PROTECTING, OBSERVING AND ENFORCING HUMAN RIGHTS FOR LABOURERS IN THE CUT FLOWER INDUSTRY IN KENYA: A CRITIQUE

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS UNIVERSITY OF NAIROBI

By:

MARTIN OLE KAMWARO

G62/71785/2008

NAIROBI

NOVEMBER, 2012
DECLARATION

I, MARTIN OLE KAMWARO, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED

MARTIN OLE KAMWARO

G62/71785/08

DATE OF SUBMISSION: 16th November 2012

This thesis has been submitted with my approval as University Supervisor

SIGNED

JOY ASIEMA

SCHOOL OF LAW

UNIVERSITY OF NAIROBI
DEDICATION

This work is dedicated to my loving mum, Susan Namunyak Enelogol-iloik for being wise, decisive and firm in enrolling me for formal education while my childhood friends were herding and grazing livestock in the traditional Maasai lifestyle.
ACKNOWLEDGEMENTS

First of all I would like to acknowledge, with deep appreciation, my Supervisor, Ms. Joy Asiema, for her guidance and support throughout as I worked on my thesis. Secondly, I am grateful to my family for the encouragement and support and for being understanding during the many times I was away from them pursuing my studies. This study would not have been possible without their morale support.

Finally, I wish to thank all the people who have been involved in the production of this work, especially Francis Osiemo and Naisiae Nkoiboni and all the people who encouraged me to finalize the thesis. I thank my partner in our law firm, Julius Arap Kemboy for his encouragement and Margaret Njeri, our law firm secretary for assisting me in typing this work.
TABLE OF CONTENTS

DECLARATION .................................................................................................................. ii
DEDICATION .................................................................................................................. ii
ACKNOWLEDGEMENTS .............................................................................................. iv
TABLE OF CONTENTS ............................................................................................... v
ABBREVIATIONS AND ACRONYMS .......................................................................... viii
TABLE OF INTERNATIONAL INSTRUMENTS ................................................................ ix
TABLE OF STATUTES ................................................................................................... xi
ABSTRACT ....................................................................................................................... xii

CHAPTER 1 ...................................................................................................................... 1

INTRODUCTION ........................................................................................................... 1

1.1 Background to the Study ......................................................................................... 1
1.2 Conceptual Framework ......................................................................................... 3
1.3 Statement of the Problem ..................................................................................... 5
1.4 Hypotheses ........................................................................................................... 6
1.5 Objectives of the Study ......................................................................................... 7
1.6 Research Questions ............................................................................................... 8
1.7 Significance of the Study ....................................................................................... 8
1.8 Scope of the Study ................................................................................................. 9
1.9 Literature Review ................................................................................................ 10
1.10 Research Methodology ....................................................................................... 21
1.11 Limitations .......................................................................................................... 21
1.12 Chapter Breakdown ............................................................................................ 21

CHAPTER 2 .................................................................................................................... 23

THE LEGAL, INSTITUTIONAL AND REGULATORY FRAMEWORK ......................... 23

2.1 The Right to Freedom of Association .................................................................. 23

2.1.1 International and Regional Standards ............................................................. 23

2.1.1.1 Universal Declaration of Human Rights (UDHR), 1948 ................... 23
2.1.1.2 International Covenant on Civil and Political Rights, 1966 .............. 24
2.1.1.3 ILO Declaration on Fundamental Principles and Rights at Work .... 24
2.1.1.4 The International Labour Organization (ILO) Core Conventions

2.1.2 National Standards

2.1.2.1 Constitution of Kenya 2010

2.1.2.2 The Labour Relations Act 2007

2.1.2.3 Labour Institutions Act 2007

2.2 Freedom from Sexual Harassment

2.2.1 Sexual Harassment: European Union Law and Policy

2.2.2 International and Regional Standards

2.2.2.1 Universal Declaration of Human Rights (UDHR)

2.2.2.2 ICCPR

2.2.2.3 The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

2.2.2.4 ILO Convention No 111 on Discrimination in Employment and Occupation, 1958

2.2.2.5 African Charter on Human and Peoples Rights

2.2.2.6 Protocol to the African Charter on Human and Peoples Rights on the Rights of Women

2.2.3 National Standards

2.3 Right to a Clean and Healthy Environment

2.3.1 International Standards

2.3.1.2 International Code of Conduct (ICC) In Flower Farms

2.3.2 National Standards

2.3.2.1 The Constitution of Kenya 2010

2.3.2.2 The Social Codes of Practice

2.3.2.3 The Occupational Safety and Health Act, 2007

2.3.2.4 The Right to Safety and Health: Provision of a Safe and Healthy Work Environment
CHAPTER 3

CONCLUSION AND RECOMMENDATIONS

3.1 CONCLUSION

3.2 RECOMMENDATIONS

3.2.1. Dispute Settlement Under The Labour Relations Act

3.2.2. On Freedom From Sexual Harassment

3.2.3. Labour Officers

3.2.4. Non-permanent Staff

3.2.5. Enactment of a Horticultural Wages Order

3.2.6. On the Freedom of Association

3.2.7. On the Right to Safe Working Environment

3.2.8. Creating Awareness

3.2.9. Employee Representation

3.2.10. Role of Civil Society

BIBLIOGRAPHY
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific</td>
</tr>
<tr>
<td>AEA</td>
<td>Agricultural Employers Association</td>
</tr>
<tr>
<td>AGOA</td>
<td>African Growth Opportunity Act</td>
</tr>
<tr>
<td>CBA</td>
<td>Collective Bargaining Agreement</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CSO</td>
<td>Civil Society Organisation</td>
</tr>
<tr>
<td>COTU</td>
<td>Central Organization of Trade Unions</td>
</tr>
<tr>
<td>CRS</td>
<td>Corporate Social Responsibility</td>
</tr>
<tr>
<td>EGAP</td>
<td>European Good Agricultural Practices</td>
</tr>
<tr>
<td>EPC</td>
<td>Export Promotion Council (EPC)</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EUREPGAP</td>
<td>Euro-Retailer Produce Working Group Good Agricultural Practices</td>
</tr>
<tr>
<td>ETI</td>
<td>Ethical Trading Initiative</td>
</tr>
<tr>
<td>FKE</td>
<td>Federation of Kenya Employers</td>
</tr>
<tr>
<td>FPEAK</td>
<td>Fresh Produce Exporters Association of Kenya</td>
</tr>
<tr>
<td>HCDA</td>
<td>Horticultural Crops Development Authority</td>
</tr>
<tr>
<td>HEBI</td>
<td>Horticultural Ethical Business Initiative</td>
</tr>
<tr>
<td>ICC</td>
<td>International Code of Conduct</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>JETRO</td>
<td>Japan External Trade Organisation</td>
</tr>
<tr>
<td>JICA</td>
<td>Japan International Co-operation Agency</td>
</tr>
<tr>
<td>KARI</td>
<td>Kenya Agricultural Research Institute</td>
</tr>
<tr>
<td>KBS</td>
<td>Kenya Bureau of Standards</td>
</tr>
<tr>
<td>KEPHIS</td>
<td>Kenya Plant Health Inspectorate Service</td>
</tr>
<tr>
<td>KEWWEDO</td>
<td>Kenya Women Workers Education and Development Organization</td>
</tr>
<tr>
<td>KFC</td>
<td>Kenya Flower Council</td>
</tr>
<tr>
<td>KNHCR</td>
<td>Kenya National Human Rights Commission</td>
</tr>
<tr>
<td>KPAWU</td>
<td>Kenya Plantation and Agriculture Workers Union</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>KIRDI</td>
<td>Kenya Industrial Research and Development Institute</td>
</tr>
<tr>
<td>MPS</td>
<td>Milieu Programma Sierteelt</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Government Organization</td>
</tr>
<tr>
<td>NRI</td>
<td>National Resources Institute</td>
</tr>
<tr>
<td>PCPB</td>
<td>Pest Control Products Board</td>
</tr>
<tr>
<td>PPE</td>
<td>Personal Protective Equipment</td>
</tr>
<tr>
<td>PSSs</td>
<td>Private Social Standards</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>VPI</td>
<td>Voluntary Private Initiative</td>
</tr>
<tr>
<td>WRA</td>
<td>Workers Right Alert</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organisation</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
</tr>
</tbody>
</table>
## TABLE OF INTERNATIONAL INSTRUMENTS

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Date</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abolition of Forced Labour Convention</td>
<td>June 25, 1957</td>
<td>C 105</td>
</tr>
<tr>
<td>African Charter on Human and People's Rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discrimination (Employment and Occupation) Convention</td>
<td>June 25, 1958</td>
<td>C 111</td>
</tr>
<tr>
<td>Equal Remuneration Convention</td>
<td>June 28, 1951</td>
<td>C 100</td>
</tr>
<tr>
<td>Forced Labour convention</td>
<td>June 28, 1930</td>
<td>C29</td>
</tr>
<tr>
<td>Freedom of Association and Protection of the Right to Organise Convention</td>
<td>July 9, 1948</td>
<td>C87</td>
</tr>
<tr>
<td>Right to Organize and Collectively Bargain Convention</td>
<td>July 1, 1949</td>
<td>C98</td>
</tr>
<tr>
<td>International Code of Conduct (ICC) in Flower Farms</td>
<td></td>
<td></td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights</td>
<td>1966</td>
<td></td>
</tr>
<tr>
<td>Minimum Age Convention</td>
<td>June 26, 1973</td>
<td>C138</td>
</tr>
<tr>
<td>Plantations Convention</td>
<td>1958</td>
<td></td>
</tr>
<tr>
<td>Right to Organize and Collective Bargaining Convention</td>
<td>1949</td>
<td></td>
</tr>
<tr>
<td>Sexual Harassment: European Union Law and Policy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The International Labour Organization (ILO) Core Conventions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Universal Declaration on Human Rights (UDHR)</td>
<td>1948</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF STATUTES

The Constitution of Kenya 2010

The Employment Act 2007

The Kenyan National Commission on Human Rights Act 2011

The Labour Relations Act 2007

The Labour Institutions Act 2007

The National Gender and Equality Commission Act 2011

The Occupational Safety and Health Act 2007

The Sexual Offences Act 2006
ABSTRACT

The main aim of this study is to analyze the extent to which human rights are protected, observed and enforced in the cut flower industry in Kenya. The study focuses on three rights, namely, freedom of association, freedom from sexual harassment and the right to a clean, healthy and safe environment. The cut-flower sector falls under the agricultural industry, with the principal applicable laws being the Constitution of Kenya 2010, Employment Act, Labour Relations Act, Labour Institutions Act, Work Injury Benefits Act and the Occupational Safety and Health Act (OSHA). Another relevant statute is the Sexual Harassment Act. The legal provisions on freedom of expression, prohibition of sexual harassment and the right to a clean, healthy and safe work environment guaranteeing protection of employees’ health lay a solid ground for protection of workers. National laws on these three human rights trace their origin to international and regional instruments under the United Nations, International Labour Organization and African Charter frameworks, respectively. The United Nations human rights framework is grounded on the theme: “Respect, Protect and Remedy.” In spite of having all these laws, there are challenges with regard to compliance with and effective enforcement of the applicable labour laws.

This study is significant to the extent that it is an effort to contribute to the making of a case for the improvement of the conditions in which cut flower farm employees work, with particular emphasis on the three human rights. The study examines provisions contained in the various international, regional and national legal instruments dealing with the three rights identified above. The frameworks under the United Nations, International Labour Organization and African Charter are discussed. National laws examined include those specified above. The study analyses and critiques the extent to which the applicable laws are complied with by flower farm owners and employers as well as the government and makes recommendations for legal reform.
CHAPTER 1
INTRODUCTION

1.1 Background to the Study

The purpose of this study is to analyze the extent to which human rights are protected, observed and enforced in the cut flower industry in Kenya and to make appropriate recommendations for legislative, regulatory and institutional reforms. The study specifically focuses on three rights which are enshrined in the Constitution of Kenya 2010. These are: the right to freedom of association, freedom from sexual harassment and the right to a clean and healthy environment. This study deems these rights to be at the core of the cut flower industry in Kenya.

As at 2002, cut flower farming in Kenya was a fast growing industry. It continues to grow even at the present time. At the national level, flower exports account for more than 50% of Kenya’s horticulture exports. Flower exports were the biggest source of foreign exchange for Kenya in 2011. At the global level, Kenya accounts for 58% of the exports from the African, Caribbean and Pacific (ACP) countries to the European Union (EU).

However, the growth of this industry is faced with challenges. Even though record profits are posted yearly by the flower farms, there is little or no improvement in the socio-economic status and wellbeing of workers in the flower farms. More specifically, the industry is grappling with challenges in protecting, observing and enforcing human rights at the place of work in so far as the abovementioned three human rights of workers in the flower farms are concerned.

1 The Constitution of Kenya was promulgated on 27th August 2010.
2 Articles 36(1) and 41(2)(c) of the Constitution of Kenya 2010
3 Articles 27(4) and (5) and 29(c) and (f) of the Constitution of Kenya 2010
4 Article 42(a) of the Constitution of Kenya 2010 and read together with Article 41(2)(b) the latter of which deals with labour relations and provides for the right to reasonable working conditions.
The first challenge which is the focus of this study concerns the protection, observance and enforcement of the right to freedom of association provided for in the Constitution. Many of the flower farms in Kenya do not observe the right of the workers to freely associate and collectively bargain. The Kenya Plantation and Agricultural Workers Union (KPAWU), being the industry union, faces restriction in its attempts to defend workers’ rights. As of 2003, KPAWU had only 8,000 members as compared to the large number of workers in this industry. This is because cut flower farm owners resort to intimidation, threats of dismissal, espionage and physical violence in an attempt to prevent their workers from joining trade unions. Workers who attempt to form unions against their employers’ wishes are secretly observed and dismissed from employment.

The second challenge concerns the fundamental right of freedom from sexual harassment. This right is located in the provisions of the Constitution on freedom from discrimination on the ground of sex. Further, the Constitution guarantees freedom and the security of the person and grants the right not to be subjected to any form of violence from either public or private sources and the right not to be treated in a degrading manner. Female workers are sexually harassed especially in the hands of managers in the various flowers farms. Moreover, they are dismissed from employment on flimsy grounds including union affiliation and refusal to give in to sexual advances from their male supervisors. This infringement on their rights is significant for the flower farm industry since women account for 65-75% of the work force in this industry.

The third challenge concerns the right to a clean and healthy environment. Working conditions at flower farms are deplorable despite provisions in both international and national laws as well as voluntary Codes that are adopted by the flower farms stipulating standards to be observed. While addressing a meeting of the KPAWU in Kisumu, Mr. Francis Atwoli, the Secretary
General of the Central Organization of Trade Unions (COTU) accused flower farm owners of having deplorable working conditions, poor pay, poor housing, poor sanitation and lack of protective gear for farm workers. As a result of the poor working conditions coupled with lack of protective gear while performing risky jobs that involve unsafe handling of harmful chemicals, some workers develop health problems. Doctors attending to workers at the flower farms cite cases of chronic bronchitis, breathing problems, severe headaches, loss of hair and acute chest pains due to exposure to the harmful chemicals.

The Chief Chemist of the Kenya Pest Control Products Board states that the Board cannot train individual workers. This task is left to the individual employers to handle. This means that the workers’ plight is left to the goodwill of their employers. In some cases, if an accident occurs at the workplace, the worker’s family is usually given a lump sum to keep them silent. Some workers stay silent because they cannot afford to hire lawyers to pursue enforcement of their rights and most of these cases remain largely unreported.

This study therefore examines the need for more effective enforcement of the three rights mentioned above for the protection of workers in cut flower farms. The study is informed by the writer’s own observations and personal experience spanning a total of twelve years as the Director in charge of Human Resources in various cut flower farms in Kenya. Also, the writer’s two years of experience as the Executive Officer of the Agricultural Employers Association of the Federation of Kenya Employers (FKE) also provides him with some insight that is relevant to the study.

1.2 Conceptual Framework

As stated earlier, cut flower production contributes immensely to the Kenyan economy. However, the country’s success in supplying European markets has brought with it increased attention to the industry’s social and environmental impacts. Concerns have been raised by consumers, retailers, auctions, European regulators and civil society organizations regarding the

---

17Supra, Note 5.
conditions under which the flowers are produced and especially the conditions in which the flower farm employees work. The willingness of importers, retailers and consumers to buy flowers grown in Kenya is pegged to the condition that the flowers must be grown under humane conditions for the flower farm workers. A number of codes of conduct have been developed by major market-brokers, international organizations, national industry associations and multi-stakeholder partnerships to set minimum standards for conditions under which flowers are produced. These conditions are intended for the protection of the rights of flower farm workers. The codes are part of a global increase in nongovernmental regulation. They make reference to both Kenyan labour and health and safety law, and the core conventions of the International Labour Organisation. Flower growers therefore have to comply with these codes in order to be allowed to trade in the European market.

This study proceeds from a conceptual framework that makes a link between the willingness of European importers, retailers and consumers of cut flowers grown in Kenya, on the one hand, and the assurance, through certification processes, that the flowers imported or bought are produced in humane conditions where the rights of flower farm workers are respected, observed and enforced. A higher volume of trade and increased sales of flowers is also associated with adherence to these codes.

There are over 50 flower farms in Kenya.\(^\text{18}\) This number is a rapid growth considering the initial handful of farms started by European settlers in the 1960s. As of 2005, these farms employed 40,000-50,000 workers to provide labour.\(^\text{19}\) In some areas, these farms are the only source of employment for the inhabitants.\(^\text{20}\) However, flower farming has received negative publicity from the media due to its labour practices. This led to the boycott of flowers from Kenya by importers in the European market as a result of spirited campaigns by the civil society led by the Kenya Human Rights Commission (KHRC) and trade unions in the early 1990’s.\(^\text{21}\) As a result of the

---


\(^\text{19}\) Hale, A. and Opondo, M. 2005, Humanising the Cut Flower Chain: Confronting the Realities of Flower Production for Workers in Kenya, Antipode, 37(2), 301-323.

\(^\text{20}\) Inhabitants of areas like Karagita in Naivasha depend solely on the flower farms.

increased pressure, flower farms were forced to comply with demands from the consumers of European countries, Europe being the main export destination of flowers grown in Kenya.

This pressure from the European importers and buyers was as a result of laws passed in their countries which required retailers to be more vigilant of the labour practices of the suppliers from third world countries. An example of legislation in the United Kingdom (UK) is the UK Food Safety Act, 1990. Further, consumers in Europe increasingly prefer flowers certified with quality marks that they were produced with farms that uphold worker rights. Fair-trade certification is an example of certification preferred by European buyers.

Following pressure from the European importers and buyers, Kenyan flower growers incorporated various codes, both local and international, into their operations. The Codes adopted by the farms are so many that the Kenyan flower sector is considered to be one of the most codified in the world.22

1.3 Statement of the Problem

An examination of international, regional and national laws dealing with the three human rights identified above reveals that there are extensive provisions covering these rights. The rights are protected in the various laws. However, it is opined that there is no effective implementation and enforcement of these provisions in Kenya. The Ministry of Labour is charged with the overall responsibility of ensuring that worker’s rights are respected, observed and enforced. Labour Officers are required to carry out routine inspection of flower farms for this purpose. However, the Ministry of Labour has no capacity to carry out ‘labour inspection.’ There are not enough Labour Officers who can traverse the country to inspect all the flower farms. Coupled with the problem of lack of capacity is the fact that the Government does not allocate enough resources to the Ministry of Labour for such inspection.

The problem is compounded by the fact that there is lack of awareness of the safeguards provided for by the various laws. This cuts across from trade union officials to managers of

---

flower farms and to the workers themselves. Trade unions have a supervisory role to act as a check and balance between workers and their employers. They are supposed to ensure that workers rights are respected, observed and enforced. However, many trade union officials too have little or no awareness of or training on the specific legal provisions covering these rights. Managers of flower farms also lack sufficient training on these rights. Many of them are also not specialized in the human resource management discipline, even though they may be very highly qualified in other professional and technical fields relevant to managing a flower farm such as agriculture, economics and marketing. As for the workers, many of them, especially women, are not aware of the full extent of legal protection of their rights and they are therefore not able to forcefully seek enforcement of these rights.

The upshot of all the above is that the rights of the workers are not fully respected, observed and enforced. In some cases, where such awareness exists whether to a small or large extent, the workers' rights are outrightly infringed by farm employers and their managers. More specifically, employers frustrate workers' involvement in trade union activities. Also, women are sexually harassed in the farms by their bosses. In addition to this, workers carry out their duties in an environment that is unclean and unsafe for their health and well being. This in turn leads to frustration and discontent among the flower farm workers.

It is also important to note that there is increasing concern by the international trade community to ensure that flowers bought on the international market must be produced in conditions that do not jeopardize the safety and health of flower farm workers or trample on their rights. It is therefore imperative that mechanisms be identified and explored for the effective implementation of the relevant laws providing for the rights of workers in cut flower firms in order that the problems identified above are addressed.

1.4 Hypotheses

The following hypotheses will be tested:

1. There are provisions under international, regional and national law requiring respect for, observance and enforcement of the human rights of workers, and more specifically, the right of freedom of association, the freedom from sexual harassment and the right to a
safe working environment. However, these three rights are not accorded to flower farm workers in Kenya by their employers.

2. Institutional and regulatory mechanisms for the observance and enforcement of these rights in flower farms are inadequate and ineffective. This contributes to the problems that the flower farm workers face.

3. Effective implementation and enforcement of the law and regulation of the operation of flower farms will ensure the observance and enforcement of the three human rights of flower farm workers.

1.5 Objectives of the Study

The main objective of the study is to examine the extent to which international, regional and national laws providing for and protecting the abovementioned three human rights of workers in the cut flower industry are adhered to in Kenya and to make appropriate recommendations for legislative, regulatory and institutional reforms.

The specific objectives are:

a) To examine international, regional and national laws providing for the right to freedom of association, freedom from sexual harassment and the right to a clean and healthy working environment.

b) To examine Social standards and Social Codes applicable in the flower farm industry in Kenya.

c) To examine regulatory and institutional mechanisms and analyze the extent to which cut flower farms in Kenya comply with the international, regional and national laws as well as Social Codes, in respect of the three human rights identified above.

d) To make appropriate recommendations for legislative, regulatory and institutional reforms to ensure compliance with and adherence to the laws providing for and protecting the three human rights for cut flower farm workers in Kenya.
1.6 Research Questions

This study is guided by the following research questions:

1. What standards do international, regional and national laws impose on flower farms owners as regards upholding the rights of freedom of association, freedom from sexual harassment and the right to a clean, healthy and safe working environment?

2. What do the flower farm regulatory Private Social Standards and Social Codes provide on these three rights?

3. What are the regulatory and institutional mechanisms and to what extent do flower farm owners and employers in Kenya adhere to the international, regional and national standards as well as the Private Social Standards and Social Codes and what are the shortcomings?

4. What recommendations can be made for legislative, regulatory and institutional reforms to ensure greater respect for, compliance with and adherence to these standards?

1.7 Significance of the Study

This study is significant to the extent that it is an effort to contribute to the making of a case for the improvement of the conditions in which cut flower farm workers work, with particular emphasis on the three human rights.

Infringement of the human rights of cut flower farm workers by flower farm owners and managers as their agents is an issue of great concern to Kenya as a country and to the consumers of those products. This is especially so for workers whose freedom of association is infringed through restrictions by their employer on the workers’ right to join trade unions. There is even greater concern for women working in the cut flower industry who make up the majority of the workforce. The cleanliness and safety of the environment in which the workers carry out their duties is also of great concern to the country and the international trade community.

Thus, while the flower farms are a revenue earner for the country, the interests of investors should not override the interests of the workers on these farms. There is need to strike a balance
between the commercial interests of the cut flower farm owners and investors, on the one hand, and the overall well being of the workers, on the other hand. The failure to adhere to international, regional and national human rights standards protecting the rights of cut flower farm workers will negative any gains made. This is because the government will spend more revenue on remedying the adverse effects occasioned by the non-observance or breach of the human rights of flower farm workers. It makes no economical sense if the government receives revenue from investors in the cut flower industry but is left reeling with effects such as poverty, degradation of the environment and sick workers who cannot be able to sustain themselves after the investors leave the country. There is therefore need to find a balance between worker rights and the need for the government to attract investors.

In particular, there is need to uphold the rights of freedom of association, freedom from sexual harassment and the right to a clean, healthy and safe working environment for the cut flower farm workers in Kenya. This will only be possible if the legal, regulatory and institutional mechanisms for upholding these rights are adequate and effective.

1.8 Scope of the Study

This study examines provisions contained in international, regional and national instruments dealing with the three rights identified above. International instruments examined include the Universal Declaration of Human Rights (UDHR), the United Nations International Convention on Civil and Political Rights (ICCPR), the United Nations International Convention on Economic, Social and Cultural Rights (IECSR) and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Various International Labour Organization (ILO) Conventions touching on these rights will also be discussed. Regional instruments examined include the African Charter on Human and Peoples’ Rights (ACHPR) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. National laws examined include the Employment Act,23 the Labour Relations Act,24 the Labour Institutions Act,25 the Sexual Offences Act,26 the Occupational

---

23 Enacted in 2007
24 Enacted in 2007
25 Enacted in 2007
26 Enacted in 2007
Safety and Health Act\textsuperscript{27} and the Work Injury Benefits Act.\textsuperscript{28} In addition to the above, the study also discusses the so called Private Social Standards (PSSs) or Social Codes, which are increasingly gaining importance, with regard to the three rights.

The study analyses the legal and institutional challenges encountered in effectively implementing and enforcing the three rights and makes recommendations for legal and institutional reforms in order to address these challenges.

1.9 Literature Review

An analysis of available literature demonstrates that to a large extent, the human rights of workers in the cut flower industry are not respected or observed. This is the case not only in Kenya but also in other parts of the world. The right to freedom of association, to assemble, collectively bargain, protection from sexual harassment and safe and healthy environment are in some cases nonexistent. Below is a review of the available literature on the subject.

Few researchers and authors have ventured to write in the area dealing with the cut flower industry, especially in Kenya. Dr. Maggie Opondo\textsuperscript{29} is one such publicist in this area. Others that have made notable contribution in this area are Sally Smith\textsuperscript{30}, Catherine Dolan\textsuperscript{31}, Dr. Stephanie Barrientos\textsuperscript{32} and Andrienetta Kritzinger\textsuperscript{33}. Others who will be considered here are Norma Mena and Silvia Proaño, both of Ecuador.\textsuperscript{34}

As has been noted above, Dr. Maggie Opondo has researched and published numerous reports, singly and with other authors. Her focus is on gender aspects of labour relations and working environments in the Kenyan cut flower industry. Most of these publications are in the form of project reports.

\textsuperscript{26} Act No. 3 of 2006
\textsuperscript{27} Enacted in 2007
\textsuperscript{28} Enacted in 2007
\textsuperscript{29} Also referred to as Dr. Mary Magdalene Opondo of the Department of Geography and Environmental Studies, University of Nairobi, Kenya
\textsuperscript{30} Institute of Development Studies, UK
\textsuperscript{31} Northeastern University, USA
\textsuperscript{32} Professor at the University of Manchester
\textsuperscript{33} Professor in the Department of Sociology at the University of Stellenbosch, South Africa
\textsuperscript{34} Of the International Labour Rights Fund
In one such project report, Dolan, Opondo and Smith\textsuperscript{35} examine a number of issues affecting the workers in the cut flower industry in Kenya. The issues are: security of employment; working hours and other conditions of work; composition of workers (gender); equity in wages and discrimination; grievance procedures and workers committees; health and safety; pregnancy and maternity leave; sexual harassment, harsh and inhumane treatment as well as intimidation; and general worker welfare in the industry.

The report contains graphical representations of labour force composition in the firms, including the nature of work undertaken by given percentages of each gender. However, their research is based on non governmental regulation, the so called ‘codes of conduct’ that are made by market brokers, international organizations, national industrial associations and multi-stakeholder partnerships.\textsuperscript{36} These codes cover a wide range of issues in workers’ rights including the rights aforementioned. They are market oriented and rely on audits for enforcement and compliance.

The report further tackles the question of freedom of association, collective bargaining and worker participation in decision making. It discusses in details its findings on the role and effectiveness of trade unions, workers’ committees and other grievance procedures. It also covers and stresses the effects of the temporary nature of most of the employment in the farms on the collective bargaining rights of the employees and their overall welfare.

The report also addresses the general question of health and safety and specifically the provision of a safe and healthy work environment. It contains findings that most farms in Kenya use Codes, which have engendered notable improvements in occupational health and safety, specifically concerning the safe use of chemicals and separate toilets and washing facilities for male and female employees. Reporting of interviews with employers, the report contains findings that three companies provide all workers with general health and safety training every one or two years, while the remaining companies only train workers regarding special risks, such as those handling chemicals.

\textsuperscript{35} Dolan, C., Opondo, M. and Smith, S., ‘Gender, Rights and Participation in the Kenya Cut Flower Industry.’ (2002-4) Natural Resources Institute Report No.2768. The research project was undertaken under the auspices of the Natural Resources Institute.

\textsuperscript{36} Dolan, C., Opondo, M. and Smith, S., ‘Gender, Rights and Participation in the Kenya Cut Flower Industry.’ (2002-4) Natural Resources Institute Report No.2768. The research project was undertaken under the auspices of the Natural Resources Institute
However on the part of employees, the report points out that Focus Group Discussions yielded complaints from both female and male employees. The women raised concerns related to pregnancy, exposure to chemicals, and extended periods of bending and standing, while men raised the issue of chemical exposure and inadequate protective clothing. The Report goes on to contain a detailed analysis of findings on this question.

The report also dedicates a section to the question of pregnancy, having noted that a majority of the labourers are female, and contains findings of not-so-good treatment of pregnant workers despite the fact that most Codes used by the farms stipulate that women shall not be discriminated against during ante- or post-natal periods in regard to recruitment, selection or termination of employment. Expectant mothers should also be given due consideration and assigned duties appropriate to pregnancy. Some supervisors are known to deride the demands for lighter duties for pregnant women by saying, "Mimba iko kwa tumbo si kwa mikono," meaning, "Pregnancy is not in the hands but in the stomach".

Finally, the report looks at other issues such as benefits and in particular leave, laying special emphasis on maternity leave, as well as other non-wage benefits such as housing and healthcare, child care and transport.

The report concludes by making recommendations on what measures employers in the industry can adopt to address the issues raised, laying emphasis on the cultivation of a gender-sensitive working environment.

In their article, Barrientos, Kritzinger, Opondo and Smith note that the cut flower industry is characterized mostly by temporary female employees. They discuss the gender implications for temporary and contract workers, with particular reference to South Africa and Kenya. The article also examines how the vulnerability of such workers could be addressed. The article acknowledges that the labour force in the flower farms of the two countries includes a significant proportion of women, often drawn from the households of male permanent agricultural workers or from smallholder households.

In sectors such as horticulture and floriculture this female employment is often temporary, low-paid, informal and insecure. The article points out those insecure workers are highly vulnerable to poverty, which is compounded in the case of women who juggle their reproductive role with that of wage earner.

The article also includes empirical evidence from Kenya, South Africa and Zambia indicating that 65 to 75 percent of the workers in the industry are female, and deals with the question of gender and employment. The article takes the position that the rationale for preferring female workers for such jobs in the industry can be said to relate partly to the perceived “skill” and “dexterity” of women in handling delicate produce, which is key to maintaining the quality demanded by consumers of the industry products. It points out that despite undertaking tasks that add significant value, women can be employed on low wages with little training since they are seen as docile, compliant and accepting of poor employment conditions, often because they are ill-informed about their rights.

On the question of vulnerability, the authors take the position that intense competition and falling prices have created pressure on growers and dedicated pack houses to minimize labour costs. Flexible employment allows them to do this by minimising the labour they retain and varying the length of the working day. This further disadvantages the labourer as it increases the chances of more abuse of her rights, and discourages even collective bargaining due to the temporary nature of the engagement.

Another author, Gardman, does not mince his words on the matter. He outrightly charges the Kenyan government for failing to implement the labour laws that existed at the time. He points out that there is a gap in protection of workers' rights that is being filled in by private initiative. Buyers who have become concerned about labour practices in Kenyan flower farms draw up these certification initiatives. Thus the latter must comply in order to access the market in the former’s country thus a market orientated compliance system.

39 Ibid
40 Ibid.
His study looks at flower farms in Kenya that have Fairtrade certification, which is a private initiative that has certified 18 flower farms in Kenya. He contrasts labour situation in some of these farms with those that are not certified. He focuses on freedom of association, protection against sexual harassment and health and safety rights.

As regards freedom of association, he posits that the Fairtrade certified farms were prone to have improved labour situations. Workers there did not see the need to join a trade union although they were allowed to.41 They, however, formed workers committees to articulate their issues to the management.42

According to his study, non Fairtrade certified farms were portrayed as having a stronger trade union activity leading to the conclusion that the workers in these farms too were allowed to exercise their right to freedom of association. However this right is more often than not respected where the author points out that dismissal is not uncommon for those engaged in union activities.43 The picture drawn is that Fairtrade certified farms were better placed than those that were not certified to respect, observe and protect labour rights.

On matters of sexual harassment, Gardman argues that Fairtrade certified farms were superior to those that were not certified. He states that in the latter farms, the management would be only too eager to sweep the matter under the rug because they might dislike the presence of the problem.44 This is the opposite of what happens in the certified farms where, according to Gardman, the matter is investigated and those involved given an opportunity to present their case before a decision is rendered.45

Certified farms provided the necessary protective gear to their workers.46 In addition, clean drinking water and first aid kits were provided for the workers.47 This is in stark contrast to

41 Ibid, p.18
42 Ibid
43 Ibid, p.30
44 Ibid
45 Ibid, p.18
46 Ibid, p.24
Gardman’s representation of the non certified farms where he charges them with providing inadequate or insufficient protective gear.⁴⁸

He concludes by giving a scathing remark on the Kenyan government’s enforcement of its labour laws. He posits that workers’ rights in the non certified farms were deplorable because the government was unable to enforce minimum standards and advocates for more government involvement as regards law enforcement.⁴⁹ He also recommends the increase in the number of labour officers who would be the enforcers.⁵⁰

A report by the International Federation for Human Rights and the Kenya Human Rights Commission analyses the extent to which the relevant workers’ rights are respected, observed and protected in light of corporate social responsibility motivated codes.⁵¹ This report postulates that workers in three farms studied were allowed to unionize but the management would not sign a collective bargaining agreement with their trade union Kenya Plantation and Agricultural Workers Union (KPAWU).⁵²

Sexual harassment occurs on the farms that were investigated. The report posits that the matter is normally handled by men.⁵³ This invariably leaves women, in such circumstances, in a fix as they find it hard to approach men on the matter.

In conclusion, they criticize the way the codes of conduct operate, especially when it came to auditing. Workers were not involved in the process⁵⁴ making it very improbable to conclusively ascertain that the farms certified are adhering to these codes. This complicates the extent to which workers’ rights are respected, observed and protected.

⁴⁸ Ibid, p.32
⁴⁹ Ibid, p.39
⁵⁰ Ibid
⁵² Ibid, p.35
⁵³ Ibid, p.36
⁵⁴ Ibid, p.38
Moosebrugger on his part laments about the sexual harassment on Kenyan flower farms. He points to the fact that most of the codes of conduct focus on permanent workers and completely leaving out the non permanent ones. Thereby, the rights of the non permanent workers to protection from sexual harassment go unobserved and are not respected.

The literature on Kenyan flower farms and workers’ rights therein revolves around private initiatives. These private initiatives are prompted mainly by conscious consumers who demand for products produced with utmost respect to the environment and proper labour standards. This is an indictment of government as the chief duty holder in ensuring that the rights of workers are respected, observed and protected.

However, Kenya is no exception and these issues obtain in other cut flower industries of the world. It may be that Kenya’s position is relatively better than other flower producing nations. Take Columbia for instance, it is posited in a report by War on Want that Colombia is the most dangerous place for trade unionists. Trade unionists in that part of the world are threatened with at best arbitrary dismissal and at worst death. These rights are not protected in Columbia according to the report.

This position is confirmed by a report of the US/Labour Education and International Labour Rights Fund. It largely focuses on the right to freedom of association. The report points to intimidation in various ways that prevents workers from unionizing. This opposition to unionization is aided and abetted by the Colombian government which at times uses state machinery to bully determined workers into submission. Thus the right to freedom of association is denied the workers in these farms.

56 Ibid, p.21
58 Ibid
60 Ibid, p.7
Ecuadorian flower farmers fair no better according to Korovkin. She charges that a majority of flower farms neither have trade unions nor workers' committees. Those who try to engage in such activities usually find themselves out of a job and are blacklisted. If one is blacklisted, he/she cannot work anywhere else in the cut flower industry.

She also looks at workers' right to a safe and healthy environment. According to her study, national regulations on pesticide use and the labour code are not enforced. Further, she posits that provision of protective clothing to those who conduct the spraying is little. Many workers end up getting sicknesses related to the pesticide use and lack of protection against them.

Norma Muena and Silvia Proaño carried out research in Quito where 60% of Ecuador's flowers for export are grown. In this report, they state that in Ecuador, women suffer sexual harassment with reckless abandon. They charge that many farms do not have established procedures that deal with sexual harassment claims. This leads to few cases being reported and fewer of those reported being decisively dealt with. However they postulate that of the ones that are successful, a female supervisor or authority was at hand to help.

The writers note that the laws of Ecuador regard sexual harassment as a crime but still many reported cases are rarely brought to justice. They proceed to define various terms. They define sexual harassment as being understood to be any act in which one or several power relations interact in a coercive situation to affect the body, integrity, sexual freedom, health, or life of a person. According to them, it is any kind of sexual approach in the workplace or outside of it, in which one person takes advantage of their relationship of power or authority to suggest, offer, or demand sexual acts from the other person, using any form of coercion, intimidation, or violence.

62 Ibid, p.26
63 Ibid
64 Ibid
65 Ibid
67 Ibid, p.19
68 Ibid
69 Ibid
In the report, the writers acknowledge the existence of problems of sexual harassment and make it clear that women are the main victims. However, they point out that workers in flower plantations go through other challenges both at work and at home and as such they end up not bothering to report cases of sexual harassment. The main reason for this is that such workers prefer to keep their jobs and so maintain the status quo.

The writers state that any kind of sexual approach in the workplace or outside of it, in which one person takes advantage of their relationship of power or authority to suggest, offer, or demand sexual acts from the other person, using any form of coercion, intimidation, or violence is in itself a violation of human rights.

Another author, Dwasi,70 highlights the issue of discrimination based on gender. She states, for instance, that female workers undertaking similar tasks as their male counterparts are paid relatively less. She further states that, women have limited access to training on the job as compared to the men and that they are also less likely to occupy supervisory or managerial positions. She also states that discrimination of women also extends to the issue of job security. She observes that women are in jobs that have less job security and employment benefits.

Riisgaard discusses the evolving standards leading to the adoption of these codes.71 She gives them the technical term Private Social Standards (PSSs). PSSs are adopted to improve the various labour standards by companies. These companies impose these standards to their suppliers in an attempt to give the consumers assurance that labour standards were complied with. This improves business, especially in the developed economies, where consumers are sensitive to labour matters.

A report by the UK Ethical Trading Initiative72 found that lack of representation, sexual harassment, unsafe working environment and other labour issues still plagued the flower farm

71 Riisgaard, L 2009, Labour Agency and Private Social Standards in the Cut Flower Industry, PhD Thesis, Roskilde University, Denmark, viewed on 7 August 2012 <forskning.ruc.dk/site/services/...3716130/Lone_Riisgaard_PhD_tr_yk-1.pdf>.
industry, in spite of the existence of PSSs since the 1990s' in Kenya. The report by also demonstrates the flouting of legal provisions, both national and international, on labour matters. The study shows that flower farms, despite the record profits they make, do not channel some of the money back to the welfare of the workers.

The Kenya Human Rights Commission carried out a recent study and released its report in April 2012. The report exposes the violations that face women working in cut flower farms. The study was commissioned to gain knowledge of the impact of the new labour laws and the Constitution of Kenya specifically on the cut-flower sector. The study focused on working conditions around six key areas: equal pay for equal work, maternity and paternity, child support, sexual harassment, dismissals, casual labour and contracting processes.

The study was conducted among 15 flower companies in Naivasha, Thika, and Athi River. It shows several outcomes. First, due to the reduced number of staff and low level budgetary support, the Ministry of Labour has been unable to strictly enforce labour rights, as contained in various laws. Further, there is poor governance within the Kenya Plantation and Agricultural Workers' Union, either caused by limited resources at branch level, demoralised officials, or simply, lack of accountability on workers' funds.

Second, self-regulation of the industry was found to be weak as the employers have not brought on board the large number of small and medium-scale enterprises operating in the cut-flower sector. Further, whereas the Kenya Flower Council is mandated to set national standards for the sub-sector, there is limited workers' participation in the development or review of the codes of standards. This also obtains in setting international standardisation procedures.

Third, the study found that some companies have internal policies that guide human resource management, including promotion. In spite of this, the study found that some companies do not involve workers in the drafting of these policies and also do not effectively communicate them to

---

employees. Also, some companies fail to equip workers with knowledge of the policies, yet they are expected to abide by them.

Fourth, with regard to the equal pay for equal work principle, some companies were found wanting. Seasonal workers, commonly referred to as casual workers, are paid less than permanent workers although they do the same amount of work. Further, overtime is usually unpaid or employers use “bonus schemes”, which are way below the overtime entitlement.

Fifth, the study found that further violations occur with regard to entitlement of pregnancy and paternity leave. Whereas all the 15 companies surveyed have implemented the policy of paid leave for all permanent workers, and this is commendable, violations still exist. There has been gradual decrease of employment of women as a result of the longer maternity leave in the new laws. Worse still, women are perpetually screened for pregnancy, which is contrary to the Constitution, where pregnancy as a protected status should not be used to deny a woman employment. Once maternity leave is granted, the woman’s pay and other entitlements are withheld until she returns.

Other findings of this report point out violations of children’s rights, and these include absence of childcare infrastructure at the workplace, cases of child abuse, and malnutrition and occasional deaths as a result.

Finally, the report finds that despite the existence of gender-specific policies, there are many cases of sexual harassment, especially by male supervisors, termination and dismissal cases are handled in a high-handed manner and usually as a way to intimidate the rest of the workforce, and the long-term employment of casual workers to avoid paying the benefits of permanent workers.

This report covers a broad range of issues affecting women in the cut flower industry. It does not engage in an in depth discussion and analysis of the international, regional and national legal regimes governing the issues discussed in the report.
In conclusion, the extent to which the right to freedom of association, to assembly, collective bargaining, protection from sexual harassment and the right to a safe and healthy environment are respected, observed and protected in Kenya depends on private initiatives. These initiatives help in executing duties that the government is supposed to execute. Kenya’s situation may not be as bad as the one in Ecuador or Colombia but a lot remains to be done, especially by the government.

This study is different from other studies carried out and discussed in the foregoing literature review. This is because as a starting point, the study focuses on the legal regimes on the three human rights stated earlier, at the international, regional and national levels. This provides the framework within which the study then analyses the effectiveness of the regulatory and institutional mechanisms for implementation and enforcement of the three rights.

1.10 Research Methodology

The study involves desk research and utilizes library and internet sources. The study relies on secondary sources of data, including the Constitution of Kenya 2010 and various statutes under national law. Other sources comprise international and regional legal instruments. The study also uses secondary data including journals and reports of various international, regional and national organizations.

1.11 Limitations

This thesis recognizes other workers’ rights provided for by international and national legal instruments. However, owing to the focus and thrust of this thesis, rights apart from those specifically mentioned will not be discussed. This is so as to sustain a comprehensive argument on the aforementioned rights. To this end rights dealing with wages are not considered hereunder because they are out of the scope of this thesis.

1.12 Chapter Breakdown

This study is divided into three chapters.
Chapter 1 is the introduction to the study. It sets out the background, conceptual framework, problem statement, hypotheses, objectives, research questions, significance of the study, scope of the study, literature review, research methodology and chapter breakdown.

Chapter 2 examines the Legal and Institutional Framework covering the right to freedom of association, freedom from sexual harassment and the right to a clean, healthy and safe working environment. It discusses international, regional and national human rights standards. The Chapter also discusses Private Social Standards and Social Codes developed for the cut flower industry. It also discusses institutional and regulatory mechanisms and provides a critique of the extent to which flower farm owners and employers in Kenya comply with international, regional and national standards and with the Codes, with regard to the three rights.

Chapter 3 contains the conclusion and recommendations.
CHAPTER 2

THE LEGAL, INSTITUTIONAL AND REGULATORY FRAMEWORK

This Chapter discusses the rights guaranteed and provided for by various international and regional instruments, the Constitution of Kenya and relevant statutes as enacted by the Parliament of Kenya, as well as Private Social Standards, also referred to as Codes particularly the Kenya Flower Council Code.

More specifically, this Chapter examines the international, regional and national legal regimes containing provisions on the right to freedom of association, freedom from sexual harassment and the right to a clean, healthy and safe working environment. It also discusses Private Social Standards or Codes developed for the cut flower industry. The Chapter also analyzes institutional and regulatory mechanisms for the implementation and enforcement of these standards at the national level. A critique of the effectiveness of these mechanisms is provided.

2.1 The Right to Freedom of Association

2.1.1 International and Regional Standards

There are a number of international and regional instruments which contain provisions on the right to freedom of association. These are relevant to the rights of workers. The instruments are discussed below.

2.1.1.1 Universal Declaration of Human Rights (UDHR), 1948

This Declaration was adopted by the United Nations General Assembly on December 10, 1948 in Paris. The Declaration traces its roots to the experience of the Second World War during which atrocities were committed against humanity in the name of war. The document represents the first global expression of rights to which all human beings are inherently entitled. It is one of the instruments comprising the International Bill of Rights. Even though it is only a declaration and not a treaty and it is not legally binding, it has acquired universal acceptance and is even regarded as a source of customary international law. It contains 30 articles which have been
elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws.

The pertinent provision relevant to labour matters states that everyone has the right to freedom of peaceful assembly and association and further that no one may be compelled to belong to an association. Another provision states that every person has the right to join and to form trade unions for the protection of his interests. These rights equally apply to cut flower farm workers.

2.1.1.2 International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966. It commits its parties to respect the civil and political rights of individuals. One such right is the right of peaceful assembly. The Covenant also provides that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. The Covenant also provides that “Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.” This is an important link with the International Labour Organization framework which has a direct bearing on the rights of workers, including those in cut flower farms.

2.1.1.3 ILO Declaration on Fundamental Principles and Rights at Work

This ILO Declaration recognizes four generally acknowledged workplace human rights as core labour rights, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

74 Article 20 (1)
75 Article 20 (2)
76 Article 23 (4)
77 It came into force on March 23, 1976. As of March 2012, it had 74 signatories, including Kenya, and 176 parties.
78 This right is recognized in Article 21 (1).
79 Article 22 (1)
80 Article 22 (3)
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.\textsuperscript{81}

ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:
(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
(b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions; and
(c) by helping the Members in their efforts to create a climate for economic and social development.

The core labour standards identified by the Declaration have their origin in the eight ILO conventions approved by the Organization over the past fifty years.\textsuperscript{82} Yet, the Declaration was born out of the frustration that after nearly half a century, little progress had been made in achieving universal adoption of these conventions in both developed and developing countries. Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions; The ILO draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development; The ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation; Seeking to


maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential; The ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting Fundamental Rights at Work as the expression of its constitutional principles; The Declaration represents a breakthrough for the world community, not only because it has largely ended controversy as to which particular worker rights constitute the internationally recognized set of “core” worker rights, but also because it expressed its member countries’ assent to the principle that they were bound to respect and promote these rights, regardless of whether they had formally adopted the relevant ILO instruments.

Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including, by the mobilization of external resources and support, as well as by encouraging other international organizations with which the The Declaration states:

All [ILO] Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.

2.1.1.4 The International Labour Organization (ILO) Core Conventions

The International Labour Organization is responsible for promulgating and ensuring compliance with international labour standards by member countries. It is a 'tripartite' United Nations agency that brings together representatives of governments, employers and workers to jointly shape policies and programmes promoting its motto, Decent Work for All. The ILO has enacted various international conventions on labour rights that are ratified by member states to promote globally acceptable labour standards.

See supra note 81
There are eight International Labour Organization core Conventions on Fundamental Human Rights. Two of these Conventions deal with freedom of association and the right to collective bargaining. The two Conventions are the Freedom of Association and the Right to Organize Convention and the Right to Organize and Collective Bargaining Convention. One other Covenant that is relevant though not part of the eight core Conventions is the Plantations Convention. The three Conventions referred to above place on member countries obligations as to the facilitation of the enjoyment of the abovementioned rights by the employer and the employee in their relations with one another in the workplace. The relevant provisions are set out below.

**a. Freedom of Association and Protection of the Right to Organize Convention, 1948**

This Convention provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. It recognizes the rights of all workers to form and join trade unions.

**b. Right to Organize and Collective Bargaining Convention, 1949**

This Convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Such protection shall apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership. Protection also extends to a worker where an act is calculated to cause the dismissal of or otherwise prejudice a worker by

---

85 ILO Convention 87, 1948
86 ILO Convention 98, 1949
87 ILO Convention 110, 1958
88 ILO Convention 87
89 Article 2
90 ILO Convention 98
91 Article 1 (1)
92 Article 1 (2) (a)
reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.\textsuperscript{93} The Convention further provides that workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.\textsuperscript{94} In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference.\textsuperscript{95}

As regards collective bargaining, the Convention provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.\textsuperscript{96}

c. \textit{Plantations Convention, 1958}\textsuperscript{97}

This Convention recognizes the right to freedom of association. It provides that the right of employers and employees to associate for all lawful purposes shall be guaranteed by appropriate measures.\textsuperscript{98} The Convention also contains other provisions on freedom of association and the right to organize and collective bargaining in wording exactly similar to that in the Freedom of Association and Protection of the Right to organize Convention 1948 and the Right to Organise and Collective Bargaining Convention 1949.\textsuperscript{99}

\textsuperscript{93} Article 1 (2) (b) \\
\textsuperscript{94} Article 2 (1) \\
\textsuperscript{95} Article 2 (2) \\
\textsuperscript{96} Article 4 \\
\textsuperscript{97} ILO Convention 110 \\
\textsuperscript{98} Article 54 \\
\textsuperscript{99} See Articles 58, 59, 60, 61, and 62
d. African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights provides that every individual shall have the right to free association provided that he abides by the law. It also provides that no one may be compelled to join an association and further that every individual shall have the right to assemble freely with others.

At the international level therefore, the rights of workers in so far as freedom of assembly, association and collective bargaining are firmly entrenched as fundamental human rights. As such, the obligations placed upon state parties by these Conventions also extend to Kenya to ensure that the rights of flower farm workers are respected and protected.

2.1.2 National Standards

Kenya is a signatory to the international instruments discussed above. The provisions contained in those instruments touching on the right to freedom of association and, more specifically, in relation to workers, have been entrenched in the Constitution of Kenya 2010 and in specific statutes. By extension, the above provisions apply to employees in cut flower farms. The pertinent provisions of the Constitution and statutes are discussed below.

2.1.2.1 Constitution of Kenya 2010

The Constitution guarantees every person the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. It also provides that a person shall not be compelled to join an association of any kind. Further, it provides that any legislation that requires that registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably and that there shall be a right to

---

101 Article 10 (1)
102 Article 10 (2) This right is subject to the obligation of solidarity provided for in Article 29 which states that every individual shall have the obligation to preserve and strengthen social and national solidarity, particularly when the latter is threatened.
103 Article 11. This Article further provides that the exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.
104 Article 36 (1)
105 Article 36 (2)
have a fair hearing before a registration is cancelled. On picketing, the Constitution provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities.

On labour rights, the Constitution provides that every person has the right to fair labour practices. More specifically on workers, it provides that every worker has the right to fair remuneration, to reasonable working conditions, to form, join or participate in the activities and programmes of a trade union and to go on strike. In the case of employers, the Constitution provides that every employer has the right to form and join an employer’s organisation and to participate in the activities and programmes of an employer’s organization.

The fact that the rights of workers are enshrined in the supreme law of the land as fundamental human rights demonstrates the importance attached to these rights. The challenge, however, is in ensuring observance of these rights.

2.1.2.2 The Labour Relations Act 2007

The Preamble to the Labour Relations Act states that it is:

"An Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected."

106 Article 36 (3) (a) and (b)
107 Article 37
108 Article 41 (1)
109 Article 41 (2) (a)
110 Article 41 (2) (b)
111 Article 41 (2) (c)
112 Article 41 (2) (d)
113 Article 41 (3) (e)
114 Article 41 (3) (f)
This Act repealed\(^{115}\) the Trade Unions Act\(^{116}\) and the Trade Disputes Act\(^{117}\). It provides for the employee’s right to freedom of association.\(^{118}\) It gives every employee the right to participate in the formation of a trade union,\(^{119}\) the right to join a trade union\(^{120}\) and the right to leave a trade union.\(^{121}\) It also gives members of a trade union the right to participate in the lawful activities of the union\(^{122}\) and the right to participate in the election of the officials and representatives of the union.\(^{123}\) A member of a trade union also has the right to stand for election and be eligible for election as an officer or official\(^{124}\) and to stand for election or seek for appointment as a representative.\(^{125}\)

The Act protects employees by providing that no person shall discriminate against an employee or any person seeking employment for exercising any right conferred in the Act.\(^{126}\) It provides that no person shall require an employee or a person seeking employment not to become a member of a trade union or give up membership of a trade union.\(^{127}\)

The Act sets out the procedure to be applied where there is a dispute regarding the interpretation and application of any provision of Part II of the Act (which deals with Freedom of Association). It provides that in such a case, any party to the dispute may refer the dispute in writing to the Minister in charge of trade to appoint a conciliator to solve the dispute.\(^{128}\) Where the dispute is not solved, the dispute shall be referred to the Industrial Court for adjudication.\(^{129}\) The fact that parties are required to refer a dispute to the Minister in writing creates room for manipulation of the case. It should also be noted that most of the affected parties are flower workers a majority of whom are illiterate and cannot even write. Reference to the Minister further creates more

\(^{115}\) See Section 84 of the Labour Relations Act 2007
\(^{116}\) Chapter 233 Laws of Kenya (now repealed)
\(^{117}\) Chapter 234 Laws of Kenya (now repealed)
\(^{118}\) Section 4
\(^{119}\) Section 4 (1) (a)
\(^{120}\) Section 4 (1) (b)
\(^{121}\) Section 4 (1) (c)
\(^{122}\) Section 4 (2) (a)
\(^{123}\) Section 4 (2) (b)
\(^{124}\) Section 4 (2) (c)
\(^{125}\) Section 4 (2) (d)
\(^{126}\) Section 5 (1)
\(^{127}\) Section 5 (2) (a)
\(^{128}\) Section 10 (a)
\(^{129}\) Section 10 (b)
bureaucracy and delays which may defeat the intended purpose of obtaining justice. Most beneficiaries of this section are therefore the employers who have the capacity and who are more aware of this provision. A majority of flower farm workers are not aware of this provision.

The Act empowers trade unions to collect ‘agency fees’ from non-members. It provides:

“A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers’ organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.”

It has been argued that to the extent that this provision allows collection of agency fees from non-members of a trade union, it is inconsistent with the Constitution as it is an infringement of the right to freedom of association which is enshrined in the Constitution. The Act contains provisions for the recognition of trade unions and collective bargaining agreements. The Act states that an employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees. The Act extends the same obligation on recognition to a group of employers as well as employers’ organizations. Although the Act allows workers to form trade unions, several conditions are laid down for such a trade union to be recognized by the employers. The Act provides that the employer, group of employers or employers’ organization and a trade union shall conclude a written recognition agreement recording the terms under which an employer or group of employers recognize such a trade union. This in itself does not depict the freedom required in the formation of and participation

130 Section 49
132 Part VII of the Act, Sections 54 to 61
133 Section 54 (1)
134 Section 54 (2)
135 Section 54 (3)
in trade unions. The provision creates room for manipulation of the recognized agreement due to the unequal bargaining power between the flower farm worker and the employer. The question arises as to what will happen if an employer declines to sign such an agreement. It may therefore be said that the employers still have a hand in the control of trade unions formed by their employees in so far as the recognition agreement is concerned. The worker’s freedom of association is therefore inhibited by the employer because the employer will choose which union to recognize and when to recognize it.

The Act provides that the Minister may, after consultation with the Labour Relations Board, publish a model recognition agreement. The Act also provides that an employer, group of employers or employers’ association may apply to the Board to terminate or revoke a recognition agreement. However, the Act does not state the grounds upon which an employer can apply to have a recognition agreement terminated or revoked. This is therefore a gap in the law which an employer can take advantage of to cancel a recognition agreement without good cause, thereby impinging the worker’s right of collective bargaining.

The Act provides that if there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining or the cancellation of a recognition agreement, the trade union may refer the dispute for conciliation. If the dispute is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency. When determining a dispute, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

From the above, it may be said that the settlement of disputes on recognition of trade unions goes through several channels of bureaucracy. This results in unnecessary delays. The referral of the dispute to the Industrial Court leads to further delays. Courts are known for the delays. Such delays are detrimental to the rights of the worker.

The Act requires that employers disclose to the trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees. Disclosure of

---

136 Section 54 (4)
137 Section 54 (5)
138 Section 54 (6)
139 Section 54 (7)
140 Section 54 (8)
141 Section 57 (2)
information may not be realized in most cases. This is because an employer required to give this information is the same one in possession of the information. It is obvious that he/she will only give that which will place him/her in a better place leaving out any information which may jeopardize the investment/business.

Membership to any trade union is permanent and a person still remains a member even after resignation from the job under which the membership was obtained. The Act provides that a collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.\textsuperscript{142} This is beneficial to the workers as it protects them as they pursue their retirement benefits and the social security benefits. It can be stated that most of the agreements mainly end up protecting the interests of the employer at the expense of the employees.

The Act contains provisions dealing with strikes and lockouts.\textsuperscript{143} It provides for the right to take part in strikes and lockouts as well as the procedure to be followed.\textsuperscript{144} An important provision is the one on the requirement for notice of the strike or lockout.\textsuperscript{145} The Act also contains provisions on prohibited strikes or lockouts and sets out the circumstances in which strikes or lockout are prohibited.\textsuperscript{146}

In summary, the Labour Relations Act is an umbrella Act. It is cross cutting and deals with all labour matters. It is beneficial to the cut flower farm workers and has been frequently used to address their concerns. However, there is need for a specific provision for the cut flower farm sector. This is considering the fact that the cut flower industry is growing and the challenges this sector is facing are becoming more complicated with time. The Act should therefore be amended to provide specifically for this industry which generates huge income within the economy of Kenya.

2.1.2.3 Labour Institutions Act 2007

\textsuperscript{142} See Section 59 (2)
\textsuperscript{143} See Part X, covering Sections 76 to 81
\textsuperscript{144} Section 76
\textsuperscript{145} Section 76 (c)
\textsuperscript{146} Section 78
The purpose of the Act is “to establish labour institutions, to provide for their functions, powers and duties and to provide for other matters connected thereto.”

This Act establishes and strengthens institutions which deal with labour administration and management of labour relations. More specifically, the Act provides for the establishment of the National Labour Board, the Industrial Court, the Committee of Inquiry and the Wages Council. The Act also contains provisions which deal with labour administration and inspection, as well as employment agencies.

a. The National Labour Board

The National Labour Board consists of 12 members who are appointed by the Minister for Labour and are Kenya citizens. Their composition is as follows:

a) a chairperson who has experience and expertise in labour relation matters;
b) the general secretary of the most representative federation of trade unions;
c) the chief executive of the most representative federation of employers organisation;
d) two persons appointed from nominees of the most representative federation of employers’ organisation dealing with labour matters;
e) two persons appointed from nominees of the most representative federation of trade unions;
f) not more than two other independent members;
g) the Director of Employment;
h) the Director of Micro and Small Enterprise Development;
i) the Director of Occupational Safety and Health Services;
j) the Director of Industrial Training;
k) the Registrar of the Industrial Court; and

---

147 Preamble to the Act
148 The National Labour Board is established under Section 5 of the Act. See Part II Sections 5 – 10.
149 Section 11. See Part III Sections 11 – 27. The Industrial Court is now referred to as the National Labour Court.
150 Section 28. See Part IV Sections 28-29
151 Section 43. See Part VI Sections 43 - 54
152 Part V Sections 30 - 42
153 Part VII Sections 55 – 60
154 Section 6 (1)
1) the Registrar of Trade Unions.

The composition of the members of the Board is therefore a rich mix of all the key players in the labour industry. For purposes of the cut-flower industry, this composition is ideal.

The Act states that the functions\textsuperscript{155} of the Board are to advise the Minister for Labour on the following:

(a) all matters concerning employment and labour;
(b) legislation affecting employment and labour;
(c) any matter relating to labour relations and trade unionism;
(d) any issue arising from the International Labour Organisation and the International Labour Organisation Conventions;
(e) codes of good practice;
(f) any issue raised by an international or regional association of states of which Kenya is a member;
(g) systems of labour inspection and the administration of the labour laws;
(h) any aspect of public employment services, vocational guidance, vocational training and the employment of persons with disabilities;
(i) the formation and development of policies designed to promote the granting of paid educational leave to workers for the purposes of training, trade union social and civic education and trade union education;
(j) the general state of employment, training and manpower development in the country;
(k) productivity measurement and improvement;
(l) the appointment of wages councils;
(m) the appointment of members of the Industrial Court;
(n) the setting of compensation benefits in accordance with the provisions of the laws relating to work injury benefits;
(o) the registration, suspension and deregistration of trade unions and employers organisations; and
(p) any other matter related to any of the Board’s functions.

\textsuperscript{155} Section 7 (1)
The Act empowers the Board to conduct any investigations as it may consider necessary.\footnote{Section 7 (3) (a)}

From the above, it can be seen that the functions and powers of the Board are broad. The capacity of the Board therefore needs to be strengthened in order for it to perform its functions efficiently and effectively.

b. The Industrial Court

The Industrial Court is established for the purpose of "the furtherance, securing and maintenance of good industrial relations and employment conditions in Kenya."\footnote{Section 11 (1)}

The Act provides that:

"The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member thereof."\footnote{Section 12 (1)}

The Industrial Court consists of a Principal Judge,\footnote{Section 12 (2) (a)} judges appointed by the President in consultation with and on the advice of the Judicial Service Commission\footnote{Section 12 (2) (b) as read together with Section 13} and other members appointed by the Minister.\footnote{Section 12 (2) (c) as read together with Section 17}

An application, claim or complaint may be lodged with the Industrial Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Commissioner for Labour or the Minister.\footnote{Section 12 (2)} The Industrial Court has the power to grant injunctive relief, prohibition, declaratory order, and award of damages, specific performance or
reinstatement of an employee. Its decision or order has the same effect as a judgement of the High Court.

c. Committee of Inquiry

The Act gives the Minister for Labour the power to appoint a Committee of Inquiry to inquire into any matter which appears to the Minister to be connected with or relevant to any trade dispute or to trade disputes in general, or to trade disputes of any type or class, whether or not any such dispute has been reported to the Minister under the Act. The Committee shall submit its report to the minister. The Committee consists of three or more persons appointed by the Minister for Labour.

The Committee is an important tool for addressing the plight of flower farm workers.

d. Labour Administration and Inspection

The Act empowers the Minister to appoint a Commissioner for Labour, a Commissioner for Employment and such other officers as may be necessary for purposes of administration of laws relating to labour and employment. The Minister may designate the officers as labour officers, employment officers or medical officers. The Act also empowers the Minister to appoint a Registrar, Deputy Registrar and Assistant Registrars of Trade Unions. The Registrar is responsible for the registration and regulation of trade unions, employers' organizations and federations. The Registrar acts on the advice of the Board. Labour administration and labour inspection have enjoyed an increasingly high profile in recent years, both nationally and internationally. Much of the increased interest is from governments as the labour administration in a globalized world became a key actor in the elaboration and implementation of government’s economic and social policies.

163 Section 12 (4)
164 Section 12 (6)
165 Section 28 (1)
166 Section 29 (1)
167 Section 28 (3) and (4)
168 Section 30 (1)
169 Section 30 (2)
170 Section 31 (1) and (2)
171 Section 31 (3)
Labour administration is a major source of information in its fields of competence for government, employers and workers; it is an active intermediary in the prevention and settlement of labour disputes; it is an informed observer of the trends in society by virtue of its special links with the social partners; it is a provider of effective solutions to the evolving needs of its users; it bears responsibility for an increasing part of public expenditure. Yet employers and workers are also calling for better resources for Ministries of Labour and inspectorates, to promote fairness and a 'level playing field', and to make Decent Work a reality. The authorized officers are empowered to enter places where employees work or are housed to inspect those places to ensure that those places are kept in a clean and sanitary condition.\(^{172}\) The officers also have the power to institute an appeal on behalf of any employee in any civil proceedings concerning any matter arising in the course of the employment.\(^{173}\)

The Labour Administration and Inspection Programme (LAB/ADMIN) aims at assisting constituents in promoting Decent Work through the strengthening of labour administration machinery, including labour inspection, and making them more effective. The 2008 ILO Declaration of Social Justice for a Fair Globalization has reaffirmed the need to "strengthen the ILO's capacity to assist its members' efforts to reach the ILO's objectives in the context of globalization... and of promoting social dialogue and tripartism as the most appropriate methods for (among others)... the building of effective labour inspection systems."

The Labour Institutions Act gives the Minister power to establish a general wages council and an agricultural wages council.\(^{174}\) The functions of a wages council are to investigate the remuneration and conditions of employment in any sector,\(^{175}\) invite and consider written and oral representations from interested parties\(^{176}\) and make recommendations to the Minister on minimum wage remuneration and conditions of employment.\(^{177}\)

\(^{172}\) Sections 34 -37
\(^{173}\) Section 35 (1) (l)
\(^{174}\) Section 43 (1) (a) and (b)
\(^{175}\) Section 44 (a)
\(^{176}\) Section 44 (b)
\(^{177}\) Section 44 (c)
The Minister may also, in consultation with the National Labour Board, establish a sectoral wages council if the Minister is of the opinion that the remuneration and other conditions of employment of any category of employees in any sector is not adequately regulated by collective bargaining agreements and it may be expedient to set minimum wages and other conditions of employment in respect of employees in those sectors.

The Minister has a duty under the Act to publish a Wages Order setting minimum terms and conditions of service for workers. The publishing of the Wages Order with minimal wage increments in Kenya has traditionally coincided with the Labour Day celebrations on 1st of May each year. The Agricultural Minimum Wages Order has been criticised for not meeting the minimum conditions of workers employed in commercial agriculture especially in the cut-flower sector. Workers in this sector are classified under the same category as general agriculture. Agriculture is the backbone of the Kenyan economy with over 75% of workers employed in the industry mainly in small and medium enterprises. The Agricultural Wages Order is based on the reality of small agricultural enterprises including small-scale wheat, maize and other traditional subsistence farming activities. It is ironical to lump a successful highly commercialised sector like the cut-flower with other sub-sectors of the agricultural industry. The minimum terms and conditions set in the Agricultural Wages Order are not enough for any worker to survive and require the supportive infrastructure of a rural small-scale economy where workers live on farm and grow their own food on plots of land allocated by employers or are availed food rations for survival.

In contrast, the cut-flower sector is far removed from the other sub-sectors of the agricultural industry with workers being employed in farms that are located in up market areas of the city like Karen and workplaces being concentrated in towns like Naivasha municipality. The sector therefore requires an independent Wages Order because flower farm workers are not adequately covered by the existing Agricultural Wages Order. The Labour Institutions (Amendment) Bill 2011 attempts to address this anomaly by amending the Labour Institutions Act 2007 and

---

178 Section 43 (2) (a)
179 Section 43 (2) (b)
180 Section 45
181 Kenya Human Rights Commission, Wilting in Bloom, p 28-29
182 Ibid.
providing for remuneration of workers in the Agriculture and Floricultural Sector through legislation. The Bill further appears to suffer the anomaly of lack of job valuation, mix between general agriculture and floriculture and also the difficulty in interpreting the job categories intended. Categories such as “stockman, herdsman, watchman, house servant, cook, unskilled employee, farm foreman, senior foreman,” are not related to cut-flowers and are too contentious and may make the Bill unworkable as a solution for workers in cut-flowers.\textsuperscript{183}

From the above, it can be said that elaborate mechanisms exist under the law by which concerns of workers, including flower farm workers, can be addressed. The question is whether in actual fact these mechanisms are employed effectively and whether the workers are fully aware of these mechanisms.

In conclusion, is so far as the labour institutions are concerned, it is to be noted that the various institutions are provided for adequately in the law. However the ability of the worker to access these institutions is hindered by bureaucracy. Also, in the event that the worker has to file a suit to obtain a remedy for a grievance, the costs incurred in filing the suit may be beyond the affordability of the worker. The worker is therefore not able to benefit fully from the operations of these institutions.

As for the Ministry of Labour, the challenges it faces in implementing its mandate of enforcing labour rights is summarized in the following words by the Ministry itself:

\begin{quote}
\textit{...inadequate staff, insufficient budgetary allocations and lack of budgetary provision for certain programmes, dilapidated and obsolete equipment, inadequate operational facilities, poor succession planning and management coupled with an ageing workforce, limited staff capacity, poor working environment, inadequate legal, institutional and policy framework, erratic disbursement of funds from the Treasury, disjointed schemes of service, difficulties in complying with e-government environment, and bureaucracy in procurement of goods and services... The weaknesses of the Ministry comprise deficiencies in resources and capabilities, which must be contained in order to realize the strategic objectives during the plan period. These include: a) Lack of legislative...}
\end{quote}

\textsuperscript{183} Ibid.

The Ministry of Labour should be provided with enough resources from government in order for it to discharge its functions efficiently and effectively. The Ministry is severely understaffed operating at 42% human resource capacity. It also operates at 33% under-budget with only 84 officers countrywide working in the labour division. The budget for the Ministry for the years 2008 to 2012 is Kshs.15 billion (approximately Kshs.3 billion per annum), compared to a budgetary estimate of Kshs. 20 billion (Kshs.5 billion required every year). The Ministry is therefore severely under-resourced. The opportunity of public participation in budget making presents a lobby opportunity for stakeholders to push for improved funding for the Ministry.

2.2 Freedom from Sexual Harassment

A discussion of the right of freedom from sexual harassment must of necessity begin with a consideration of the definition of the term ‘sexual harassment.’ This is because there are varying definitions of this term in different jurisdictions. This section examines definitions given under the European Union law and policy framework as it contains the most comprehensive coverage of the definition of sexual harassment in historical perspective. The section then discusses the right of freedom from sexual harassment in the context of the definitions and the protections granted under international and national law.

It is to be noted that even though the conduct in question can be harassment of women by men, many laws around the world which prohibit sexual harassment recognize that both men and women may be harassers or victims of sexual harassment. However, most claims of sexual harassment are made by women.

---

184 Ministry of Labour Strategic Plan 2008-2012 p.5
185 Ibid. p.38
2.2.1 Sexual Harassment: European Union Law and Policy

The Treaty Establishing the European Community,\(^{187}\) and the Charter of Fundamental Rights of the European Union\(^{188}\) describe the European Union's general commitment to equality in employment.

The 1998 Treaty of Amsterdam incorporated several new provisions in the Treaty Establishing the European Community concerning several broad commitments to equality between men and women and specific guarantees of equality at work. These include Article 2 which identifies the promotion of equality between men and women as a fundamental task of the Community; Article 3(2) which touches on the elimination of gender inequalities among the Community objectives, strategies and actions and most specifically, Article 13 which requires Member States to take action to combat discrimination based on sex or sexual orientation.

The other important provision therein is contained under Article 141 which encourages measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Protocol No. 14 to the Treaty Establishing the European Community incorporates the Agreement on Social Policy, which seeks to promote equal opportunities and equal treatment for men and women at work.

Although the Charter of Fundamental Rights of the European Union\(^{189}\), (unlike the Treaty) is not legally binding, it guarantees several rights, among which stands out the right to non-discrimination, equality between men and women and the right to working conditions which respect the worker's health, safety and dignity.

\(^{187}\) Signed in 1957
\(^{188}\) Promulgated in 2001
\(^{189}\) The Charter was included in Part II of the draft constitutional treaty for the European Union, which was proposed in June 2003. The constitutional treaty was signed in October 2004, but was rejected by France and the Netherlands in 2005
As amended in 2002, the Equal Treatment Directive\textsuperscript{190} is to the effect that the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to conditions for access to employment, vocational guidance and training, employment and working conditions, including dismissal and membership in organizations of workers or employers. It is worth noting that the 2002 amendment to the Equal Treatment Directive introduces the concepts of harassment related to sex and sexual harassment and stresses that they are forms of discrimination in violation of the equal treatment principle. It should also be pointed out here that EU Directive 2006/54/EC is a recast directive that coalesces previous directives and case law on equal treatment for women and men in employment, and characterizes sexual harassment as both a form of sex discrimination and a violation of dignity in the workplace.

Although European Union directives are legally binding on Member States, they require the adoption of implementing legislation by the individual Member States. As far as the issue of sexual harassment and equal treatment is concerned, EU Member States were required to adopt implementing legislation meeting the objectives described in Directive 2002/73/EC by October 5, 2005. The states were also required to adopt implementing legislation complying with EU Directive 2006/54/EC – including an appropriate definition of sexual harassment by August 2008.

On definitions, EU Directive 2002/73/EC proscribes two forms of harassment: Harassment related to sex; and Harassment of a sexual nature.

The directive defines harassment as unwanted conduct related to the sex of a person occurring with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

This definition of harassment related to sex is the same as the harassment definitions included in the earlier Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal

treatment between persons irrespective of racial or ethnic origin and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Put together, these three directives prohibit harassment in the workplace that is related to sex, religion or belief, disability, age, sexual orientation, race and ethnic origin so long as the conduct is unwanted, its purpose or effect is to violate the dignity of a person and it creates an intimidating, hostile, degrading, humiliating or offensive environment.

The 2002 directive defines sexual harassment as:

'...any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurring with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.'

This makes the definition of sexual harassment here reflect the definition of sexual harassment adopted by the EU Commission in 1991 in its recommended Code of Practice on Measures to Combat Sexual Harassment.

The directive prohibits both quid pro quo and 'hostile work environment' harassment. Hostile work environment harassment related to sex and of a sexual nature is addressed in the definitions described above with the reference to the creation of 'an intimidating, hostile, degrading, humiliating or offensive environment'. The proviso to the Directive is also to the effect that quid pro quo harassment is also prohibited.

On the question of enforcement, Directive 2002/73/EC requires Member States to establish agencies to promote equality and enforce anti-discrimination laws. The requirement is also that Member States must encourage employers and those responsible for vocational training to institute preventative measures to protect against sexual harassment in the workplace. The Directive further touches on the question of redressing harassment by forbidding Member States from capping compensation or reparation to victims of discrimination, including harassment or sexual harassment, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of the Directive is the refusal to take his/her job application into consideration.
To seal the loophole of delays occasioned by an inability in enacting Member-State legislation within the timeframe indicated above, the provisions of the Equal Treatment Directive, as amended in 2002 and in accordance with a decision by the European Court of Justice, will become directly applicable (and enforceable by individuals under national law) if the Member State has not adopted adequate domestic legislation implementing the Directive within the allotted timeframe and to the extent that the provisions of the Directive confer rights to individuals.

A reading of Directive 2006/54/EC indicates that the definitions and essential requirements of the earlier equal treatment Directives with regards to sexual harassment remain unchanged.

In addition to the Directives discussed above, a number of non-binding resolutions and recommendations addressing sexual harassment have also been introduced through the EU Council and the Parliament. For instance in December 1984, the Council of Ministers of the EU adopted the Recommendation on the Promotion of Positive Action for Women, in which it was recommended that a policy be adopted to eliminate existing inequalities in the workplace, and to promote a better balance between the sexes in employment and that positive action be taken to increase the respect for the dignity of women in the workplace.

Two years later in 1986, the European Parliament adopted a Resolution on Violence Against Women, which called for the collection of information about the incidence of violence against women and the financial costs of violence against women. This particular resolution includes detailed recommendations for member states on sexual harassment, calling on states to review national labor and anti-discrimination legislation to see how it applies to sexual harassment, and proposing additional legislation to address any inadequacies found during this review.

In 1990, the Council of Ministers adopted a Resolution on the Protection of the Dignity of Women and Men at Work in which it recognizes both quid pro quo harassment and the creation of a hostile work environment as intolerable violations of the dignity of workers and trainees, and calls on member states to develop training and education for employers and employees.
A Code of Practice on Measures to Combat Sexual Harassment was developed by the European Commission in 1992. This code focuses on sexual harassment as a form of employment discrimination and as a factor preventing or hindering the proper integration of women into the labour market.

The code aims both at preventing sexual harassment and ensuring that adequate procedures are available to deal with sexual harassment should it occur, and defines sexual harassment as:

'...unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work... (which) can include unwelcome physical, verbal or non-verbal conduct.'

From the above, it may therefore be said that a range of behavior may be considered to constitute sexual harassment. It is deemed unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; and a person's rejection of or submission to such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training or to employment, continued employment, promotion, salary or any other employment decisions; and/or such conduct creates an intimidating, hostile or humiliating working environment for the recipient.

The European Parliament and the Council took a bold step toward prohibiting sexual harassment throughout workplaces in the European Union (EU) when it enacted amendments to the 1976 Equal Treatment Directive (European Parliament and the Council, 2002). The public policy objective of Directive 2002/73/EC (hereafter, "the Directive") is to harmonize the Member States' laws regarding the equal treatment of men and women. As Member States (currently 15 nations, soon to be 25) adopt laws implementing the Directive, sexual harassment will be recognized as a form of gender-based discrimination throughout the EU.

The Directive is a natural outcome of a series of policy initiatives over the last few decades aimed at realizing a fundamental principle underlying the EU—the equal participation of men and women in the labor market. Sexual harassment in the workplace did not receive serious attention
by EU policymakers until the mid-1980s, when Rubenstein (1987) published the results of his study made on behalf of the European Commission. Finding that sexual harassment was a widespread problem, the Commission undertook a number of initiatives in the early 1990s to correct the problem, but progress was painfully slow and results minimal. In a more recent manuscript prepared by the European Commission (1998), evidence suggests that between 40 and 50% of women, and 10% of men, have experienced sexual harassment at some point in their working lives.

The EU’s most efforts to eliminate sexual harassment in the workplace present significant challenges and opportunities for human resource managers in multinational corporations with interests in the EU. The practice of the EU in this regard is a useful reference point for Kenya in the country’s efforts to address the problem of sexual harassment at the workplace.

2.2.2 International and Regional Standards

2.2.2.1 Universal Declaration of Human Rights (UDHR)

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (Article 1)

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex... (Article 2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Article 5)

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. (Article 7)

In view of the gravity and serious repercussions of the practice, some countries are now adopting legislation prohibiting it and making it subject to civil and/or criminal penalties. These are an ILO document titled ‘Action against Sexual Harassment at Work in Asia and the Pacific’ by the International Labour Office (ILO Bangkok Area Office and East Asia Multidisciplinary
Advisory Team) and another ILO document ‘Sexual Harassment at work: National and International Responses.’

2.2.2.2 ICCPR

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Article 7)

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26)

2.2.2.3 The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

This Convention is regarded as an international bill of rights for women. It was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights.

The Preamble to the Convention acknowledges that "extensive discrimination against women continues to exist." Further, it emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity." The Convention defines discrimination as "any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field."
The Convention provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights…”\(^{194}\)

The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination Against Women. In 1992, the Committee adopted General Recommendation No.19 on Violence against Women\(^{195}\) and called on States to take measures to protect women from sexual harassment, which the Committee recognized as a form of violence. The Committee stated that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.\(^{196}\) The Committee further stated that:

“Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”\(^{197}\)

### 2.2.2.4 ILO Convention No 111 on Discrimination in Employment and Occupation, 1958

Discrimination includes any distinction, exclusion or preference based on race, colour, sex…which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The scope of the Convention covers…access to employment and to particular occupations and terms and conditions of employment.” (Article 1)

Discrimination is denied as any distinction, exclusion or preference based on race, color, sex, religion, political opinion, national extraction or social origin (or any other motive determined by the State Concerned) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The scope of the Convention covers access to vocational education.

\(^{194}\) Article 11 (1)  
\(^{196}\) See General Comment 17  
\(^{197}\) See General Comment 18
training, access to employment and to particular occupations and terms and conditions of employment.

According to the ILO, sexual harassment undermines equality at the workplace by calling into question individual integrity and the well-being of workers, it damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity.

2.2.2.5 African Charter on Human and Peoples Rights

The African Charter on Human and Peoples’ Rights provides for the right of every person to enjoy the rights guaranteed by the Charter without any distinction or discrimination on various grounds, including sex. It also states that every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law. The Charter also pronounces the right of every person to the respect of the dignity inherent in a human being and prohibits all forms of exploitation and degradation of a person, particularly, inter alia, degrading punishment and treatment.

2.2.2.6 Protocol to the African Charter on Human and Peoples Rights on the Rights of Women

The following are the pertinent provisions relating to sexual harassment.

States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

---

198 Committee of Experts: Special survey on the application of Convention No. 111 on Discrimination in Employment and Occupation (Geneva, ILO, 1996), p. 16
200 Article 2 of the Charter
201 Article 3 (1) and (2)
202 Article 5 (1) and (2)
204 See Article 2 of the Protocol. See also Article 3 on the right to dignity and Article 4 on the rights to life, integrity and security of the person
a) Include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) Enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) Integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) Take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) Support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

The African Charter and the Protocol on the Rights of women therefore provide adequately for the right of freedom from sexual harassment as broadly defined and interpreted.

2.2.3 National Standards

This section covers the Constitution of Kenya 2010 and relevant statutes dealing with the right of freedom from sexual harassment.

2.2.3.1 The Constitution of Kenya 2010

The Constitution contains provisions on equality and freedom from discrimination.\textsuperscript{205} It spells out the equal protection principle by providing that every person is equal before the law and has

\textsuperscript{205} Article 27
equal protection and equal benefit of the law.\textsuperscript{206} It also provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms.\textsuperscript{207} Further, it provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.\textsuperscript{208} More specifically, the Constitution prohibits discrimination on any ground, including, inter alia, sex and pregnancy.\textsuperscript{209} The Constitution also obliges the State to take affirmative action to redress any disadvantage suffered by individuals or groups because of past discrimination.\textsuperscript{210} Concerning human dignity, the Constitution states that every person has inherent dignity and the right to have that dignity respected and protected.\textsuperscript{211}

As noted earlier, sexual harassment has been interpreted to encompass the equality principle, the element of discrimination on the ground of sex and the element of being an affront to a person’s dignity. The Constitution therefore aptly captures these elements and in so doing grants full protection against sexual harassment. This protection extends to cut flower farm workers.

Also, it is to be noted that the Constitution provides that the Bill of Rights binds all state organs and all persons.\textsuperscript{212} It defines a ‘person’ to include a “company, association or other body of persons whether incorporated or unincorporated.”\textsuperscript{213} Hence, the Constitution envisages a role for business enterprises in respecting and observing human rights. This is a departure from the traditional view that only States have obligations in respect of human rights. This is also in tandem with emerging global norms, which recognise that businesses share in the responsibilities for human rights. For the Kenyan business enterprise, what remains unclear is the extent of these obligations or responsibilities. There have been allegations of human rights abuses across many business sectors including the agricultural sector where sexual harassment, poor housing, low remuneration and poor working conditions are common particularly in commercial farms growing tea, coffee and cut flowers. The fact that the Constitution contains a wide definition of person therefore puts cut flower farm owners and employers on notice that sanctions can also

\begin{itemize}
  \item \textsuperscript{206} Article 27 (1)
  \item \textsuperscript{207} Article 27 (2)
  \item \textsuperscript{208} Article 27 (3)
  \item \textsuperscript{209} Article 27 (4) and (5)
  \item \textsuperscript{210} Article 27 (6)
  \item \textsuperscript{211} Article 28
  \item \textsuperscript{212} Article 20
  \item \textsuperscript{213} Article 260
\end{itemize}
apply to them to redress violations of human rights of their workers, in this case, breach of the right of freedom from sexual harassment.

2.2.3.2 The Employment Act 2007

This Act repealed the Employment Act (Chapter 266) of the Laws of Kenya. The object of the Act is to declare and define the fundamental rights of employees, provide basic conditions of employment of employees, regulate employment of children and provide for other connected purposes.214

The Act places a duty on the Minister for Labour, labour officers and the Industrial Court to promote equality of employment in order to eliminate discrimination in employment.215 The Act prohibits an employer from discriminating against an employee or prospective employee on the ground of sex, among others.216 The Act states that it is not discrimination to take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace.217

The Act also defines sexual harassment and requires an employer who employs twenty or more employees to issue a policy statement on sexual harassment.218 On the definition of sexual harassment, the Act provides as follows:

"An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—

(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—

(i) promise of preferential treatment in employment;
(ii) threat of detrimental treatment in employment; or
(iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;
(c) uses visual material of a sexual nature; or
(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the
employee to behaviour that is unwelcome or offensive to that employee and that by its
nature has a detrimental effect on that employee’s employment, job performance, or job
satisfaction.\textsuperscript{[219]}

The Act further provides that the policy statement shall contain, inter alia, a statement that every
employee is entitled to employment that is free of sexual harassment; that the employer shall
take steps to ensure that no employee is subjected to sexual harassment; that the employer shall
take such disciplinary measures as the employer deems appropriate against any person under the
employer’s direction, who subjects any employee to sexual harassment.\textsuperscript{[220]}

The above provisions are extremely important as they provide an avenue for employers of flower
farm workers to put in place measures to protect female employees especially from
discrimination on the ground of sex and from sexual harassment.

\subsection*{2.2.3.3 The Sexual Offences Act}

This Act attempts to define sexual harassment by phrasing it as a criminal offence under the
Sexual Offences Act.\textsuperscript{[221]} The relevant section states:

"Any person, who being in a position of authority, or holding a public office, who persistently
makes any sexual advances or requests which he or she knows, or has reasonable grounds to
know, are unwelcome, is guilty of the offence of sexual harassment..."\textsuperscript{[222]}

The Act goes on to state:

"...It shall be necessary to prove in a charge of sexual harassment that...the submission or
rejection by the person to whom advances or requests are made is intended to be used as a basis
of employment or of a decision relevant to the career of the alleged victim or of a service due to

\textsuperscript{[219]} Section 6 (1)
\textsuperscript{[220]} Section 6 (3)
\textsuperscript{[221]} Sexual Offences Act No 3 of 2006
\textsuperscript{[222]} Section 23 (1)
a member of the public in the case of a public officer; ...such advances or requests have the effect of interfering with the alleged victim's work or educational performance or creating an offensive working or learning environment for the alleged victim or denial of a service due to the member of the public from a public office."223

This provision ties in with the provision in the Constitution on equal treatment and equal opportunities in the economic sphere,224 under which employment falls. It cascades the protection all the way from the Constitution to the statute.

Sexual harassment is unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions.225 The conduct can be humiliating and may constitute a health and safety problem. Sexual harassment also constitutes discrimination when the person being sexually harassed is afraid of objecting to the harassment due to belief on reasonable grounds that such objection would prejudice their employment, their chances of promotion and/or recruitment or lead to a hostile work environment.226

2.2.3.4 The National Gender and Equality Commission Act 2011

National Gender and Equality Commission Act, 2011, establishes the Commission227 and sets out the functions of the Commission. These include, inter alia:

i. to promote equality and freedom from discrimination in accordance with Article 27 of the Constitution;228

223 Section 23 (2)
224 Article 27 (3) of the Constitution
225 General Recommendation 19, Convention on the Elimination of All Forms of Discrimination Against Women
227 Section 3
228 Section 8 (a)
ii. to monitor, facilitate and advise on the integration of principles of equality and freedom from discrimination in all national and county policies, laws, administrative regulations in all public and private institutions;  

iii. act as the principal organ of State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including, inter alia, women;  

iv. to monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution; and  

v. to investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned.

The Act states that the Commission shall work with other relevant institutions in developing standards for the implementation of policies for the progressive realization of economic and social rights provided for in the Constitution. Further, the Act states specifically that the Commission shall work with the National Commission Human Rights, the Commission on Administrative Justice, also known as the Ombudsman and other relevant institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection of rights related to the principle of equality and freedom from discrimination.

The Commission is therefore a key institution in the implementation and enforcement of the right of freedom from sexual harassment for cut flower farm workers.

2.2.3.5 The Kenya National Commission on Human Rights Act 2011

This Act establishes the Kenya National Commission on human Rights. It provides that the

\textsuperscript{229} Section 8 (b)  
\textsuperscript{230} Section 8 (c)  
\textsuperscript{231} Section 8 (d)  
\textsuperscript{232} Section 8 (e)  
\textsuperscript{233} Article 8 (g)  
\textsuperscript{234} Article 8 (j)  
\textsuperscript{235} Section 3
functions of the Commission shall be, inter alia, to promote respect for human rights and develop a culture of human rights in the Republic and to promote the protection and observance of human rights in public and private institutions. The rest of its functions are analogous to those of the National Gender and Equality Commission. With regard to the function relating to compliance with treaties and the investigative function, however, the Kenya National Commission on Human Rights expressly matters of equality and freedom from discrimination as the preserve of the National Gender and Equality Commission and expressly exempts these matters from its own functions. This is yet another institution which can be used to champion the human rights of flower farm workers.

In concluding this section, attention is drawn to the study conducted by and the report of the Kenya Human Rights Commission. The study found that there is marked improvement in prevention of sexual harassment in workplaces with 46% of respondents reporting policies in place to be adequate to protect workers. The report noted that workplaces have adopted sexual harassment policies to answer to the Employment Act with Community Service Organizations and development agencies supporting training programmes on sexual harassment notable among them being the ETI Supervisory Training. Standard bodies like KFC have also profiled sexual harassment by auditing and monitoring it, which has hence reduced incidences and forced companies to take action. The statistics resonate with the quantitative data results where workers in six of the companies visited expressed confidence in policies and measures to protect workers.

The report further noted that there was significant improvement compared to pre-2007 period, closely associated to prohibition of sexual harassment in the Employment Act 2007. 46% of workplaces sampled were found to be free of sexual harassment. Thika flower farms were found to have the highest number of complaints due to the geographical set ups, where farms are located deep inside coffee plantations which present an environment conducive for sexual

---

236 Section 8 (a)
237 Section 8 (b)
238 See Sections (c) to (n) of the Kenya National Commission on Human Rights and cf Sections (c) to (n) of the National Gender and equality Commission
239 Sections 8 (d) and (f)
harassment and sexual predators. Working late hours was found to endanger women. Generally, for all companies, 67% of respondents reported sanctions against sexual harassment are not adequate to deter the vice.

Notwithstanding the above, the report noted that there is still a lot of work to be done with regard to workplace policies, training and sanctions. Sexual harassment is shrouded in secrecy but workers still indicate that some cases persist. For example Thika area reported the highest number of sexual harassment allegations. The unique set up of farms in Thika area where most companies are located deep in coffee plantations may be a contributing factor. In addition to sexual harassment, rape cases were also reported. With no transport and housing provided, workers have to seek accommodation in nearby suburbs and in the coffee plantations. The long distances that workers have to walk, make them vulnerable to sex predators. This environment was reported to provide opportunities for isolation of workers for purposes of sexual harassment.

In most cases, the employment policies on sexual harassment were found to fall short in providing guidelines on investigation, level of evidence required and sanctions in case of violations. Further, the women (sometimes referred to as ‘gender’) committees that deal with sexual harassment lack credibility in the eyes of male employees, whilst management in some companies claiming that the committees are a tool for witch hunting.

The success of sexual harassment policies depend on level of training for workers and management, and the commitment to severely sanction or punish sexual harassment in the workplace. On a positive note, the report noted that there is marked improvement regarding the fight against sexual harassment in over 50% of the farms sampled due to awareness raising and focus through codes of practice.

The majority of management staff interviewed did not think that sexual harassment occurred on the farm. Even where it was acknowledged, sexual harassment was viewed as a cultural rather than company issue. As one manager claimed, “there is a problem between male supervisors and female workers – women are treated badly. This is largely a socio-cultural phenomenon –
women have traditionally been abused by men.\textsuperscript{241} The challenge of the cultural barrier therefore needs to be addressed through appropriate policies and strategies.

Some female workers felt that management was making efforts towards confronting sexual harassment. A similar study ought to be conducted in more flower farms for comparison of the statistics in order to assess whether indeed the fight against sexual harassment is being won overall.

2.3 Right to a Clean and Healthy Environment

The role of governments in the maintenance of appropriate levels of Occupational Safety and Health (OSH) is an important matter that cannot be ignored. This role, world over, is executed through the facilitation of both the establishment and pooling of relevant and effective OSH policies and laws. The private sector also has a responsibility and, in addition, the need for visionary management which sees high levels of OSH as a competitive advantage, offering less down time, fewer long-term welfare requirements and more transparent forms of corporate social responsibility. This section considers how, and to what extent, this has been achieved at the national level, as viewed against international standards.

2.3.1 International Standards

2.3.1.1 International Covenant on Social Economic and Cultural Rights

This Covenant recognises the right of every person to just and favourable working conditions.\textsuperscript{242}

2.3.1.2 International Code of Conduct (ICC) In Flower Farms

The ICC was proposed in August 1998 by the International Union of Food Workers (IUF), unions and NGOs in Germany and Holland. The Code emphasizes employers’ respect for labour rights such as freedom of association, collective bargaining, equal treatment, living wages, reasonable working hours, compliance with health and safety standards, employment security, no child or forced labour, as well as environmental protection and limited pesticide and chemical

\textsuperscript{241} However, one interviewee admitted that sexual harassment had been disclosed on another of the company’s farms and of the three perpetrators, only one was fired, since the others were too valuable to the company.

\textsuperscript{242} Article 6
The code provides that a safe and hygienic working environment shall be provided. Companies shall provide free and appropriate protective clothing and equipment, and comply with internationally recognised health and safety standards. (ILO Convention 170) Workers and their organisations must be consulted, trained and allowed to investigate safety issues. There should be regular monitoring of workers' health and safety. Companies shall supply drinking water; provide clean toilets and offer showers and washing facilities. Where housing is provided, it should comply at least with the minimum standards for size, ventilation, cooking facilities, water supply and sanitary facilities (ILO Convention 110, Articles 85-88).

On pests and chemicals, the code provides that every company should assess the risks of the chemicals used and apply measures to prevent any damage to the health of their workers. Companies shall record and reduce pesticide and fertilizer use by adequate techniques and methods. No banned, highly toxic as per the requirements of WHO or carcinogenic pesticide and chemical should be used. Safety instructions and re-entry intervals must be strictly observed and monitored. Spraying, handling and storing pesticides and chemicals should be done by specially trained people with suitable equipment. Stores, apparatus and equipment must be clean, safe, handy and conforming to international standards.

As to the protection of the environment companies should make every effort to protect the environment and the residential areas, avoid pollution and implement sustainable use of natural resources. Again this is not taken much care of in the flower farms. Production is export oriented and the environment around is merely looked at as a channel through which high profits shall be generated. It thus doesn’t matter whether the environment is safe or not. Pollution is a daily business with nobody worrying about it.

There is an independent body to make provisions for workers, trade unions and other concerned groups to lodge complaints about violations of the Code, which if serious, have to be followed up. The code provides for a right to lodge complaints. This has often failed due to the bureaucracies involved which demoralize the workers at the end. Further trade unions though set out to protect the rights of the workers, most of them are often manipulated by the employers through corrupt deals at the expense of the workers.
2.3.2 National Standards

2.3.2.1 The Constitution of Kenya 2010

The Kenyan Constitution under Article 42 deals with matters of the environment and provides that every person has the right to a clean and healthy environment. Article 70 deals with the enforcement of environmental rights. This is therefore a basic human right as recognized by the supreme law of the land.

The Constitution of Kenya 2010 provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care (Article 43 (a)). It further outlines that a person shall not be denied emergency medical treatment and that the State shall provide appropriate social security to persons who are unable to support themselves and their dependants (Articles 43(2) and 3). In recognition of previously centralised services that have undermined access to services including health services, Article 6 (3) on devolution and access to services lays emphasis on enhancing access to services in rural and remote areas. To guarantee implementation of these rights, Article 21 clearly articulates and directs that every institution has the duty to ensure that the rights are fulfilled and report on the progress made in respect to Article 43.

The Constitution further singles out health care for specific groups such as children and persons living with disabilities in Article 53 article 54 respectively. The underlying determinants of the right to health are also guaranteed in article 43(1) (b-f) and include right to adequate housing, right to adequate food, clean safe water, social security and to education.

(iii) The Occupational Health and Safety Act, 2007

The preamble states that it is an Act of Parliament to provide for the safety, health and welfare of workers and all persons lawfully present at workplaces, to provide for the establishment of the National Council for Occupational Safety and Health and for connected purposes.

The Act aims at securing safety and health for people legally in all workplaces. It prohibits employment of children in workplaces where their safety and health is at risk. It also encourages entrepreneurs to set achievable safety targets for their enterprises. It further requires reporting of work-place accidents, dangerous occurrences and ill health with a view to finding out their

243 Section 3 Occupational Safety & Health Act
causes and preventing of similar occurrences in future so as to ensure that a worker is working in a safe and healthy environment.

It advocates for the creation of a safety culture at workplaces through education and training in occupational safety and health. The Act imposes a duty on an occupier to ensure the safety health and welfare at work all employees.\textsuperscript{244} An employer is expected to promulgate a safety and health policy statement for his employees.\textsuperscript{245} Further, it provides that an employee has a duty to report to a supervisor any situation which an employee has reasonable grounds to believe that it presents imminent or serious danger at the workplace.

The constitution of Kenya and labour legislation in general and social codes prohibit harsh or inhumane treatment or intimidation in the workplace (including verbal, psychological, physical and psychological abuse, and corruption). The clearest case of harsh treatment relates to the relationship between supervisors and employees. Supervisor abuse was ranked as one of the most significant problems facing both male and female workers in all interviewed employees. The poor relationships with supervisors is manifest in several ways including job harassment and verbal abuse (experienced by both male and female workers), corruption and favouritism, dismissal without just cause, and sexual harassment of female workers by male supervisors. Non-permanent workers were particularly vulnerable to this abuse, as supervisors were often responsible for hiring them, and workers feared not being rehired, or being fired, if they complained or resisted. As one worker reflected, "\textit{temperature inaweza panda, akasirike na akufute kazi}" (the supervisor may simply lose his temper and get very angry and dismiss a worker). Incidences of supervisor abuse were reported on the farms.\textsuperscript{246} However, workers also acknowledged that supervisors were merely transferring the pressures from management onto workers such that the supervisor is "pushed" by the management who then "pushes the worker to do more work".

\textsuperscript{244} Section 6 ibid
\textsuperscript{245} Section 7
\textsuperscript{246} For example, there were allegations of supervisors sacking workers and informing the management that workers had deserted duty. Bribery was also reported by some men who claimed that supervisors will help a worker to obtain employment on the condition that he receives a portion of the workers first pay check. Some supervisors also borrow money from the workers (particularly those that they have had a hand in employing or promoting) and delay paying it back.
The Act imposes an obligation on an employer to provide protective clothing and appliances to employees who work in an environment involving exposure to wet or to any injurious undertaking. Part III of the Act establishes the National Council for Occupational Safety and Health.

2.3.2.2 The Social Codes of Practice

In the recent years, the horticultural industry in Kenya has been on the spotlight receiving adverse publicity regarding the social and environmental impact of the flower trade. These negative press reports have focused mostly on the health implications for workers and the importance of ecologically-sensitive agro-chemicals. It is this negative campaign against the industry, combined with close trading relations with European buyers, and the lack of comprehensive and enforcement mechanism of national legislation that have made it necessary for the industry to reassure buyers through the development of codes of practice. It is important to note that over the last few years, the industry has been beleaguered by allegations of iniquitous labour practices and environmentally destructive production processes. For this reason and in an attempt to address the negative publicity, the need for codes of conduct that establish guidelines for responsible production became inevitable in order to improve these conditions. Both local and foreign investors in the cut flower industry have been at the forefront embracing these codes, both through the development of their own codes and the adoption of overseas buyer codes which give guidelines on how cut flowers are to be produced taking into account the welfare of workers and the environment. In this way, the codes guarantee that every flower producer embraces the corporate social responsibility values by minding the interests of their workers and the environment.

In this section, discussion on of some of the key features of the social codes of practice that are in operation in the country will be studied. (see also appendix 6). The purpose is to understand the diverse environment that each code presents and in particular the opportunities that each of the codes present to workers and their families. The codes can be broadly categorized into two: local and international.

---

247 Section 101
The Milieu Project Sieteelt (MPS) code is one of the earliest certification programmes. It was developed in 1993 in an endeavor to reduce the environmental impact of floriculture. Although it was initially limited to inspections of horticulture in the Netherlands, it spread to other countries including Kenya.

Flower Label Programme (FLP) code was developed in 1996 as a business-to-business code between a German importer’s association (BGI) and the Association of Flower Producers and Exporters of Ecuador (EXPOFLORES). This code was initially developed to evaluate environmental conditions associated with flower production, but it was later expanded to include social and labour conditions when the International Code of Conduct (ICC) standards were incorporated into the FLP in 1999.

The ICC was proposed in August 1998 by the International Union of Food Workers (IUF), unions and NGOs in Germany and Holland. The Code mainly focuses employers’ respect for labour rights such as freedom of association, collective bargaining, equal treatment, living wages, reasonable working hours, compliance with health and safety standards, employment security, no child or forced labour, as well as environmental protection and limited pesticide and chemical use.

Max Havelaar code was developed in April 2001. The Swiss based Max Havelaar code, began to award its label to ICC-certified cut flowers from Ecuador, Kenya, Tanzania, Zambia and Zimbabwe. The Max Havelaar Foundation certifies agricultural harvest that are produced and sold in harmony with the international criteria of fair trade. The unique thing about this code is that exporters selling with the Max Havelaar label receive a higher price for their goods. This higher premium is send back to the producing farm to benefit the worker under a strict program.

Fresh Produce Exporters Association of Kenya (FPEAK) code of practice was formulated in 1996. FPEAK as an association was established in 1975 to promote the export horticultural industry through the provision of market information, business planning support, technical
assistance and training for small growers. In 1996, FPEAK developed the first edition of its code of practice which was to be implemented by all the members of the association.

In the year 1996, a few large growers in Kenya’s horticultural industry founded the Kenya Flower Council. Working in conjunction with Kenya’s Ministry of Agriculture, Ministry of Labour, the Horticulture Crops Development Authority and the Pest Control Products Board, KFC developed a code of practice with both labour and environmental standards well captured and borrowed heavily from ILO core conventions. This code is well treasured in Europe as a local code that has made serious steps to bring sanity to the industry. Interestingly enough, the code does not enjoy respect locally as it is perceived to represent ‘a club for the rich’ or who is who in the flower industry.

Having discussed the origin of some of the social codes adopted by the flower growers, it is now prudent to look at what aspects of these codes touch on the workers labour rights. Most of the social codes of practice center on workers’ social state of affairs and employment and in particular, they aspire to improve the worker’s welfare and that of their families and local communities. All the codes have a provision against child labour, although there is some variation in the minimum age and the degree to which assistance is provided when phasing out child labour. They also stipulate that no persons under the age of 18 years shall be employed in work which may endanger health and general safety of the child. All the codes have a provision that prohibits forced labour and workers should not be required to lodge or deposit or their identity papers with their employers.

On health and safety issues, the codes obligate an employer to provide a safe and healthy working environment. Every employer must ensure that all employees should have access to drinking water, clean toilets or pit latrines as well as shower rooms. The codes call for either a senior management agent or a safety officer, to be accountable for health and safety. Further that all personnel, especially new employees, receive health and safety instructions prior to being deployed to do their respective assignments. There are elaborate mechanisms of ensuring that systems and procedures are in place for working safely. A good number of the codes make provision for worker housing or give housing allowances in addition to wages, (MPS, FPEAK)
but in all cases where housing is provided, it should be of satisfactory or recommended standard. The codes also have a provision that adequate medical services should be offered for workers and members of their families, either through ensuring adequate access to local public facilities or by provision of such facilities on site. The codes also contain provision for use, handling and storage of pesticides, including worker training on these issues. Some codes, for example FPEAK are unequivocal in their stipulations aimed at controlling and reducing environmental degradation resulting from agro-chemical use.

All the codes support the rights of workers to union membership of their choice and collective bargaining. The codes warn employers not to engage in anti-union activities and state that employees should not be discriminated or victimized against with respect to their employment on grounds of union membership. The codes have a provision for the election of worker welfare committees in situations where there are no trade unions.

All the codes contain provision against discrimination of any form be it based on race, colour, sex, religion, political opinion, nationality or social origin. Physical harassment in the work place or psychological oppression, particularly sexual harassment of women workers, is prohibited. Management in consultation with the workers’ representatives is required to create, execute and communicate policies on sexual harassment, disciplinary and grievance procedures. Codes stipulate there should be no wage deductions as disciplinary measure and no corporal punishment.

Other provisions contained in the codes are on working hours, restricting the number of hours worked in a week to 48 hours (some codes 46 hours), stipulating rest days and obliging overtime to be paid at normal or higher rates. The codes state that all employees must be employed on the basis of an employment contract, which is legally binding. There is a requirement that wages shall, at least, meet legal or industry minimum standards and should be adequate to meet basic needs and provide some discretionary income. The codes contain provision for paid annual leave, sick leave and maternity leave. They cover the conditions for dismissal and redundancy. With respect to the particular circumstances of women, the codes shield against discrimination on the grounds of pregnancy and prevent the deployment of pregnant women on pesticide related tasks.
2.3.2.3 The Occupational Safety and Health Act, 2007

The Act aims at securing safety and health for people legally in all workplaces. It prohibits employment of children in workplaces where their safety and health is at risk. It also encourages entrepreneurs to set achievable safety targets for their enterprises. It further requires reporting of work-place accidents, dangerous occurrences and ill health with a view to finding out their causes and preventing of similar occurrences in future so as to ensure that a worker is working in a safe and healthy environment.

The operationalisation of the Occupational Safety Act two years ago is one of the major achievements of the Directorate. The Act has ensured that each organization formulates a health and safety policy to give direction and commitment on the way they run their health and safety functions. Most of the organizations have the policy in place. The new Act has also ensured the establishment of National Council on Occupational Safety and Health.

It advocates for the creation of a safety culture at workplaces through education and training in occupational safety and health.

The Act imposes a duty on an employer to carry out appropriate risk assessments in relation to the safety and health of employees and, on the basis of these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all chemicals, machinery, equipment, tools and process under the control of the employer are safe and without risk to health and comply with the requirements of safety and health provisions in this Act. Section 101 of the Occupational Safety and Health Act, requires that in workplaces where employees are exposed to wet or to any injurious or offensive substances, the employers must provide and maintain clothing and appliances that are adequate, effective and suitably protective, including, where necessary, suitable gloves, footwear, goggles and head coverings. On enforcement, the Director is required to register safety consultants to assess the suitability and effectiveness of such protective clothes and appliances.
2.3.2.4 The Right to Safety and Health: Provision of a Safe and Healthy Work Environment

The Constitution of Kenya and the Occupational Safety and Health Act and the Social codes require that companies provide a safe and hygienic working environment. This study found that legislation and codes have engendered notable improvements in occupational health and safety, specifically concerning the safe use of chemicals and provision of PPE, as well as separate toilets and washing facilities for male and female employees.²⁴⁸ According to interviews with employers, the company provides all workers with general health and safety training every one or two years.

²⁴⁸ Provisions mentioned by some or all respondents include: health and safety committees; protective clothing for all workers, or alternatively just for those handling chemicals; cholinesterase testing (from random testing every month and base-line testing of new employees, to annual testing of those handling chemicals); alternation of sprayers and irrigators; light duties for pregnant women; first aid training and equipment; fire safety precautions and training.
CHAPTER 3
CONCLUSION AND RECOMMENDATIONS

3.1 CONCLUSION
The study concludes that there are a good number of legal instruments both at international and local levels to address the three rights that are the subject of this discussion. Despite the existence of the law, a violation of human rights still persists in the industry. The enforcement mechanism and lack of awareness on the part of the workers is wanting.

The Ministry of labour has a legal mandate to inspect and enforce labour rights compliance in the cut flower industry as provided for in the law. However, due to limited budgetary allocation to this ministry by the Treasury, the ministry suffers from acute shortage of personnel to effectively discharge its mandate. The industry applies the Agricultural Wages Order to remunerate its employees due to lack of Horticultural Wages Order. It is further observed that the country is yet to incorporate the civil society in matters of industrial relations. The outdated tripartite structure excludes the civil society from taking an active role in labour issues.

There is laxity and lack of goodwill on the part of the government to improve labour matters in the industry. The industry trade union is KPAWU. This union is weak in terms of effective representation of its members due to poor governance and abdication of its primary role, of its members.

The union suffers from lack of enough union officials on the ground to effective supplement the ministry of labour in monitoring labour practices in the industry. This state of affairs is contributed partially by limited allocation of resources to union branch offices or general lack of accountability and transparency in utilization of union funds, undemocratic and poor governance structures. For this reason, the branch officials are demoralized and grossly demotivated and ineffective in appealing flower farms to improve working conditions and protection of workers’ rights. The union is a tripartite social partner in labour matters. It has therefore the capacity to ensure that observance and protection of labour rights in the industry are enforced and respected.
On the area of social codes, it is noted that there is general lack of awareness by workers of the provision of these codes. At the same time there is little worker involvement in adoption of the codes. The codes lack mechanisms for workers to notify the certification body of the violations of the codes. The auditing and monitoring structures are rather weak. Workers have very limited understanding of local laws, culture and practices.

Private codes are certified by foreign organizations. These organizations lack the experience of local dynamics and knowledge in labour management. The audit periods are too short and often unable to pick out the day to day realities of labour practices and implementation of those codes. On the right to freedom from sexual harassment, the social codes and the Employment Act require that employers develop policies on anti-sexual harassment. Flower farms are yet to develop these policies and educate the workers on the same. Sexual harassment is rampant in the industry despite existence of both international and national as well social due to workers ignorance on the provisions prohibiting them.

The victims of sexual harassment have developed a culture of not talking openly about this social evil. The high rate of unemployment and illiteracy make women susceptible to sexual harassment and manipulation. Tools to detect sexual harassment are inadequate as the perpetrators are male and women fear reporting for fear of dismissal from employment.

The serious challenges on health, safety and safe working environment, it is noted that cut-flower farms do not strictly observe re-entry hours and spraying rules when workers are in greenhouses. This is probably due to production pressure to meet tight deadlines as a result of which workers not allowed work breaks. Workers stand for long hours during harvesting and in pack houses. Workers are subjected to extreme temperatures in greenhouses during the day while harvesting.

3.2 RECOMMENDATIONS

3.2.1. Dispute Settlement Under The Labour Relations Act

Section 10 of the Labour Relations Act should be amended to do away with the long procedure of having disputes addressed by reference to the minister. Section 10 of the Act provides that where there is a dispute on the implementation and application of Part II of the Act (Freedom of association), the parties affected shall write an application to the Minister in charge of trade to appoint a conciliator to solve the dispute. Where the dispute is not solved, the same shall be referred to the Industrial Court.
The fact that parties are required to refer a dispute to the Minister in writing creates room for manipulation of the case. It should also be noted that most of the affected parties are flower workers a majority of whom are illiterate and cannot even write. Reference to the Minister further creates more delays which may defeat the intended purpose of obtaining justice. Most beneficiaries of this section are therefore the employers who have the capacity and who are aware of this provision.

3.2.2. On Freedom from Sexual Harassment

It would be in the interest of the farms to respect this right. Majority of the workers at the farms are women. Women being the backbone of the labour force in this industry, lack of respect for this right affect the flower industry in a major way. Workers become unmotivated and thus produce less in terms of work output. This affects the productivity of the farms and there are fewer flowers produced.

Into the bargain, a work environment that is affected by the issue of sexual harassment has the risk of transmission of venereal diseases. Thus the health costs of the employer are increased. Therefore, it is in the interest of the flower farms to uphold this right in the farms.

The farms can achieve this by employing more women in managerial positions. This reduces the risk of sexual abuse of the women by the superiors. The farms could also educate the women workers on their rights at work. Some of the workers are ignorant on their rights as most of the flower farm workers have basic or no education. Sensitizing the workers on their rights greatly improves the chances of them repelling unwarranted sexual advances by fellow male workers.

To test the effectiveness of the sensitization, the flower farms should set up report centres. They should be based on anonymity so that workers can report incidences of sexual harassment. These centres should have a senior management staff as part of the permanent staff to ensure anonymity and strict adherence to procedure against sexual harassment. The presence of a senior staff will also assist to analyze what needs to be done to improve the protection against sexual harassment.

Labour officers could assist in providing information and training on company policies and procedures, and terms and conditions of employment to all workers. The farms should provide a
copy of their contract (in the local language) and should give pay slips to the workers for the workers to be informed. Training of the workers should also extend to the various labour legislation and their rights as workers. The workers should be provided with a full and comprehensible explanation of the code (both verbally and in written form), and how it is implemented and audited. Involve workers in internal monitoring and auditing of codes. The labour officers should not only train the workers, they should also train the management and supervisory staff.

There should be more succinct and unambiguous government policies and laws on sexual harassment at workplace. Despite the provisions in the Employment Act and Sexual Offences Act on this subject, deliberate measures must be put in place to protect victims of sexual harassment. It is recommended that more focus and attention is required to stem the rampant cases of sexual harassment.

It is also recommended that deliberate efforts are needed to educate the society that this social vice exists, that it is on the rise, that women are highly menaced thereby and that there is need for an immediate action to deal with it. There is also a growing concern of the fact that the victims of sexual harassment are stigmatized to talk about it openly. Discussing the problem will make it be recognized as a hazard. Many workers do not talk about the problem for fear of being dismissed from their jobs or worse being laughed at. Workers should however be confident to freely talk about the problem and given the liberty to come up with more suitable solutions towards dealing with the problem.

Human rights groups should be more involved in fighting for the rights of female workers who are habitually beleaguered in the hands of managers and dismissed from work for baseless reasons. Most women suffer in silence for fear of what the society will perceive of them. These human rights groups will help build confidence in the women and enable them open up and talk about the issues affecting them in their work places. Community based groups should also be involved in discussions of the issues that affect the workers.

249 Section 20, The Employment Act
250 See Opondo.
251 See Opondo.
3.2.3. Labour Officers
It is recommended that the government should, as a matter of urgency, recruit and deploy labour officers to handle labour matters exclusively in the flower farms. Bearing in mind the economic importance and the profitability of this sector, the government should ensure observance to labour rights a priority. This will undoubtedly improve the rather negative perception the international community has about the country's labour profile. The immediate benefit that would be realized is that Kenyan flowers will be put on an exalted level thereby making the country to fetch higher gains. International consumers of our products would be eager to pay more for flowers that are produced by farms that have reverence for their workers' labour rights.

3.2.4. Non-permanent Staff
The government should also grant non-permanent workers protection in all labour legislation. This should be done soon since most of the workers in the farms are hired on a non-permanent basis. It is suggested that for better safeguarding of the worker rights, the government should ratify ILO Convention 87 covering workers' right to freedom of association. By ratifying this convention, the provisions of Article 2(5) and 2(6) of the Constitution will be operationalized.

3.2.5. Enactment of a Horticultural Wages Order
The government, through the institution of Wages Council, should enact a Horticultural Wages Order for the industry instead of applying the Agricultural Wages Order. This is for the basic logic that, unlike the mixed farming sector, the floriculture industry is perceived to be doing better in the global market.

3.2.6. On the Freedom of Association
Though the New Constitution of Kenya and Labour Relations Act guarantee the freedom of Association but the right is given by the right hand and taken by the left in some instances. The best example is the Agency fee under Section 49 which technically forces the employee to contribute to the union, thus forcing them to join the union involuntarily. There is need for change in policy and the law relating to payment of agency fees and payment of dues directly to COTU by workers. In order to address the right to freedom of association, it is recommended that registration of an independent union for cut-flower workers be fast-tracked.
3.2.7. On the Right to Safe Working Environment

Workers should be encouraged to demand for the observance and enforcement of the right to clean and safe working environment. There should be clear mechanisms for reporting violation of such rights. The Occupational Safety and Health Act 2007 requires reporting of work-place accidents, dangerous occurrences and ill health with a view to finding out their causes and preventing of similar occurrences in future so as to ensure that a worker is working in a safe and healthy environment.

This is not frequently practiced in the cut-flower industry in Kenya. Most workers fear reporting cases of this nature for fear of being dismissed from employment or be subjected to other disciplinary measures. Workers can be encouraged to report such cases through establishment of confidential report centres to deal with the issue.

There is the right to a safe working environment. This right should be respected by flower farms without compromise as their activities affect both the overall environment and the health of the workers that handle the various chemicals in the flower farms in the fumigation and packaging departments. The first recommendation is that the farms should provide adequate protective gear to its workers as outlined in the Occupational Safety and Health Act. The employer should provide functional protective gear.

There is need for proper awareness and training programmes for the workers on the safe ways of handling working equipment and use of chemicals. There should be a training programme for new workers and a regular training programme for all workers generally as provided for under the social codes. Through the training programmes, workers will learn safety techniques and ways of improving on their methods of operation. Old workers will also be able to catch up with changes in the modes of operation, use of new equipment and chemicals. This is due to the fact that most of the workers in the cut flower industry are semi-illiterate.

The common practice is that such workers are recruited in the farms and given working equipment then instructed to join older workers and work along with them as they observe what how the work is done. Through this process, a worker is expected to gain experience. This position need to be changed. New workers should be subject to a rigorous training programme with practical sessions to allow them to learn how to perform the task safely.
The government should allocate enough funds to the Ministry of Labour. This would enable the ministry to hire sufficient personnel, to increase staffing, training of staff. This will enable the labour officer intensify labour inspections and enforcement mechanisms of the ministry.

The Kenya Pest Control Products Board should be constantly consulted in coming up with the training programmes for workers in the cut flower industry. Though this Board cannot train individual workers, employers of such workers should take the initiative and liaise with the Board so as to come up with proper training programmes that suit the needs of the workers. This should be made a mandatory requirement which should be made known to both the workers and employers from the onset. It would be even made more effective if it is contained in the contract of employment.

3.2.8. Creating Awareness
Awareness programmes on the rights of workers is also important and should be encouraged. Though there is effort in creating awareness on these rights, most of the workers lack the means of enforcing these rights. Chapter four of the Constitution stipulates on the rights of the workers. At Article 21, the Constitution provides that the state shall observe, respect, promote and protect the fundamental freedoms of the Bill of rights. Although this is provided in the Constitution, little has been done to realize the same. Workers should be made able to lodge complaints against any violations of their rights through more simple and accessible channels. The existing bureaucracies have made it difficult for workers to report their cases and get redress. The procedure should be made simpler and easy to apply noting that most of the workers in this sector are not educated.

3.2.9. Employee Representation
Employee representation should also be adopted in Kenya as a mandatory condition in every employment contract. This will facilitate access to legal services. Under Article 48 the Constitution provides that every citizen shall have access to justice. In this, legal services shall be made affordable to all.
This is not the case in the cut flower industry. Most workers fail to report cases of violation of their rights because they lack the financial means to hire private lawyers. They then suffer in silence.

It is proper that legal services be made accessible to workers as this is a right provided for in the constitution. This could be realized if the trade unions in this sector come up with a policy which shall facilitate access to legal services for the workers. The state in collaboration with the various stakeholders in the cut flower industry should work also towards putting up policies to ensure that workers have access to legal representation so as to encourage them to seek redress.

It should be noted that the constitution has provided for labour rights. However parliament is yet to come up with legislations to fulfill the implementations of these rights. There is therefore need for urgency in the implementation of this section.

3.2.10. Role of Civil Society
The role of the civil society should be seen as necessary in coming up with policies. The cut flower sector has ignored the civil society in policy formulation. The role of the civil society is important in checking the exercise of power by state organs. Where this group is left out, the policies may fail to check the interest of the workers. The participation of the civil society should therefore be encouraged to ensure that the policies that are formulated reflect the needs of the workers.
BIBLIOGRAPHY

Catherine, D Maggie, O & Sally, S 2002, Gender, Rights & Participation in the Kenya Cut Flower Industry, Natural Resources Institute, Report No. 2768, viewed 1 May 2011, Chapter 318 of the Laws of Kenya
Galinsky, B., 1997, UK Rose Market in Full Bloom, Market Asia, V. 4(2),


ILO – International Labour Organisation.


