenya’s legal framework and how government can alleviate the plight of these workers.

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