

**CHILD LABOUR AND THE LAW IN KENYA: TO WHAT
EXTENT ARE CHILDREN PROTECTED AGAINST
ECONOMIC EXPLOITATION?**

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the Award of the Degree of Bachelor of Laws (LL.B),
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**By:
ONYANGO DICK OMALA**

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DEDICATION

This work is fondly dedicated to my parents, the dearest fountains of inspiration and pillars of strength in my life.

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To my mother and father, I say, “thank you.” You never let me down.

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- Subordinate Courts (Separation and Maintenance) Act, Cap 153
- Trade Disputes Act, Cap 234
- Widows and Children's Pensions Act, Cap 195
- Workmen's Compensation Act, Cap 236

LIST OF ABBREVIATIONS

ANPPCAN.....	African Network for the Prevention and Protection Against Child Abuse and Neglect
CLAN.....	Children’s Legal Action Network
UNCRC.....	United Nations Convention on the Rights of the Child
ILO.....	International Labour Organization
IPEC.....	International Programme on the Elimination of Child Labour
UN.....	United Nations

INTRODUCTORY BACKGROUND

Child labour is a vast and complex phenomenon. It is and still continues to be one of the most intractable socio-economic problems facing the country.

In the ancient world, child labour was not at all abhorrent.¹ In fact, it was considered proper and was even encouraged. With the passage of time, however, it has come to be treated with contempt since it is viewed as a violation of children's rights.² Kenya has put its best foot forward not to be left behind in the fight against child labour by enacting legislation to regulate and control matters pertaining to the exploitation of juveniles. But the laws are totally wanting. Legislation has not sufficiently addressed the problem as will be shown.

This research work is divided into five chapters:

Chapter one is basically introductory. To be precise, it is an overview of child labour. Firstly, the term child is defined, followed by an in-depth examination of child labour; its causes, determinants and consequences.

Chapter two is an elaborate examination of the treatment of child labour in international law. That is, a thorough scrutiny of the provisions of the various international legal instruments addressing the problem of economic exploitation of children and, further, the stance taken by international law, whether child labour is frowned upon or encouraged.

Chapter three is a study into the various Kenyan laws regulating the conditions of juveniles in employment. It endeavours to reveal that Kenyan statutes do not make any attempts to eliminate child labour but only strive to regulate the conditions of employment pertaining to those children who are already working.

¹ Ombaka O.Oki "The Law and Child Labour in Kenya" in Journal of East African Research and Development No. 13 (1983)

² Ibid.

Chapter four is a critical inquiry into the efficacy of the Kenyan law in shielding the child against exploitative engagement in work detrimental to physical, mental, spiritual, moral and social development. Focus will be upon the gaping flaws in the enforcement mechanisms put in place to curb child labour as the most conspicuous stumbling block to the effective legal protection of children against the worst forms of labour. The question to be addressed, and which is the crux of this research work, is the extent to which Kenyan law protects children against economic exploitation.

Chapter five is the conclusion of the research paper. It contains a summary of the study followed by detailed recommendations.

CHAPTER ONE

AN OVERVIEW OF CHILD LABOUR

Introduction

The discussion in this chapter centers on presenting a general overview of child labour. It commences with the definition of a child under various statutes. Next, the causes, determinants and consequences of child labour are looked into. The last segment contains a stunning revelation of child labour as a gross violation of the rights of the child.

1.1.0 DEFINITION OF A CHILD

Kenya has not codified her child law into a single, uniform legislation. Instead, laws touching on matters pertaining to children are to be found scattered over numerous enactments. As a result of this there is no uniform definition of who a child is. Every statute seems to be having its own definition. In fact, the various statutes provide for the definition of a child by setting out the different ages of children for purposes of their operation.

Article 1 of the **United Nations Convention on the Rights of the Child 1989** defines 'child' for the purposes of the convention as 'every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier.' This article was left deliberately vague so as to allow each contracting party flexibility in interpretation of the term 'child'. Article 2 of the Convention concerning the Prohibition and Immediate Action for the Elimination of the worst forms of Child Labour defines children as all persons under the age of 18.

The definition in the Age of Majority Act¹ seems to be in conformity with those provided by the two conventions mentioned above. Under section 2 of this Act,

¹ Cap 33, Laws of Kenya.

“A person shall be of full age and cease to be under any disability by reason of age on attaining 18 years.”

Persons below this age are considered to be minors and, among other disabilities, may not enter into commercial legal contracts. Similarly, under the Adoption Act,² a child is anyone below 18 years. This is the law in line with the UN Convention.

The Children and Young Persons Act³ has been hailed as the main and the most comprehensive of all the statutes relating to children in Kenya. The Act at section 2 divides children into three categories: young persons, juvenile and child. It defines a young person as ***“a person who is of the age of 16 years or more and is under the age of 18 years.”*** A juvenile is ***“a person who is of the age of 14 or more and is under the age of 16 years”*** and a child means ***“a person under the age of 14 years.”***

The Employment Act,⁴ in order to confer rights and protection on the child, stipulates that a person who has not yet attained the age of 16 years is a child for purposes of being engaged in gainful employment. This applies where the child is employed in an industrial undertaking under a deed of apprenticeship or indentured training contracted under the provisions of the Industrial Training Act.⁵

For the purposes of the Kenya Citizenship Act,⁶ a person under 21 is a minor. The Liquor Licensing Act⁷ allows for liquor to be sold to anyone 18 years and above, therefore implying that, a child is one below 18 years.

Family law statutes attempt to define child for purposes of marriage and succession. The Marriage Act⁸ permits a person of 16 years to get married but with the consent of a parent or a guardian, that is, a written consent to the intended marriage signed by the person

² Cap 143, Laws of Kenya.

³ Cap 144, Laws of Kenya.

⁴ Cap 226, Laws of Kenya.

⁵ Cap 237, Laws of Kenya.

⁶ Cap 170, Laws of Kenya.

⁷ Cap 121, Laws of Kenya.

⁸ Cap 150, Laws of Kenya.

having the lawful custody of any such party. Other statutes within family law provide contradicting ages below which one is to be considered a child. For instance, the Hindu Marriage and Divorce Act⁹ puts it at 16 for girls and 18 for male children. On the other hand, the Mohammedan Marriage and Divorce Act¹⁰ puts it at 9 for girls and 13 for boys or alternatively, the attainment of puberty. Further, the Matrimonial Causes Act¹¹ defines an African child to mean, for males, one who has not attained the age of 13 years. For all other persons, a child is one who is not married and has attained the age of majority.

The definition of a child is also found in criminal law. In determining the culpability of a child, criminal law recognizes different levels of a child's development. Under section 14 of the Penal Code,¹² a child below 8 years is incapable of forming criminal intent and therefore cannot be criminally liable for any act or omission. The same Act goes on to state at section 14(2) that a person under the age of 12 years is not criminally responsible for any acts or omissions unless evidence is adduced to show that the child, if aged between 8 to 12 years knew what he or she was doing. Under the Penal Code, the death penalty cannot be meted out against a person below 18 years. However, the Evidence Act¹³ and Oaths and Statutory Declarations Act¹⁴ are not clear on who a child is. In employing the term 'tender years' in reference to children, they seem to have the implication of leaving the definition of a child to the court for purposes of evidence.

Under both the Law of Contract Act¹⁵ and the Partnership Act,¹⁶ a child is any person who has not attained the age of majority. The age of majority in Kenya is 18 years.

In summary, there are approximately 66 statutes in Kenya that touch on matters relating to children. Each one seems to have its own definition of who a child is. This may be attributed to the fact that the Constitution of Kenya allows different personal laws on

⁹ Cap 151, Laws of Kenya.

¹⁰ Cap 156, Laws of Kenya.

¹¹ Cap 152, Laws of Kenya.

¹² Cap 33, Laws of Kenya.

¹³ Cap 80, Laws of Kenya.

¹⁴ Cap 15, Laws of Kenya.

¹⁵ Cap 32, Laws of Kenya.

¹⁶ Cap 29, Laws of Kenya.

adoption, marriage, divorce, burial, devolution of property and related matters.¹⁷ The effect of this is to allow for the varying definitions in these laws. What further thwarts any meaningful attempts to have a uniform definition is that Kenya has over forty different ethnic communities, and each of these define children and childhood differently. The definitions depend on how each community marks the transition from childhood into adulthood through various rites of passage. These take place at different stages, and the ceremonies normally involve age-sets determined by different socio-cultural events. An example is the Bukusu of Western Kenya who perform circumcision ceremonies for boys during even years and at harvest time.

What emerges from all the above definitions is that children are susceptible to all forms of exploitation and abuse. For this reason, the law should strive to ensure that all forms of abuse and exploitation of children are prevented.

1.1.1 DEFINITION OF CHILD LABOUR

Child work may be exploitative and abusive or non-exploitative and societally approvable.

Many writers and researchers on this subject have candidly pointed out that there seems to be no universal, unanimous conceptual understanding of child labour.¹⁸ This perhaps explains why the term is used differently by different people, thus attesting to the fact that there is no universally agreed-upon definition. However, three elements usually feature in any attempted definition of what child labour is: age, purpose for which the particular work is done and the conditions of work. On age, it will be discovered that even within one given jurisdiction, certain laws or Acts give conflicting ages of a child, depending, as we have already seen, on the conditions in which they apply.

¹⁷ The Constitution of Kenya, Sec. 82(4) (b)

¹⁸ ILO: Child Labour: A briefing Manual, 1983, p. 73

From the interviews carried out, officers in the Ministry of Labour and Manpower Development¹⁹ define child labour as a situation where a person who is fifteen years or below enters some agreement or contract, either written or verbal, with an employer to work for payment. The basis for this definition, they concede, is the provisions of the Employment Act.

On the other hand, the Children's Department of the Ministry of Home Affairs and National Heritage views a child labourer as one who works for payment and is below eighteen years of age. The conditions of work must be difficult.

The Federation of Kenya Employers (F.K.E.) defines child labour as any work done by a child during school time.²⁰ So, for them child work during school holidays is all right as long as it does not in any way endanger the physical or psychological health of the child as a result of the length of time worked or conditions of work.

For purposes of clarity in this dissertation, child labour is any work carried out by a child which impedes his physical, psychological, mental, social and moral development. Simply stated, it is work which is done by children which endangers their health or safety and interferes with their education.²¹

According to the 1995 World Labour Report,²² child labour implies that young people are being exploited or overworked or deprived of their rights to health or education.

Characteristics in work a child does that indicate exploitation include:²³ working too young; working long hours; working for very low or for no wages; working under strain; working on the streets; premature assumption of adult roles; damage to their physical and psychological health; denial of the opportunities for their education and recreation.

¹⁹ Located at the N.S.S.F. Building, Milimani, Nairobi

²⁰ COTU, 1996, Combating Child Labour in the Context of Trade Unions in 1996/97 and Beyond, Report of Child Labour Seminar, February 1996- Kasarani – Nairobi.

²¹ Dr. D.S. Obikeze "Agricultural Child Labour in Nigeria" in Child Labour in Africa – Proceedings of the First International Workshop on Child Labour in Nigeria

²² Vol. 3, 1995, p. 14

²³ Ibid.

According to the children Bill, 1998, child labour refers to any situation where a child provides labour in exchange for payment and includes:-

- a) Any situation where a child provides labour but somebody else receives remuneration on his behalf;
- b) Any situation where a child provides labour as an assistant to somebody else and his labour is deemed to be the labour of that other person for the purposes of payment;
- c) Any situation where a child's labour is used for gain by any individual or institutions whether or not the child benefits directly or indirectly; and
- d) Any situation where the party providing the services is a child whether the person using the services does so directly or by an agent.²⁴

1.2.0 CAUSES AND DETERMINANTS OF CHILD LABOUR

As part of their socialization process, children in most societies since time immemorial have been encouraged by their parents to learn skills, to do things for themselves and generally help in the economic production process. From this perspective, it is evident that children work because of family or societal 'pressure' as part of growing up which ensures a balanced physical, social and psychological development of the child.

However, in recent times, and due to the impact of industrialization and urbanization, family systems in Africa and in Kenya in particular have drastically changed. Different forms of families have emerged which are having difficulties and conflicts on how best to bring up children. As a result of this transition and changing socio-economic production and income distribution methods, children have been forced into the work situation of industrial setting. Majority, particularly those of low social economic levels are no longer working under the care and guidance of the family. They are tirelessly toiling to earn a living in situations where they are largely exploited until child labour has now become a form of child abuse.

²⁴ The Children's Bill, 1998, sec. 9 (2)

1.2.1 Poverty

Probably the greatest 'push' factor of child labour in Kenya is poverty which has linkages to historical trends of socio-political forces prevailing in the country over the years and aggravated by an inappropriate and a predominantly negative economic environment characterized by, *inter alia*, population growth rate of 3.3 per cent per annum; low economic growth; low levels of job creation leading to high levels of unemployment and underemployment; inadequate infrastructure; inadequate and inequitable access to social services.

A joint Government of Kenya/United Nations Children's Fund report says poverty has engulfed all communities in the country, manifesting itself in the form of reduced productivity, child labour and deprivation at household level.²⁵ It has been established that poor people constitute approximately 52 per cent of Kenya's population. Abject penury especially in the rural areas and urban slums has led to the ever increasing number of child labourers mainly because their parents can barely feed them, never mind sending them to school.²⁶ Poverty is viewed as the lack of adequate income which can sustain the most basic needs of the family.

Most children work because their families are poor. The most pressing reason for any child to work or be compelled to work is the need to reduce to the greatest extent possible the pathetic state of penury in which he is living and thus help him satisfy his basic needs. Furthermore, the child is led to believe that he has to work from an early age in solidarity with the family group so as to compensate as much as possible for the family's economic burden. Families sell child labour to augment their income. Case studies carried out on child labour situation in commercial agriculture in Kenya, Malawi, South Africa, the United Republic of Tanzania and Zimbabwe found that children work primarily for economic reasons, to supplement low family income.²⁷

²⁵ East African Standard, Monday April 23rd, 2001.

²⁶ East African Standard, Monday 1st May, 2001.

²⁷ ILO: Child Labour in Commercial Agriculture in Africa: Technical workshop on child labour in commercial agriculture in Africa, Dar es Salaam, 27 – 30th August 1996 (Geneva, 1997).

The high cost of schooling which is directly linked to poverty has pushed children into the labour market since their parents are unable to afford school fees. Indeed, for Kenya, this has been seen as accounting for the greatest number of working children aged between five and fourteen who are not in school or have dropped out of school to work. Some children actually work in order to go to school. The cost of uniform, books, stationery and other items is usually very high. Children may need to work to earn the necessary money that would enable them to go to school. It interesting to note that many working children also go to school! In Asuncion, the Capital City of Paraguay, 77 per cent of working street children attend school.²⁸

1.2.2 Traditional, Social and Cultural Factors

Child labour depends on normative attitudes towards children in society; the culturally-determined roles and functions of children; the values by which the activities of the children are judged and by the nature of the socialization process. In industrialized countries, there is a general disapproval of formal labour force participation of school age children. However, participation of children in housework is approved, by parents at least. In many countries, participation in various types of economic activities from an early age is considered as an essential part of socialization. As has been mentioned earlier in this chapter, some children work because of family or society 'pressure' as part of growing up which ensures a balanced physical, social and psychological development of the child. Children in traditional African societies, such as the Chagga of Tanzania, were given work tasks by parents to train them in perseverance and responsibility as well as in the details of the task itself.²⁹

In keeping with the traditional view of the domestic role of women, it seems almost universal that child care and housework fall more to females than to males. Indeed, the traditional practice and cultural beliefs that systematically favour the education and development of boys over girls contributes to the large number of girl child workers. In Togo, for example, a study on domestic work found that parents prefer to send girls

²⁸ ILO: World Labour Report, 1995, Vol. 3

²⁹ Raum, O.F. Chagga Childhood, London: Oxford University Press, 1940, p. 205

rather than boys into domestic service because the girl's income helps to support the schooling of her brothers!³⁰

In Indian society, although slowly changing, there still exists a strict compartmentalization of groups of people on the basis of a caste hierarchy. The Brahmins belong to the priestly caste thus holding supreme position in the society while the Shudras are on the lowest rung. Lower caste groups are economically more dependant on the middle castes thus their children are most likely to be exploited and abused in the form of child labour.³¹

1.2.3 Inefficiency in the enforcement of protective legislation

Weaknesses and shortcomings in inspection and enforcement of laws protecting children against exploitative labour have perpetuated child labour in Kenya. As shall be later discussed in detail, even countries having progressive child labour laws commonly find it quite difficult to put them into practice. In most jurisdictions, labour laws pertaining to children are found scattered in numerous statutes and subsidiary regulations which are so detailed that violations cannot be effectively monitored.³² So, it is evident that in many cases child labour is the direct result of failure to comply with relevant labour laws intended for the protection of children. For example, although the Kenya Employment Act³³ plainly prohibits the employment of children without the prior written consent of an authorized officer or local labour officer, quite a large number of children still continue to work notwithstanding the fact that such prior consent has not been sought.

1.2.4 HIV/AIDS and Armed Conflicts

One study points out that the AIDS epidemic is producing an unimaginably large number of orphans who lack support from the extended family and risk becoming labourers.³⁴ It

³⁰ Black, M. : Child Domestic Workers: A Handbook for Research and Action, Anti-Slavery International, 1997, p. 15.

³¹ Obikize D.S., Supra, note 21, p. 45

³² Bequele A. and Myers W.C. : First Things First in Child Labour: Eliminating Work Detrimental to Children: Geneva, ILO, 1995.

³³ Cap 226, Laws of Kenya ,

³⁴ ILO; op cit. p. 6.

suffices to note that many children find themselves in the labour market because their parents or guardians have succumbed to the HIV/AIDS scourge.

Armed conflicts have also had a devastating effect on communities. Not only have children worked to replace family income; but they also have been drawn into the conflicts, including as combatants.

1.2.5 Other Causes

A study carried out in the United Republic of Tanzania revealed that some employers hire children because of their dependability – they have no family or other commitments. Some employers consider that children comprise the only reliable, readily available labour force.³⁵ These are the type of employers who view child workers as more active, amenable to discipline, control and most importantly, cheap. This perpetuates child labour in the country and in the world at large. Another reason given as a cause of child labour is that children possess as individuals the necessary resources which can, during their period of growth, be offered for hire in the labour market. However, the labour market unlike the family system is not sensitive to the welfare of children and hence they end up suffering silently while working. An ILO (International Labour Organization) survey conducted in Ghana found that from a fifth to one-quarter of the enterprises employing children indicated that the two main reasons for employing children were the absence of labour disputes and the willingness of children to work as many hours as required. In Zimbabwe, some employers perceive the use of child labour as a ‘mutual support’ system in which the children provide needed labour and the employer in return provides the children with the needed income to supplement their household incomes.³⁶

Teachers’ treatment of children may also affect indirectly their involvement in labour. A child’s self-esteem can be affected by the teachers’ comments and attitudes on the child’s capabilities. If the juvenile becomes convinced that he has no academic ability because

³⁵ Onyango, P. : “The State of Child Labour in Kenya and Priority Areas for Action,” a Paper presented at the Seminar on International Labour Standards, August 9-13, 1993

³⁶ Ibid, p. 7

of the way he is treated by the instructor, he may in fact become less and less capable in school and more likely to feel that he is fit only for manual work.³⁷

Commercial enticements have also compounded the problem.

Today's modern consumer oriented society has been accused of stimulating children's minds on the need to have money so that they can also have access to that which money can buy.³⁸ Ben White notes that:

“It is contradictory and unjust for society on one hand to bombard its children with all the messages of global and national consumer culture, underlining the importance of having money and on the other hand to deny the same children the right to earn money.”³⁹

High unemployment levels, changing social production relations, unequal access to the means of production, population explosion and unstable family environment have contributed to the prevalence of child labour. In rural-urban migration, the exodus coupled with rapid urbanization leads to the proliferation of slums which are a major source for generating child labour and compounding the problem of street children.

1.3.0 TYPES OF WORK CHILDREN DO

In one sense or another, many children work, whether it is around the home, family, farm or in wage employment. To some extent, domestic chores limited on farm and off farm activities are perceived as part of the socialization process where children internalize norms about their future roles and social obligations. However, many are in wage employment, which is often hazardous, harmful to their development, abusive and wantonly exploitative.⁴⁰ It would be an arduous task to attempt to ferret out all the instances where children are engaged in work, but the most common are as follows:

³⁷ Kayongo M.D. and Walji P. : Children at Work in Kenya, Nairobi, Oxford University Press, 1984

³⁸ White B., “Child Labour: Dilemmas for Governments and Activists”, An Inaugural Address, 16th June 1994, Colombia University.

³⁹ Ibid.

⁴⁰ Supra, note 32.

1.3.1 Domestic Child Work

Studies have revealed that this is the most common form of work children do to earn a living in Kenya. It is quite alarming to note that for household work, juveniles as young as nine years old are preferred to adult workers.⁴¹ This explains why most of the maidservants are pitifully young. They are preferred by their employers since they are seen to be more active and amenable to control. This explains why the working conditions are usually extremely poor. Some of these youngsters work for very long hours, they do not get enough sleep, sometimes they face the wrath of their employers by being beaten up or being denied access to food and comfortable sleeping facilities. Some of these children, especially the females, risk being sexually abused by their employers.⁴² It is very common in developing countries for little children to work as maids, house boys or baby-sitters. Their presence is typically justified by the employing households as a form of social service in which the employer provides shelter, care and education to the child of a poor family who otherwise would be destitute.⁴³

The other form of domestic work is non-exploitative and in most cases unharmed to the welfare of the child. This is where children work for purposes of socialization and normal development under the supervision of the parents and within the family setting. In this kind of work, the child is assigned some domestic activity commensurate with age, sex and physical ability. They fetch water, gather firewood, cook and wash.

1.3.2 Child Work in Commercial Agriculture

Commercial agriculture is agricultural activity carried out with the aim of making money as opposed to subsistence agriculture where food crops are grown solely for domestic consumption. Children are being continuously employed in plantations and farms. In rice plantations of Ahero, Kisumu, children work under very poor physical environment that threatens their health.⁴⁴ Swampy grounds infested with mosquitoes and possible bilharzia worms pose a danger to the child's well-being. A study carried out at Kipingo

⁴¹ Supra, note 35, p. 42

⁴² OAU/UNICEF: *Africa's Children, Africa's Future*, OAU/UNICEF, New York, 1992, p. 176

⁴³ ILO Surveys in the Developing World, 1996

⁴⁴ Author's own observation.

Sisal Estate shows that juveniles are engaged in very strenuous jobs such as cutting sisal, tying bundles, loading and processing.⁴⁵ In coffee estates, the youngsters pick coffee berries and in sugarcane plantations they chop the canes. They also toil in *Miraa* farms. For the children in Murang'a, Thika and Kiambu Districts, labour in the coffee plantations is nothing alien. What emerges is that children have been exploited and used by farmers during the planting, weeding and harvesting seasons countrywide.⁴⁶

1.3.3 Child Work in Forestry

Newspapers in Kenya started providing information about this form of employment as early as 1976.⁴⁷ A study of this form of employment sector in Kisii revealed that the activities engaged in included splitting timber beams, trimming and felling trees.⁴⁸ Their working conditions were reported to have been harsh. The children bitterly complained of cold weather.

1.3.4 Factory/Industrial Child Labour

This category of child labour was acknowledged to have been existent in Europe especially during the industrial revolution.⁴⁹ Children engaged in industrial work toil on the factory floor as well as at construction sites. The work they do involves lifting heavy weights, welding and other arduous tasks. Children working in factories are frequently exposed to deadly, toxic fumes and noise pollution. Falling objects could lead to fatal accidents. Reports on the carpet factories in Pakistan in 1991 estimated that 50,000 juveniles are bonded in the industry. They do such work as embroidery and carpet weaving. Mining industries and quarries are also a source of juvenile employment.

1.3.5 Child Work on Streets

On the streets, children are engaged in various types of work chiefly as a way of income generation for survival. They assist motorists to park cars and thereafter guard them at a

⁴⁵ Supra, note 35

⁴⁶ ILO: Towards Action Against Child Labour in Zimbabwe. ILO Press, New York, pp 46-47

⁴⁷ Supra, note 35, p. 17

⁴⁸ Ibid.

⁴⁹ Wallbank et al (eds) Civilization Past and Present Book 3: 1815 to the Present (6th ed). London: Scott Foresman and Co. 1970.

fee; some children collect and sell waste papers, bottles and plastics. They also hawk edibles such as groundnuts and ice-cream, wash vehicles, ferry luggage and shine shoes.

Child prostitution is also rampant on the alleys. This is the situation whereby female children have sex with men in exchange for money. These young girls, expose themselves to deadly risks. A study done on street children in Nairobi suggests that the incidence of HIV/AIDS among child prostitutes may be as high as fifty per cent.⁵⁰

Children have been used for the production of pornography and also for pornographic performances. Juveniles have also been ^{Used} for other illicit activities like the production and trafficking of drugs.⁵¹

1.3.6 Apprentice Child Labour

Apprenticeship is the procedure by which young people acquire the skills necessary to become proficient in a trade, craft, art or profession under the tutelage of a master practitioner.⁵² The apprenticeship system mainly benefits three groups: the first group is young persons who acquire skills that provide them with financial and psychological security as trained craftsmen. The second to benefit is the employer who receives productive work from apprentices during their training. Thirdly, the society at large receives continuing supplies of skilled labour and quality goods.⁵³ In this relationship, the employer is to teach the apprentice a trade. However, the learner receives no money. Just as a matter of peeping at what will be discussed ahead, the Employment Act of Kenya seems to condone child labour by permitting apprenticeship. This is because some unscrupulous employers wantonly exploit children in the guise of apprenticeship for years to avoid payment of wages, or are used as servants to do tasks totally unrelated to the skills of the trade.⁵⁴

⁵⁰ Ministry of Labour Report on Child Labour, 1992.

⁵¹ Buern G.V. International Documents on Children, Kluwer Law International, 1988

⁵² Encyclopedia Americana, vol. 2, Grolier Incorporated, 1984, p. 124

⁵³ Liepman, Kate K. Apprenticeship: An Inquiry Into Its Adequacy Under Modern Conditions, New York, 1960.

⁵⁴ Ibid.

1.3.7 Bonded Labour

This is prevalent amongst landless peasants. The peasant family commits to its landlord certain labour services in return for repayment of debt.⁵⁵ One form of bonded labour is where children are pledged to landlords for all their lives as part of payment of family's debt. Another form of bonded labour is children sent out from the rural areas with middlemen to work in child labour intensive trade centres.⁵⁶ For example, children are brought from remote areas to work at some central points where carpet weaving is done. Children are enslaved to work on such trades. In Southern Asia, bonded labour involves the pledging of very young children by parents to owners of factories in exchange for loans. This is widespread in the carpet industry.⁵⁷

1.3.8 Armed Forces

Over the years, many children have been recruited as participants in armed conflicts worldwide.⁵⁸ Experts estimate that as many as 250,000 children under the age of 18 are serving in armed forces or armed groups in more than 30 countries worldwide.⁵⁹ In Africa, this practice has been common in war-torn countries like Burundi, Rwanda, Uganda, Sierra Leone and Sudan.⁶⁰

1.3.9 Fishing

Studies carried out in Suba District of Nyanza Province in Kenya showed that school-going children participate in fishing activities when they are not in school. The Member of Parliament for Gwassu Constituency in the district, Mr. Felix Nyauchi, attributes the high dropout rates to fishing which, apart from augmenting meagre family income, also provides the children with pocket money which they innocently confess their poor parents will never ever give them.⁶¹

⁵⁵ ANPPCAN Child Labour in Africa (Engugu Workshop Proceedings), 1986

⁵⁶ *Ibid.*

⁵⁷ Ministry of labour Report on Child Labour, 1989.

⁵⁸ Daily Nation, Wednesday May 2nd 2001.

⁵⁹ Bequele and Myers, *op.cit.* p. 32.

⁶⁰ Wallbank et al (eds), *supra*, p. 36.

⁶¹ Interview with Gwassu MP, Mr. Felix Nyauchi .

These are only some of the areas where children work. There are countless other areas where children are engaged in early employment. What has been discussed above is inexhaustive.

1.4.0 CONSEQUENCES OF CHILD LABOUR

When children work – whether for their parents or outside the family – those activities they engage in will have various effects on them. Despite the fact that the impact will vary depending upon the child's personal characteristics, experience as well as many other factors, such work would likely influence the child's personal relationships, his health, his mental alertness and his work orientation.

1.4.1 Physical Consequences

These are long-term and adversely affect the child's normal physical development. The health of exploited working children is being endangered by allowing them to work under health hazardous conditions that have a negative effect on their development.

In work situations, children come into close contact with cases of tuberculosis. Severe malnutrition, anaemia, hard labour, fatigue and inadequate sleep makes them more susceptible to infectious diseases. The juveniles are given dirty jobs like trash collection in which case there is maximum exposure to unsanitary conditions with their inherent risks. Juveniles at work may be exposed to toxic substances. The effects of lead poisoning have been documented of biocade workers who inhale very fine particles of Zari.⁶² In plantations, pesticides risk being inhaled.

The health of children could be impaired because of working in particular occupations, with poisoning from welding, byssionosis from textile manufacturing and venereal diseases from prostitution. Many diseases which can take decades to declare themselves for example, asbestosis, chronic cadmium toxicity and cancer may be the result of the occupation engaged in. Reports on the carpet factories in Pakistan in 1991 estimated that half the 50,000 bonded children in the industry never reach the age of 12-victims of

⁶² Benerji, S Child Labour in India: London: Anti- Slavery Society, 1979.

malnutrition and disease.⁶³ A World Health Organization (WHO) report on child workers cites other physical health hazards including bony lesions and postural deformity attributable to such work as carpet-weaving, embroidery and lifting heavy weights. Young, growing bodies suffer from strain when over loaded since the bone structure, especially the spine, is still soft and fragile.⁶⁴ Terribly shocking is the revelation that the eyesight of young girls working for 12 to 14 hours a day in micro-computer factories or embroidery is reported to be damaged within a period of 5 to 8 years. Stunted growth is also another long term result of child labour.⁶⁵

Owing to their feebleness and fragility, children are more vulnerable to accidents while at work as compared to adults generally.

1.4.2 Psychological Consequences

Childhood is the stage for personality formation. The physical and emotional stress of work combined with the denial of opportunities to play, explore the world, interact fully with peers, physical and emotional abuse and neglect, separation from family, monotony and the burdens of pre-mature responsibility is likely to have permanent adverse psychological impact. Exposure to hazardous work and work situations can affect the psychological and intellectual development of children, leading to violent and rebellious behaviour, withdrawal, depression and other disorders. A recent study in Bombay⁶⁶ reported that working children are usually frustrated, suffer from role conflicts, have low occupational, income and educational aspirations.

1.4.3 Effects on Education and Human Resource Development

Early employment deprives children of schooling and its associated benefits. It undermines human resource development and leads to skill deprivation which is vital for national development, leading to underdevelopment in the long run.

⁶³ Supra, note 59, p. 74

⁶⁴ Ibid, p. 75

⁶⁵ Ibid.

⁶⁶ Naidu, U.S. and Darasuram, S. : Health Situation of Working Children in Greater Bombay:WHO, Geneva, 1985.

1.5.0 CHILD LABOUR AS A VIOLATION OF THE RIGHTS OF THE CHILD

A child is by nature a human being; he is possessed of all the characteristics of a complete human being. The only reason why the child has been subjected to unfair and discriminatory treatment is because of the fact that he falls short of being an adult by reason of the tenderness of age, immaturity and inexperience. Because of this, in medieval England a child was taken to be a mere chattel of the father⁶⁷ who could do anything to him or use him for any purposes. But as the years roll by, efforts are being made to alter the warped, universal view on juveniles. Child rights activists have persisted doggedly in their campaign on the sensitization of people all over the world that by virtue of being human, children have rights which apart from being inalienable, are to be fully recognized and given all due respect by everybody.

Cranston defines a human right as 'a universal moral right, something which all men at all times ought to have; something of which no one may be deprived without a grave affront to justice; something which is owing to every human being because he is human.'⁶⁸ Thus, human rights are an expression of the worth and dignity inherent in the human being. They are claims held by human beings. A child is a human being and is to be accorded human rights.

In the international scene, the rights of the child are enshrined in conventions, charters and declarations. A perfect example is the **United Nations Convention on the Rights of the Child**. Its goal is to affirm that children's rights require special protection and aims not only to provide such protection but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security.

Hazardous and exploitative child labour violates child rights as encapsulated in these international legal instruments. The above-mentioned convention recognizes the right of the child to be protected from economic exploitation and from performing any work that

⁶⁷ Lee G. Muthoga, "The Rights of a Child" In Kenya Medical Women's Association, Child Abuse and Neglect (Nairobi: Initiatives, 1989).

⁶⁸ Cranston M., : What are Human Rights, (London, the Bodley Head, 1973).

is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral and social development.⁶⁹ It is important at this juncture to commit to memory that this convention represents internationally accepted principles hence it is undisputable.

A provision in the **African Charter on the Rights and Welfare of the Child** is strikingly similar to the provision of the **UN Convention** examined above. It states that

*“Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's physical, mental, spiritual, moral or social development.”*⁷⁰

The **International Covenant on Economic, Social and Cultural Rights** also recognizes the need to safeguard children's rights. For the purposes of this chapter, the main concern will be what it says pertaining to child labour. It states that children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.⁷¹

The **United Nations General Assembly Declaration on the Rights of the Child 1959**, in its preamble pays attention to the fact that the child, by reason of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth.

A number of **ILO (International Labour Organization) Conventions** also are against the exploitative engagement of juveniles in work that endangers their health and development. These include **ILO's First Convention on Child Labour, 1919**, the **Forced Labour Convention, 1930**, and the **Minimum Age Convention, 1973**. The contents of these conventions and others will be revealed and discussed in detail in the following chapter when child labour legislation shall be dealt with.

⁶⁹ Article 32

⁷⁰ Article 15(1)

⁷¹ Article 10 (3)

In order to bring to light the nature and extent of violations of child rights as far as child labour is concerned, an in-depth examination of children's rights as enshrined in the **UN Convention on the Rights of the Child, 1989**, is necessary. In the Convention, these rights are clustered into rights of protection, rights to development, rights to participation and rights of survival.

Rights of protection include protection from discrimination,⁷² protection from all forms of abuse,⁷³ protection from economic and sexual exploitation⁷⁴ and lastly, protection of name and nationality and preservation of identity. Child labour is not only a form of economic exploitation of children, but also a form of sexual exploitation. This is true, bearing in mind the child sex workers thronging the streets, selling their bodies in order to eke out a living. To this extent, child labour is a form of child abuse. Succinctly stated, it is a direct violation of the rights of protection contained in the convention.

As recognized by the convention, the rights to development include the rights to parental love and care,⁷⁵ right to education,⁷⁶ rights to health,⁷⁷ protection of children without families⁷⁸ and the right of the child to social security. Child labour infringes the child's rights of development. Children of school-going age who spend most or all their time working instead of going to school are clearly denied the opportunities for their education, deprived of schooling and its associated benefits. The rights to health are also sunk to oblivion when children get engaged in hazardous work. From ~~our~~^{the} detailed analysis of the physical and psychological consequences of child labour, it is clear that this is a problem which has disastrous ends and needs to be rooted out since it poses a great risk to the health and general development of the child.

⁷² Article 2

⁷³ Article 19

⁷⁴ Article 30, 32, 33, 34, and 30

⁷⁵ Article 5, 9, 10, and 18

⁷⁶ Article 28 and 29

⁷⁷ Article 27

⁷⁸ Article 20

The rights of participation comprise of the right to expression,⁷⁹ freedom of association⁸⁰ and freedom of thought, conscience, and religion. It is quite evident that this right of participation is not much infringed by the practice of juvenile employment. The extent to which it might be infringed is in relation to the freedom of association. When the child toils for extraordinarily long hours, a large chunk of the little time he is free is often devoted to resting. So, by virtue of being imprisoned in work situations, he does not have time to associate with others whether generally or for purposes of joining worker's organizations such as trade unions.

As enshrined in the Convention, the rights of survival are concerned with the child's life being protected and ensuring that the child survives through proper health and nutrition. These include the right to life,⁸¹ right to health and health services⁸² and the rights to adequate standards of living.⁸³ Child labour jeopardizes the child's rights of survival. Hazardous work situations are detrimental to young workers' health.

Deadly fumes emitted in factories, pesticides used in agricultural plantations and the HIV virus (in the case of child prostitutes) pose a great danger to the life of a child.

In the municipal regime several legislative instruments provide for the legal protection of the rights of children. Kenya's fundamental law, the Constitution is the supreme law of the land and its provisions have binding force on all persons and authorities throughout the republic of Kenya. To promote good Government and welfare of all persons in the country, the Constitution at chapter five, what is popularly known as "**The Bill of Rights**" guarantees the protection of fundamental rights and freedoms of the individual. It reiterates this at section 70 when it states that

"...every person in Kenya is entitled to the fundamental rights and freedoms of the individual..."

⁷⁹ Article 12 and 13

⁸⁰ Article 15

⁸¹ Article 6

⁸² Article 24 and 25

⁸³ Article 27

From this provision, it is clear that all persons making up the citizenry of Kenya – including children – are covered. From section 70 to 83, the Constitution lists down these rights and freedoms. In this discussion, focus will be on the rights and freedoms which are violated by the exercise of child labour.

The Constitution recognizes the right to life, and guarantees that

“No person shall be deprived of his life...”⁸⁴

It also protects the citizens’ right to personal liberty.⁸⁵ From the hazardous nature of work in factories, industries and other similar places, the child’s life is usually in great danger from falling objects, deadly fumes and unfenced machinery. The child’s right to personal liberty is also in jeopardy, especially when the child works for extremely long hours so that what he is subjected to can be equated to slavery.

The supreme law of the land also recognizes the right of citizens to be protected from forced labour. Closely linked to this is the provision that

“No person shall be subjected to...inhuman...treatment.”⁸⁶

From available literature on child labour, it is evident that some work done by children is forced labour. A perfect example is bonded labour. In such a situation, children mercilessly toil against their will. Children are forced to work, are actually enslaved to work for the landlord contrary to what the Constitution provides.⁸⁷ This is so bad that it should be totally discouraged. In fact, it amounts to inhuman treatment. Forced labour also exists in the armed forces where during war, children are forced into the fray as participants. Child domestic workers may also be forced by their employers to do what, owing to their fragility, they cannot do.

Child labour is also a violation of the child’s freedom of expression. The Constitution stipulates that,

⁸⁴ Constitution of Kenya, section 71, (1)

⁸⁵ Ibid, section 72 (1)

⁸⁶ Ibid, section 73 (2)

⁸⁷ Ibid, section 74 (1)

“No person shall be hindered in the enjoyment of his freedom of expression, that is to say...freedom to receive ideas and information without interference...”⁸⁸

If a child is deprived of schooling just because he is working in a farm or a factory somewhere, his freedom to receive instruction and information is obviously interfered with. Further, a child bonded in exploitative work cannot enjoy his freedom of assembly, association⁸⁹ and movement.⁹⁰

Apart from the Constitution, other legislation on children’s rights also strive to provide for the welfare of the young as well as the treatment of young offenders. As will be discussed in the next chapter, some statutes ensure the protection of children at work. Violation of the child’s rights thus breach of provisions of the law comes into existence when employers do not follow such express provisions. All in all, child labour constitutes an outrage on, and a gross violation of, the physical and emotional integrity of the child.

1.6.0 CONCLUSION

This chapter commenced by an examination of the way the term ‘child’ has been defined in various statutes dealing with children matters. Child labour was then defined, noting that it hinges on the exploitation of young workers. Further, the causes and determinants of child labour were looked into. What emerged was that nearly all the causes were in one way or another tethered to poverty which, if rooted out, would mark the beginning of the road to the total eradication of juvenile employment. The consequences of child labour, both physical and psychological, were also discussed. Harrowing revelations of children getting blind, maimed, or being exposed to toxic substances was testimony of the plight of children labouring in hazardous circumstances. Lastly, the employment of minors was subjected to gross condemnation as a violation of the rights of the child both in the international and in the municipal regime.

⁸⁸Slavery is expressly prohibited by section 73(1)

⁸⁹Constitution of Kenya, section 79(1)

⁹⁰Ibid, section 80 (1)

CHAPTER TWO

INTERNATIONAL CHILD LABOUR LEGISLATION

Introduction

The exploitation of children, albeit in different forms, is universal. This is partly due to the subordinate status of children, whether it be as producers in developing states or as economic dependants in industrialized societies.¹ Any treatment of a child which amounts to exploitation is rarely due to the violation of a single right. Exploitation usually involves cumulative breaches of several fundamental rights, some of which we have had occasion to examine in the last chapter. These rights are equally essential for the healthy development and survival of the child.

The need for children to be protected against all forms of exploitation first appeared in the Declaration on the Rights of the Child 1924, 'the child must be protected against every form of exploitation,'² and was reiterated in the 1959 Declaration. The Convention **on the Rights of the Child** develops the concept further, highlighting specific forms of exploitation as well as incorporating a general prohibition against all forms of exploitation. But a major drawback to the efforts made in international law is that children lack an international forum in which to enforce their entitlements directly, having to rely instead on states and intergovernmental organizations.

In this chapter, what shall be examined is how international law deals with the economic exploitation of children.

Certain international instruments prohibit child labour. The **Minimum Age Convention 1973 No. 138** and the related **Minimum Age Recommendation 1973 No. 146**; the

¹ Elson, "The Differentiation of Child's Labour in the Capitalist Labour Market" in Development and Change vol. 13, p. 494

² Principle 4

United Nations Convention on the Rights of the Child 1989 and the UN General Assembly Declaration on the Rights of the Child 1959³ are key among them.

2.1.0 THE MINIMUM AGE CONVENTION 1973 NO. 138 AND THE MINIMUM AGE RECOMMENDATION 1973 NO. 146

The Convention concerning minimum age for admission to employment 1973, **Convention No. 138**, was adopted by the General Conference of the International Labour Organization to establish a general instrument applicable to all forms of work and employment on minimum age and to replace the existing applicable ILO treaties, which are limited to specific economic sectors. The standards have evolved with the years. The more recent conventions and recommendations progressively promote raised minimum ages for child workers. Consequently ratification or accession to **Convention No. 138** entails the denunciation of earlier more limited treaties.⁴

Convention No. 138 was not intended to be a static instrument establishing a fixed minimum standard but as a dynamic treaty encouraging progressive improvement.⁵ Article 1 places a duty on States Parties to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level which is consistent with a child's 'fullest physical and mental development.'⁶ Article 2 enshrines the fundamental principle that every state party should establish a minimum age for employment or work, subject to the possible exceptions provided for by the Convention. This minimum age should be specified in a declaration which should be appended to its ratification and should not be less than the age of compulsory schooling, and in any case not below 15 years.⁷ However, where a state party has an insufficiently developed economy and educational facilities, Article 2(4) allows the state party to set the minimum age initially at 14. States Parties which adopt the lower age are under a duty in their state reports on the application

³ Kabeberi J. 1990; You and the law – The Child Custody, Care and Maintenance – Oxford University Press.

⁴ Article 10, Convention No. 138.

⁵ Minimum Age for Admission to Employment, Report IV (I) International Labour Conference, 57th Session, Geneva 1912, p.31.

⁶ Article 1.

⁷ Article 2 (1).

of the Convention to verify that the reasons for establishing the minimum age at 14 still persist.⁸ Article 2(4) is only intended as a transitional measure to enable developing states to accede to the Convention and to work towards the adoption of a higher minimum age. This is made clear by ILO Recommendation No. 146 which provides that if a state's minimum age for its children to be engaged in any kind of employment is below 15, then as a matter of urgency states are recommended to raise it to 15.⁹

It is also open to a state party by means of a declaration to set its minimum age above 15.¹⁰ This is in conformity with the trend set by ILO Recommendation No. 146 which states that the objective of members should be to raise the minimum age to 16 for all sectors of economic activity,¹¹ and the **European Social Charter**, which provides that the working hours of those under 16 years of age should be limited in accordance with their development and with their need for vocational training.¹²

The minimum ages which international law establishes for child labour are closely related to the age of the completion of compulsory education.¹³ By providing that the age of admission to employment should not be lower than the age of completion of compulsory schooling, the possibility is removed of children being in legal employment whilst under a legal obligation to attend school. Additionally, if schooling were to end before children were legally entitled to work there might be an enforced period of idleness, particularly in states where to some children only the minimum education is available.¹⁴ **Convention No. 138** provides for lower minimum age where the educational services are insufficiently developed, but this provision does not meet the realities of the situation as both the accessibility and perceived benefit of education will influence the family decisions concerning child labour.¹⁵

⁸ Article 2(5) of Convention No. 138 No. 138 and Article 22 of the Constitution of the International Labour Organization on States parties' Reports.

⁹ Recommendation No. 146 recommends that a state should establish a minimum age at the same level for all sectors of the economy.

¹⁰ Article 2 (1) and (2).

¹¹ Paragraphs 6 and 7 (1).

¹² Article 7(4).

¹³ Article 2 of Convention No. 138.

¹⁴ ILO, Child Labour: A briefing Manual, 1983 p. 66.

¹⁵ Article 15 of the Social Policy (Basic Aims and Standards) Convention 1962.

It is open to a state to exclude limited categories of employment or work in which 'special and substantial problems of application arise.'¹⁶ When excluding such work or employment States Parties are under a duty to justify the exclusion. However, work which is likely to jeopardize the health, safety or morals of children cannot be excluded.¹⁷ The general survey by the Committee of Experts on the Minimum Age Convention found that the most common exclusion by states is work in family undertakings,¹⁸ followed by domestic service.¹⁹ Although there are enough understandable reasons for excluding these categories, it is not coincidental that in both of these areas children are subject to thorough economic exploitation. Even when a child is working as part of the family working unit, the family is not always able to protect the child, particularly where the family unit itself is subject to exploitation. Succinctly stated, despite adopting a broad definition of work and employment, international law in practice focuses on waged employment, excluding family work, domestic service and 'self-employment'. It is these forms of employment which are unregulated that are prone to exploitative practices. The well documented abuses in these areas highlights the need for the ILO to review exclusions for the purposes of domestic service and for family work, and to begin restricting the ambit of the exclusions, if necessary by a further treaty. Although the political difficulties will be great, the blanket prohibition on all forms of economic exploitation of children in the Convention **on the Rights of the Child** provides the ILO with an international legal framework within which to argue for restrictions on domestic service.

The protection of the Minimum Age Convention can be weakened by a state party whose economy and administrative facilities are insufficiently developed. Such States Parties are able to limit the scope of the Convention by stating that the Convention will not be applicable to specific branches of economic activity or types of undertaking.²⁰ It was believed that the only way **Convention No. 138** would be ratified by a large number of states, particularly developing states whose economies were not sufficiently developed,

¹⁶ Supra, note 12, Article 4 (1).

¹⁷ Ibid, Articles 4 (2) and (3).

¹⁸ International Labour Conference, 67th Session 1981. Report 11 (Part IV B). p. 26.

¹⁹ Ibid p. 28.

²⁰ Article 5(1) and (2) by specifying in a declaration appended to its ratification.

was to allow States Parties to exclude from its implementation specific sectors of the economy. However, this has turned out not to be the case and ironically the Convention has gaping holes in its net of protection.

The discretion of States Parties is not completely unfettered. It is not open to a state party to exclude the following economic activities: mining and quarrying; manufacturing; construction; electricity; gas and water; sanitary services; and transport, storages and communication. Plantations and other agricultural undertakings which supply produce for commercial purposes also cannot be excluded, although States Parties can exempt family and small scale holdings producing for local assumption and not regularly hiring workers.²¹

Article 6 provides that the Convention 'does not apply' to three situations: where children are involved in artistic performances; where children are employed in 'light work' provided that the work is not harmful, prejudicial or dangerous; and where children are in schools for vocational or technical training. Rather weakly **Convention No. 138** permits a state to enact national laws or regulations allowing the employment or work of 13-15 years of age for light work or 12-14 years of age for a state party which has specified 14 as the minimum age.²² Such permission is not necessary as the making of minimum age regulations is well within the states' domestic jurisdiction and the only justification for this codification of permission is to persuade states to establish the recommended minimum ages.

The Convention also exempts light work but the concept of 'light work' is undefined. In general terms, light work should not be likely to harm the health or development of children and must not prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority, or their capacity to benefit from such instruction. The hours and conditions for light work should be set, but the Convention is strangely silent as to the limits within which this

²¹ Article 3

²² Article 7

should be done. Although the concept of light works takes the health and the education of children into account, a definition of light work would lessen the opportunities for abuse and would strengthen this convention.

Further, the minimum age convention does not apply to work carried out by children for general, vocational or technical education or in other training institutions.²³

In addition to adopting instruments on the minimum age of admission to employment and work, the ILO has adopted a range of treaties which are designed to protect working children from conditions which are harmful to their development. The ILO conventions can be divided into three categories: those which prohibit the employment of children in certain occupations at night; those which require regular medical examinations and those which prohibit children from specific dangerous occupations.

Convention No. 138 prohibits 'any' type of employment or work which 'by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals' of the child.²⁴ The principal limitation of this convention is that it contains very few requirements on the conditions under which children should be allowed to work once they are eligible. This is in contrast to the European Social Charter, 1961, which contains a number of detailed conditions.

The **Minimum Age Convention No. 138** and the **Minimum Age Recommendation No. 146** were ratified by Kenya in 1979 to ensure effective abolition of child labour and raise progressively the minimum age for admission to employment to a level consistent with the fullest physical and mental development of children and young persons.

²³ Article 6

²⁴ Article 3(1)

2.2.0 THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 1989

The Convention on the Rights of the Child is one of the latest in a series of comparatively recent treaties which recognize that individuals have a status under international law and by which states agree to be bound in order to implement specific rights to all individuals and additional rights to specific groups of individuals.

In its preamble, the Convention bears in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20th November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. This is a pointer that all the above-mentioned international instruments recognize that childhood is entitled to special care and assistance.

Under Article 32 of the Convention, a state party is under a duty to take legislative, administrative, social and educational measures to protect children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, social or moral development.' The Convention goes on:

'States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admissions to employment;*
- (b) Provide for appropriate regulation of the hours and conditions of employment;*

(c) *Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.*²⁵

It is not sufficient for a state merely to raise the minimum age; it is also incumbent upon it to ensure that social pressure will not give rise to *de facto* situations making children below that age more vulnerable to exploitation. The provisions on economic exploitation and minimum ages in the Convention **on the Rights of the Child** are not restricted by the standards of **Convention No. 138**. Article 32(1) of the Convention enshrines a general recognition of the right of the child to be protected from economic exploitation and from performing 'any work' likely to be hazardous. The words 'any work' do not automatically exclude domestic or agricultural work, so the field of application is wider. The right of the child to be protected from economic exploitation includes the right to be protected from economic exploitation where it occurs within the state party's jurisdiction. If exploitation of children occurs in any economic sector, be it domestic or agricultural, then under Article 32(2) (c), even if a state party has excluded a particular economic sector from the ambit of **Convention No. 138** it will still be under a duty to provide for appropriate penalties and other sanctions under the Convention **on the Rights of the Child**. The Convention was ratified by the Kenya Government in 1990.

2.3.0 THE UNITED NATIONS ASSEMBLY DECLARATION ON THE RIGHTS OF THE CHILD, 1959

The relevant part of this declaration is Principle 9 which states that

"The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or, interfere with his physical, mental or moral development."

This declaration is undoubtedly in line with **Convention No. 138** (especially when considering the minimum age) and the UN **Convention on the Rights of the Child** (on work prejudicing the health and education of the child).

²⁵ Article 32(2)

2.4.0 OTHER INTERNATIONAL DOCUMENTS ON CHILD LABOUR

Apart from the ones discussed above, there are also other international legal documents touching on child labour.

The Convention **for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949**, endeavours to thwart efforts to encourage child prostitution by providing punishments against any person condoning this practice²⁶ and also urging each party to the Convention to

“take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in...prostitution are subject either to special registration or to the possession of a special document” apparently validating or legalizing such a horrible practice”.²⁷

Other instruments include the **European Recommendation on the Fight Against Drug Abuse and Trafficking 1984** and the **Stockholm Declaration and Agenda for Action Against Commercial Sexual Exploitation of Children 1996**.²⁸ Regionally, there is the **African Charter on the Rights and Welfare of the Child**. It notes with concern in its preamble that the situation of most children in Africa remains critical due to the unique factors of their socio-economic, cultural, traditional and development circumstances, natural disasters, armed conflicts and hunger. It recognizes that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his/her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding. Thus, on account of the child's physical and mental immaturity, he/she needs special safeguards and care.

The Charter extensively addresses child labour at Article 15. It is very similar to Article 32 of the United Convention on the Rights of the Child which has been discussed already. Article 15 states that every child shall be protected from all forms of economic

²⁶ Article 2,3 and 4

²⁷ Article 6

²⁸ Bueren G.V. International Documents on Children, Kluwer Law International, 1988, p. 371

exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. In particular, States Parties are enjoined to take all appropriate legislative and administrative measures to ensure the full implementation of the Article which covers both the formal and informal sectors of employment. Having regard to the relevant ILO instruments relating to children, the parties are to provide, through legislation, minimum ages for admission to every employment; provide for appropriate regulation of hours and conditions of employment; provide for appropriate penalties or other sanctions to ensure the enforcement of the Article; and, promote the dissemination of information on the hazards of child labour to all sectors of the community.

2.5.0 CONCLUSION

From the discussion in this chapter, it is evident that international law recognizes the need to protect children against all forms of economic exploitation. This is manifested in the various international legal instruments that have been critically examined. Thus, the plight of working children has been paid attention to at the international level and all efforts possible are being concentrated on the regulation of the conditions of working children, and the eventual elimination of child labour, especially the worst forms of child labour.

CHAPTER THREE

HISTORICAL DEVELOPMENT OF CHILD LABOUR LEGISLATION IN KENYA

3.1.0 THE PRE-COLONIAL ERA

Child work existed in Kenya during the pre-colonial period. However, the form of child work was mainly part of the cultural socialization process which enabled children to acquire roles and responsibilities for adulthood. Indeed, by the time children were five or six years old, they were thought to be responsible enough to manage younger children at home during a mother's short absence.¹ Thus girls assisted their mothers in their duties while boys assisted their fathers. It is not that children had a great deal of spare time which allowed them to be children. In addition, they were not overworked and seldom took the place of adult labourers. Most often they worked alongside and under the supervision of adults.

Available information indicates that during the pre-colonial period, most communities in Kenya were organized in such a way that children were carefully taken care of for their physical, social, psychological and spiritual development. Indeed, a great wealth of knowledge was communicated to children through the simple process of working beside the parents besides other avenues such as folklore. The youngsters were taught, for instance, how to select seeds for reserve planting in the next season, how to relate to adults and other members of the society and other aspects of day-to-day life.

One can therefore see a situation where work by children was neither exploitative nor abusive and consequently there was no need for intervention to try and save children from unfair exploitation and abuse by the older members of the society. Indeed, there was no commercialized labour as is there today in Kenya.

¹ Kayongo M.D. and Walji P., Children at Work in Kenya, Nairobi, Oxford University Press, 1984, p.1

3.2.0 THE COLONIAL PERIOD

Colonialism in Kenya introduced some drastic changes in the way different communities organized their lives. The role of the family socializing children was dismantled without a suitable replacement. A major shift in the family division of labour occurred. The introduction of western lifestyle, the capitalistic mode of resource use and exploitation brought about the exploitative form of child labour which expropriated the labour of children for little or no return.

It is significant to note that government policy during the colonial period was to make the economy of Kenya colony self-supporting through the development of the agricultural sector, and to develop the agricultural sector effectively there was need to utilize the local people in the quest for production. A problem presented itself in that the natives refused to work for the settlers. The colonialists resorted to employing a variety of methods to make Africans work in their large holdings. Some of the methods used were forcefully taking away land, forced labour and taxation. The settlers considered that the protectorate administration should apply legislative, administrative and financial pressure on the Africans to induce them to go and work on European farms.² The 'Ainsworth Circular' of 1919 forcefully stressed the duty of administrative officers to use insistent advocacy to get Africans- women and children included-out of the reserves to work in European farms. Child labour increased.

The introduction of Hut Tax in Kenya in 1901 was a major indicator of the direction child work took in Kenya. tax was to be paid by money, thus many men left home to seek work elsewhere, which forced women to turn to child labour to replace their fathers'. Child labour was thus a significant input towards production in the agricultural sector. This was precisely what the colonizer desired. No wonder the law against child employment was silent about their engagement in the sector.

Most of the children aged between sixteen and fourteen worked in very difficult and abusive situations until protests, mainly from the church were voiced. When the attention

² Ibid.

of the colonial policy to encourage child employment was brought to the ILO, the matter was more seriously addressed. This culminated in the formation of the employment of juveniles committee to try and reduce or eliminate child labour. The Juvenile Committee identified the dangers of working children as: absence of parental control; destabilization of family systems; exploitation of children by parents for cash; development of maladaptive behaviour; child abuse.

When the matter was exposed, laws were enacted to rehabilitate child workers. This was meant to be in line with the ILO Convention on the abolition of forced labour. The lack of legislation in the pre-juvenile committee days was brought to light in the case of **Isaji Manuiji –v- Mzee Bin Ali**.³ The issue was whether a 10 years-old boy had the capacity to enter into a contract for personal service, that is, a domestic house servant. The court stated that no law on a native ~~avian~~ ^{African} child was in existence and hence reference had to be made to English Common Law. Under Common Law, an infant generally lacks the capacity to contract and so also to enter a contract of employment.

In Kenyan history, the **Master and Servant Ordinance 1910** was one of the earliest laws to be enacted addressing the plight of workers. In this Ordinance, the word 'servant' meant any Arab or native employed and included any Arab or native apprentice.⁴ The word 'native' meant a native of Africa, not being of European or Asiatic race or origin. From this, it is clear that the enactment did not consider any European or Asian to be a servant, but only Africans and Arabs. Despite the fact that neither 'child' nor 'young person' was defined, it provided for apprenticeship of children by parents or guardian or by a magistrate,⁵ in order that the child could learn skills, including commercial labour. The consent of such a child was to be considered. Under the Ordinance, there were penalties against either whoever attempted to take or took apprentices from the protectorate without the Provincial Commissioner's authority or for whoever attempted to or induced any apprentice to quit the service of his employer.

³ (1917) 7 KLR p. 38 CJ Hamilton

⁴ (1910) sec. 2

⁵ Ibid, ss. 16 and 17.

Then came the **Employment of Women, Young Persons and Children Ordinance, 1933**⁶. It defined a 'child' as a person under the age of 14 years and a 'young person' as one who had ceased to be a child and who was under the age of 18 years. On the employment of children, the Ordinance provided at Section 4(1) that

“No child under the age of 12 shall be employed in any industrial undertaking.”

It also prohibited the employment of a child in attendance on any machinery or in any open cast workings or sub-surface, workings which are entered by means of a shaft or adit.⁷ The Governor in Council could by order prohibit the employment of any child in any specified trade or industrial undertaking.⁸ Under the Ordinance, the employment of any young person at night in any industrial undertaking was expressly prohibited. Under sec. 4(b),

“Where young persons are employed in any industrial undertaking, a register of the young persons so employed, of their ages or apparent ages, and of the dates on which they enter or leave the service of their employer, shall be kept.”

Under Section 5(1), no young person could be employed on work as a trimmer or stoker in any ship. To ensure compliance with the Ordinance, for example, under Section Sec. 6 (1), if any person employed a child or a young person in any industrial undertaking in contravention of the Ordinance, he was to be liable for each offence to a fine not exceeding two pounds. The agricultural sector was conspicuously ignored by the Ordinance.

The **Employment of Natives Ordinance of 1936** had some of its Sections specifically protecting children, namely Section 20(1), Section 25, and Section 27. Parental authority for a child to work was preserved for children up to 16 years of age. It is important to observe that Section 25 to Section 27 apparently legalized the employment of juveniles at the age of 16 years by making such children liable to penal sanctions for breach of labour

⁶ The date of commencement of this Ordinance was 5/5/33

⁷ Sec. 4 (2)

⁸ Sec. 4 (3)

contract. There was also the **Employment of Women, Young Persons and Children (Amendment) Ordinance, 1936** which effected amendments to Sections 2 and 3 of the **Principal Ordinance**, that is the former **1933 Ordinance**.

Child labour seemed to have been discouraged by the **Compulsory Labour Regulation Ordinance**⁹, which was an Ordinance to regulate and control the use of compulsory labour. It provided that

*“Only adult able-bodied males, who are of an apparent age of not less than 18 and not more than 45 may be called upon for compulsory labour.”*¹⁰

So, it expressly excluded children.

In 1937, the Colonial Government legislated the **Employment of Servants Ordinance**. It was to facilitate the exploitation of labour within legal limits. It defined a juvenile as an Arab, a Baluchi born in Africa, a Comoro Islander, a Somali or a native who had not reached the apparent age of 16 years.¹¹ It was not to apply to white children. Under Section 28(3), a child of 10 to 12 years could be employed in light work. This Ordinance was amended by the **Employment of Servants Ordinance (Amendment) No. 16 of 1939**.¹² The **Mombasa Shop Assistants’ Employment Ordinance** whose commencement date was 1st February 1938 made provisions for regulating the employment of shop assistants in the Municipality of Mombasa. At Section 3, the definition of ‘shop assistant’ impliedly included children.

In 1948, a bill introduced in parliament amended and supplemented the **1933 Employment of Women, Young Persons and Children Ordinance**.¹³ No child could be employed in an industrial undertaking. Under the new ordinance, Section 6 provided that the Governor in Council could by notice prohibit any employment agreement with a child. Section 7 prohibited the employment of young persons under 16 years in any

⁹ Cap 112 Laws of Kenya : Commencement date: 31/12/32

¹⁰ Ibid., section 6(1)

¹¹ Sec. 2

¹² Kenya Gazette, July 25th, 1939

¹³ **Employment of Women, Young Persons and Children Ordinance** No. 7, September 20, 1948

industrial undertaking during the night. (But such children could work in cases of emergency or in public interest.) No person could be employed in a ship, except where the ship was a school or training ship.¹⁴ Under Section 12, a child could not be employed in a ship as a stoker or trimmer. The Ordinance raised the minimum age of employment from 14 to 15 years in line with the **ILO Minimum Age for Admission into Employment Convention (ILO Minimum Age Recommendation, 1919)**. But only the raising of the minimum age of employment served to absorb more children in employment.

In 1952, the Kenya Colonial Government's policy towards the employment of children changed. Indeed, child labour declined to about 10% of the total labour force. This was also the time of emergency and more effort was concentrated towards the war for independence. Consequently, the issue of child labour was almost forgotten. It is important to note that during this time, the government enacted the **Employment of Juveniles (Hours of work and Welfare) Rules 1952**, specifying a six-hour day for working children.

In 1956, amendments were made to the **Employment Of Women, Young Persons and Children Ordinance**.¹⁵ This included the incorporation of recommendations given by the **Slade Commission to the ILO Conventions Committee** regarding juvenile employment. A child was now defined as one under 16 years and young person§ was one over 16 years but below 18 years old. This ordinance became an Act of Parliament at independence and remained so until 1976 when it was repealed.

Towards independence, most children went to seek employment not because they were being forced to but because their parents were poor. Thus the cause of child labour in Kenya shifted from forced labour to poverty-oriented child labour. Poverty acted as the push factor, unlike before when economic production needs and profit maximization were the push factors.

¹⁴ Ord. No. 7 of 1948, sec. 11

¹⁵ **Employment of Women, Young Persons and Children (Amendment) Ordinance**, No.12 of March 12, 1956

3.3.0 THE POST-COLONIAL PERIOD

At the end of the colonial period there were about 11,000 children in employment in Kenya and by 1966 the figure had dropped to about 8,000. This is a clear indication that the trend towards the employment of children at independence had changed. The new government's initial objective was to take 3 major issues i.e. poverty, ignorance and disease. In effect, therefore, major policies towards providing basic education were put in place. Most parents thus opted to take their children to school rather than let them work.¹⁶

Though there existed no direct policy aimed at eliminating child labour as such, indirectly efforts were being made by the new government to stamp out child labour. Although this led to the minimization of child labour in some sectors such as agriculture, it was not by any means completely wiped out as many employers turned to illegal employment of children.

Due to priority being given to other sectors of Kenya's economy, even at present, there is no properly stated policy on child labour in the country.

This, coupled with the fact that no baseline survey has ever been carried out to establish precisely how many children are working in Kenya and in which sectors and what the working conditions are, most people who have commented on the issue or those working towards the elimination of child labour have relied on single sectoral surveys and media reports. However, it can be ascertained from studies conducted that child labour exists in Kenya.

3.4.0 PRESENT-DAY KENYAN LEGISLATION ON CHILD LABOUR

The specific purpose of child labour laws is to safeguard children against risk of injury generally associated with child labour such as exposure to hazardous, unsanitary conditions and overwork, and to protect children from performing any work that is likely to interfere with their education or to be harmful to their development. At present, there

¹⁶ 1970 saw a decline in the number of child labour due to the abundant supply in the labour market.

are quite a number of statutes protecting children against economic exploitation. It will be realized that these laws do not strive to completely root out child labour. It cannot be denied that Kenyan legislation has tried to protect children against unfair and abusive working conditions. But to say the truth, the law does not prohibit the employment of children. Without veering off the path of the discussion, the current Kenyan legislation on child labour will be now looked at.

3.4.1 The Employment Act¹⁷

This is an Act of Parliament since 3rd May 1976 and aims at the consolidation of the law relating to employment and matters that are incidental and connected with this purpose.¹⁸

The Act recognizes that children as workers have a right to be protected. It defines a juvenile as a child or young person. 'Child' means a male or a female who has not attained the age of 16 years. An 'employee' means an individual employed for wages or salary and includes an apprentice and an indentured learner.¹⁹

Part IV²⁰ of the statute is specifically aimed at providing for the employment of women and juveniles. It provides²¹

“no person shall employ a child, whether gainfully or otherwise in an industrial undertaking.”

Industrial undertaking is defined²² to include mines and quarries, a factory, the construction, maintenance, repair, alteration or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway...and other work of construction as well as the preparation for or laying of foundations of any such work or structure; transport of passengers or goods...including the handling of goods at docks, quays, wharves and warehouses. This, however, does not apply to the employment of a child in an industrial undertaking under a deed of apprenticeship or indentured learnership

¹⁷ Cap 226, Laws of Kenya

¹⁸ Preamble, Cap 226

¹⁹ Section 2

²⁰ Section 24 to 37 (The 1933 **Employment of Women, Children and Young Persons Ordinance** was repealed in 1975 and is now incorporated in the **Employment Act** as Part IV.

²¹

²²

entered under the Industrial Training Act.²³ Additionally, this part of the Act does not apply to an industrial undertaking in which only members of the same family are employed, unless the employment, by its nature or circumstances in which it is carried on, is dangerous to the life, health or morals of the persons employed therein, or any technical school or institution which is for the time being approved and supervised by a public authority.²⁴

It is an offence for a person to employ a child or cause a child to be employed, or being the parent or guardian or other person having for the time being in charge of or control over a child, allows the child to be employed otherwise than by a verbal contract of service.²⁵ This is however subject to the provisions of Cap 237 relating to contracts of apprenticeship and indentured learnership. Only a child serving under a contract of apprenticeship or indentured learnership as provided for under the **Industrial Training Act** shall be employed in an industrial undertaking in attendance of machinery.²⁶ However, no child shall be employed in any open-cast workings or sub-surface workings which are entered by means of a shaft or adit.²⁷

No child shall be employed between 6.30 p.m. and 6.30 a.m. in an industrial undertaking.²⁸ However, this provision can be overridden in cases of a serious emergency when public interest demands it, by a notice in the Gazette by the Minister in so far as it affects male young persons.²⁹ Moreover, male young persons may be employed within these hours in cases of emergencies which could not have been controlled or foreseen which interfere with the normal working of the industrial undertaking and which are not of a periodical nature.³⁰ Furthermore, the Minister may authorize conditionally or otherwise in writing after consultation with the Labour

²³ Section 25(1)

²⁴ Under Section 24 (2)

²⁵ Cap 237, laws of Kenya

²⁶ Section 24 (1)

²⁷ Section 26

²⁸ Section 27 (1)

²⁹ Section 27 (2)

³⁰ Section 28

Advisory Board (established under Section 3 of the Act) an employer to employ young persons up to the hour of midnight or from the hour of 5. 00 a.m.³¹

Every employer who employs a juvenile shall keep and maintain a register containing the following particulars of every juvenile employed: age or date of birth; date of entry into and of leaving employment; and such other particulars as may be prescribed.³² An authorized officer may require any juvenile in employment to be medically examined at any time during the period of his employment.³³

A labour officer may, by notice in writing served upon a person, prohibit that person from employing a juvenile or employing a juvenile in any class or description of employment specified in the notice, or terminate or cancel any contract of service³⁴ which has been entered into by any juvenile with the employer. This may be on the grounds that, in the opinion of the officer, that person is an undesirable person, or that the nature of the employment is dangerous or immoral, or is likely to be injurious to the health of the employee, or any other cause which may be prescribed.³⁵

The penalty for contravening the provisions of this part of the Act is a fine not exceeding one thousand shillings, or in the case of a second or subsequent offence, of two thousand shillings.³⁶

The death or bodily harm of a juvenile as a result of the contravention of this part shall make the employer liable, in addition to any other penalty, to a fine not exceeding four thousand shillings, or in default of payment, for a term not exceeding six months imprisonment; and the whole or any part of the fine may be applied for the benefit of the injured person or his or her family or otherwise as the Minister may direct.³⁷

³¹ Section 29

³² Section 28 (1)

³³ Section 28 (2)

³⁴ Section 31

³⁵ Section 32

³⁶ Other than a deed of apprenticeship or indentured learnership lawfully entered into under the provisions of the industrial training act.

³⁷ Section 34 (1) and (2)

At Part IV Section 56, the Minister for Labour is given vast powers in controlling and regulating employment. In this case, there is a subsidiary legislation providing rules. It is cited as the **Employment (Children) Rules**.³⁸ These rules contain therein apply to any type of employment except employment as an apprentice or indentured learner.³⁹ It is provided that no person shall employ a child without the prior written permission – which permission is to be renewed annually- of an authorized officer.⁴⁰ No such permission shall be given to employ a child in such circumstances as would cause a child to reside away from the parents or guardian (unless the permission of the latter to such employment has been obtained in writing); or in any bar, hotel, restaurant or club where intoxicating liquor is sold or anywhere as a tourist guide unless the Labour Commissioner has consented in writing to the employment and the child is in possession of a copy of the consent.⁴¹ It is an offence to employ or cause a child to be employed without the prior written consent of an authorized officer.⁴² Every person authorized to employ more than ten children on a permanent basis shall designate a person, to be approved in writing by the Labour Commissioner, to be responsible for the welfare of the children.⁴³

The **Employment of Juveniles at Sea (Medical Examination) Rules** provide that no juvenile shall be employed in or on any ship other than a ship upon which only members of one's family are employed without the production of a medical certificate attesting to that juvenile's fitness for such work, signed by a medical practitioner.⁴⁴ Such a certificate is only valid for a year, except where it is due to expire during the course of a voyage,⁴⁵ and the continued employment of every juvenile at sea hinges upon the production by him each year of a further medical certificate attesting to his continuing fitness for work.

³⁸ Section 35

³⁹ Section 37

⁴⁰ L.N. 155/1977

⁴¹ Rule 2

⁴² Rule 3(1)

⁴³ Rule 3(1) (i) and (ii) and (2)

⁴⁴ Rule 3(3)

⁴⁵ Rule 4

Failure to comply with the above rules invites penalties. Any person who fails to comply with any of the rules contained in the **Employment (Children) Rules** shall be guilty of an offence and upon conviction, shall be liable to a fine not exceeding four thousand Kenya shillings. Likewise, any person who contravenes any provisions of the employment of **Juveniles At Sea (Medical Examination) Rules** shall be guilty of an offence and upon conviction, shall be liable to a fine not exceeding three thousand Kenya shillings.

3.4.2 The Regulation Of Wages And Conditions Of Employment Act ⁴⁶

This Act of Parliament since 7th April 1951 applies to all types of employment and provides the minimum conditions under which persons can be employed. These include basic minimum wages and house allowance; working hours and days in a week; holidays and annual leave. Regulations made under this Act provide for these conditions as well as others, for example, sick leave, study leave, and maternity leave for women on account of pregnancy. The statute defines wages payable to both adults and children under the age of 18 years which include apprentices and indentured learners. Significantly, the Act provides for the establishment of Wages Councils whose main mandate is to advise the Minister on minimum wages and related conditions in different sectors.

The minimum wages for any particular sector are contained in Wages Orders periodically made under the Act.⁴⁷ One of the main orders made under Section 11 of the statute is the **Regulation of Wages (General) Order, 1982.**⁴⁸ Apart from the general conditions of employment, this order provides that a minor of sixteen years and below shall not work for more than six hours a day.⁴⁹ It also provides for periodic review of wages earned by minors. General observation however, indicate that many apprentices and indentured learners are paid nothing but they pay for the services or training they receive instead.

⁴⁶ Rule 3

⁴⁷ Rule 4

⁴⁸ Cap 229, Laws of Kenya

⁴⁹ Subsidiary Legislation

The Order states that the weekly rest day of a person under the age of sixteen shall not be deferred.⁵⁰

3.4.3 The Industrial Training Act

There are many provisions touching on children in the Act. The purpose of the **Industrial Training Act**⁵¹ is to make provision for the regulation of the training of persons engaged in industry.⁵² The statute does not, hence, require an apprentice or indentured learner to be a minor.⁵³ Indeed, it provides that a minor shall not bind himself as an apprentice or indentured learner except with the consent of his parent or guardian, or if there is no parent/guardian with the consent of the District Officer or labour officer.⁵⁴ But the person must have attained the apparent age of 15 years and must have completed any period of compulsory education required by law.⁵⁵ This same consent for minors is required in cases where a contract is to be extended or terminated by mutual agreement of the parties.⁵⁶ Under this Act, no person is to employ an indentured learner or an apprentice without first having obtained the written permission of the Director of Industrial Training to do so, otherwise, he shall be guilty of an offence.⁵⁷ The Act also nullifies, subject to any other law in force, any term of a contract of apprenticeship or indentured learnership or any condition of apprenticeship or indentured learnership which requires an apprentice or indentured learner under seventeen years of age to work overtime.

Under Section 22 A(1), every employer of apprentices or indentured learnership shall appoint from among his employees a person responsible for supervising generally the training of such learners. Failure to comply with this requirement is an offence. The

⁵⁰ L.N. 120/1982

⁵¹ Section 5(3)

⁵² Section 7(ii)

⁵³ Cap 237, Laws of Kenya

⁵⁴ Preamble, Cap 237

⁵⁵ 'Minor' is defined Under section 2 as a person under the age of 15 years

⁵⁶ Section 8 (3)

⁵⁷ Section 8 (1) (a) and (b)

offender shall be liable to a fine not exceeding Kshs. 6,000 or to imprisonment for a period not exceeding six months, or to both.⁵⁸

3.4.4 The Employment Of Women, Young Persons And Children's Act⁵⁹

This Act dating as far back as 20th September, 1948 regulates the employment of Young Persons and Children, among other pertinent things. At Part II, the Act restricts the employment of children and young persons in prescribed industrial undertakings.⁶⁰ The statute also vests in the president of the Republic of Kenya ^{the power} to prohibit employment of children in certain economic sectors.⁶¹ At part IV, penalties I, II and III and provisions. Part V contains provisions for the employment of children for issuance and cancellation of permits, maintenance of registers for the employed children and medical examination for fitness to work. At part VI, the Act provides for powers of entry to carry out inspection where, it is believed that children are at work, confirmation of age and prosecution of the offender.

3.4.5 OTHER ACTS

Certain statutes implicitly touch on the plight of working children and seek to liberate them from the shackles of extreme and chronic exploitation.

The **Trade Unions Act⁶²** was gazetted and incorporated in the laws of Kenya on 1st August 1952, providing for staff associations, employees associations and organizations. Part VI Section 28 provides for minors under the age of 21 but above 16 years to become members of Trade Unions and enjoy all rights of membership.

The **Trade Disputes Act,⁶³** was gazetted as an Act of Parliament on 8th June, 1965, consolidating and amending the laws relating to the settlement of trade disputes. The statute provides for the class of employees to be excluded from its provisions. By

⁵⁸ Section 13 (1) (6)

⁵⁹ Section 6(1) and 7 (1)

⁶⁰ Section 28

⁶¹ Cap 227, Laws of Kenya

⁶² Section 4 and 5

⁶³ Section 6

employing the term 'any person' in the definition of an employee, the Act implicitly includes children. Thus they can seek protection under this piece of legislation.

The **Children and Young Persons Act**⁶⁴ seeks to protect children from abuse, either physical, sexual or mental; abandonment, ill treatment or neglect by either a parent or a guardian. Child labour has recently been equated to child abuse so it falls within the ambit of legal protection provided under this statute. Where a person commits an offence of child abuse, he or she is guilty and is punishable by a fine of Kenya shillings 5,000 or, in the alternative, the offender may be imprisoned for a term of not more than six months, or both.⁶⁵ Children's officers are empowered to bring such offenders to court as necessary.

Under the statute, no child may be employed before he has attained the age two years below the upper limit of primary school age nor before the close of school hours on any day he is required to attend school nor more than two hours on any day he is required to attend school.⁶⁶ These prohibitions, however, do not apply to anyone twelve years old or over, taking part in a performance or entertainment as long as the public is not admitted.⁶⁷

The **Education Act**⁶⁸ is designed to provide for the regulations and progressive development of education.

According to it, all children should be in school and should not work instead going to school.

The **Workmen's Compensation Act**⁶⁹ was gazetted and incorporated in the Laws of Kenya as an Act of Parliament on 18th October 1949. It provides for compensation to workmen for injuries suffered in the course of their employment, whether it be a contract

⁶⁴ Cap 233, Laws of Kenya

⁶⁵ Cap 234, Laws of Kenya

⁶⁶ Cap 141, Laws of Kenya

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

of service or apprenticeship with an employer; whether the contract is express or implied, is oral or in writing; whether the remuneration is by work done or whether by time. Liability to pay the compensation is provided by Section 36 of the Act. This statute does not exclude children and young persons in the event of injury while at work. This is evident in the definition of ‘workman’⁷⁰ which implicitly includes children too. Children are not among the persons expected from the definition.⁷¹

3.5.0 CONCLUSION

The discussion in this chapter has centered on both municipal and international child labour legislation. It was clear that there are numerous international instruments addressing the issue of child to the numerous ILO Conventions and recommendations. On the other hand, the African Charter on the Rights and Welfare of the Child represents the regional concern for the plight of children at work. The historical development of child labour legislation in Kenya was also traced.

It is evident that Kenyan legislation recognizes that children, due to their subordinate status owing to physical and intellectual immaturity, are vulnerable to economic exploitation. In seeking to shield children against child labour, the various Acts of Parliament provide for the humane treatment of juveniles engaged in work.

⁷⁰ Cap 211, Laws of Kenya

⁷¹ Cap 236, Laws of Kenya

EFFICACY OF THE LAW

Introduction

Even though child labour laws are not in themselves adequate to eliminate child labour, they are potentially one of the most powerful instruments available to governments to deal directly with the workplace endangerment of children.¹ The basis for any approach to child labour is effective legislation. Laws provide a yard stick for what is and is not permissible in the world of work and thereby provide a framework for establishing a fair and just employment relationship. Their role is especially critical in the protection of children who have virtually no negotiation power in the labour market and are therefore the least able to protect themselves.

Legislative commitments require collective monitoring and enforcement measures to ensure that child labour particularly in its extreme forms is abolished. It is widely recognized that the weakness of enforcement mechanisms present a major obstacle to effective legal protection against child labour. Even countries that have progressive child labour laws commonly find it quite difficult to put them into practice.² This chapter strives to provide concrete proof that there has not been much success in the application of legislation in Kenya with a view to eliminating child labour.

4.1.0 OBSTACLES IN THE FIGHT AGAINST CHILD LABOUR

4.1.1 Drawbacks In Legislation

In Kenya, labour laws pertaining to children are found scattered in numerous statutes and subsidiary regulations, which are so detailed that violations cannot be effectively monitored. This scattered nature of the law depicts lack of focus. There is conspicuous absence of a single statute outlining the rights of the child and giving comprehensive

¹ A. Bequele and W.E. Myers: First Things First in Child Labour: Eliminating Work Detrimental to Children, Geneva ILO, 1995

² Ibid.

provisions on child labour. In fact, there is no such rule or law mentioning 'child labour' concept *per se* though it is implied in the numerous employment Acts and Regulations.³ Further, the existing Acts vary greatly according to the child's age, something that is very difficult to prove in communities where many children do not even have a birth certificate.

In many instances, there has been failure to comply with relevant labour laws intended for the protection of children. For example, although the Kenya Employment Act⁴ expressly prohibits the employment of children without the prior written consent of an authorized officer or local labour officer,⁵ quite a large number of children still continue to work notwithstanding the fact that such prior consent has not been sought.

Many cited statutes were enacted without the rights of children in mind. Attempts by the Kenyan personal laws to accommodate various cultures and religious persuasions creates confusion and contradictions. Examples are sections 78 and 82 of the Kenyan Constitution touching on personal freedom and protection from discrimination respectively. Therefore, the rights of a child are determined partly by statutory law and partly by the law, which governs the family in which the child is born.

To ensure compliance with the law, the various statutes set out penalties against violators. As was extensively discussed in the preceding chapter, Part IV of the Employment Act deals with the employment of children. The penalty set out in the Act is a fine not exceeding one thousand shillings, or in the case of a second or subsequent offence, of two thousand shillings. Such fines are too low to deter employers from engaging children in work in prohibited undertakings. If, for instance, a child helps an employer earn, say 50,000 shillings' profit from his business, paying 1000 or 2000 shillings as fine does not exert the kind of pain required to permanently deter the employer from further employing juveniles in these circumstances. In fact, this whole

³ COTU, 1996: Combating Child Labour in the Context of Trade Unions in 1996/97 and Beyond, Report of Child Labour Seminar, February 1996 – Kasarani, Nairobi.

⁴ Cap 226, Laws of Kenya

⁵ Rule 3(1), Employment (Children) Rules

idea of payment of fines appears to be a system of revenue collection by the government since an employer could keep on paying, at the same time continuing to employ juveniles. But even with such legal provisions in place, child labour is still rampant in Kenya. Part IV of the Employment Act should be reviewed and stricter penalties are to be provided.

It is indeed sad that the death or bodily harm as a result of the contravention of part IV of Cap 226 shall make the employer liable only to a fine not exceeding 4000 shillings or to imprisonment for a term not exceeding six months. This is clear evidence of the lack of seriousness in Kenyan legislation in making efforts concentrated towards regulation and abolition of child labour. It is my submission, therefore, that the penalty should be more harsh.

The Employment (Children) Rules⁶ only camouflage the employer's exploitation because they tend to mean that once an employer has complied with them, he can go ahead and wantonly exploit the child under his employment. Though they attempt to, the rules do not protect children adequately chiefly because they do not spell out the substantive rights and duties of a child worker in a service contract.

There are various legislation in Kenya giving minimum ages as pertains to child employment. These minimum ages refer to non-family labour, yet it is within residential houses that most children today are employed (mostly as domestic servants). It is quite surprising that there tends to be more legislation dealing with work in industry than in agriculture. Indeed, children's work in the informal sector is by nature minimally covered by legislation,⁷ yet many employers of children are in the informal and domestic sectors! Further, large numbers of working children, including those toiling in the most hazardous conditions are not covered by child labour laws.⁸

⁶ L.N. 155/1977

⁷ Supra, note 1

⁸ Ibid.

Under Part IV of the Employment Act, it is an offence for a person to employ a child or cause a child to be employed otherwise than by a verbal contract of service.⁹ Miss Christine Tongoi, Legal Officer at the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) says that this is very unfair since in case of a claim of the violation of the child's rights while under employment, it is difficult to prove that there was a verbal contract of service between the employer and the child. This is because of lack of concrete proof that such a contract existed.

Section 25(1) of the Employment Act stipulates that no person shall employ a child in an industrial undertaking. This, however, does not apply to the employment of a child in an industrial undertaking under a deed of apprenticeship or indentured learnership.¹⁰ Such a provision does not offer to the child adequate protection from exploitation since some unscrupulous employers avoid the payment of wages by exploiting children for years in the guise of apprenticeship.

4.1.2 Weakness in the Labour Inspection System

Labour inspection is the process whereby labour inspectors visit any place where an employer-employee relationship exists to investigate whether the requirements of the law as laid out in the various employment statutes are obeyed, or not. In other words, they are supposed to enforce compliance with all aspects of working conditions as required by the various statutory provisions. Such visits are usually executed during working hours, thus even factories and bars can be visited. So long as work is being done during those hours. These inspectors can penalize any employer who is in violation.

It is a requirement that each inspector or labour officer should make twenty visits per month.¹¹ These labour inspectors are employed under the Ministry of Labour and

⁹ S. 36

¹⁰ Ibid

¹¹ Supra, note 3

Manpower Development. The inspectors normally carry a questionnaire with themselves which they are required to fill up concerning wages, rates and related matters.¹²

The establishment of the labour inspection system by the government is a positive step to ensure that children work under humane conditions and to minimize their economic exploitation. But despite the fact that such a system exists, there are some obstacles to effective child labour inspections in Kenya.

To begin with, labour inspectorates are grossly understaffed. Currently labour inspectors are very few. Too few to go to every part in the country to carry out their duties. Indeed, such understaffing has fuelled the ever-increasing rate of illegal juvenile employment by uncanny and unscrupulous employers since such employers are aware of this shortage. So, they know that it is very unlikely for their business premises to be visited by inspectors.

Secondly, labour inspectors in Kenya are inadequately trained, thus are inadequately specialized in child labour matters.

Thirdly, these inspectors lack transportation to reach and inspect establishments outside the major cities like Nairobi and Mombasa. Enforcement of the law in the rural areas is extremely weak as the officers lack adequate facilities to carry out their mandate. This is attributed to lack of funds, which can in turn be blamed on the Kenyan economy which is destabilized by mismanagement of public funds among other factors which dog any attempts to improve the utilization of available funds. Lack of transportation simply means that the inspectors will not be able to travel to places where they are supposed to inspect. Thus, the economic exploitation of children will go unmonitored in such places. The results are obvious: child labour will still increase despite the fact that there exists a labour inspection system.

¹² Ibid. The Labour Inspectorate boasts of having done 6000 inspections related to child labour so far, but there has been no prosecutions.

Carrying out inspections also becomes a big burden, considering limitations placed on the actions of these inspectors. They sometimes do not have free and unfettered access to certain workplaces. ~~City places~~^{residents} sometimes lock their gates and houses to bar such officers from gaining entry. Moreover, inspectors often operate in a particularly unfriendly and unfavourable environment. They tend to be faced with public indifference, apathy from the public authorities, the hostility of powerful economic interest groups and the complicity of children and their parents.

Most child workers in the country are found mainly in agriculture, domestic service, and in other small and scattered work places such as the Kisii Soap Stones, Malindi Salt Works, Gold Harvesting in Western Kenya and Cross Border illegal trade.¹³ This dispersion makes it difficult and arduous to monitor the working children and the conditions under which they work because they are in effect hidden. Thus the labour inspectors rarely cover cases of child labour in the informal sector.

It is important at this juncture to note that this approach of labour inspection was developed in Europe to deal with textile mills and other industries where child workers were concentrated in large numbers.¹⁴ This has proved cumbersome to transfer to developing countries where child labour is widespread and popularly accepted as necessary for families living in poverty. Greater innovation is thus required in adopting legislation to the realities of our situation today.

It is really shocking that child labour has for a long time not been a real national priority area and, therefore, over the years the labour inspectorate has tended ~~to~~^{it} push ~~to~~^{it} the background.¹⁵ Finally, child labour requires not only enforcement of provisions but also a lot of counseling skills that may not be familiar with a labour inspector.

¹³ ILO : Child Labour: Targeting the Intolerable report VI (1) International Labour Conference, 86th session – 1998 (Geneva- 1996)

¹⁴ Ibid

¹⁵ Supra, note 3

4.1.3 Poverty

It has already been pointed out that the greatest 'push' factor of child labour is poverty. Abject poverty especially in the rural areas and urban slums has led to the ever increasing number of child labourers. Children work primarily for economic reasons, to supplement low family income, thus compensating as much as possible for the family's economic burden.¹⁶ So long as poverty is still in existence, efforts for an effective child labour legislation enforcement machinery will be frustrated. Kayongo and Walji argue rightly that,

“If children’s labour at home is still essential to the family’s subsistence, even compulsory schooling will not make children’s work any less essential. When unemployment rates are extremely high, it is unlikely that legislation can prevent employers from taking advantage of the situation by hiring child labourers”¹⁷

It is therefore necessary that social conditions such as poverty and high levels of unemployment need to change before laws can be meaningful and realistically enforced.

4.1.4 Other Obstacles in the Fight Against Child Labour

The cultural views of children's work is one of the factors militating against child labour eradication efforts. Many of the laws on child labour may not be meaningful to parents, teachers, local authorities and social workers because they all may have quite different views of child labour. Some see it as a necessary evil, others as a good experience for future jobs, while others still feel that any work experience increases an individual's social responsibility.¹⁸ Laws cannot be acceptable to all, but the degree of correspondence between popular views of children's labour and laws about it determines the degree of general social commitment to the aims of the law.¹⁹ In any country, laws

¹⁶ ILO: Child Labour in Commercial Agriculture in Africa Technical Workshop on Child Labour in Commercial Agriculture in Africa, Dar es Salaam, 27-30th August 1996 (Geneva, 1997)

¹⁷ Kayongo M.D. and Walji P. Children at Work in Kenya, Nairobi, Oxford University Press,

¹⁸ Ibid, p. 134

¹⁹ Ibid.

cannot force people to change their cultural views of children, nor can they necessarily reduce the exploitative forms of child labour.²⁰

Closely linked to the above is the fact that parents, especially those residing in the rural areas frequently do not know of the existence of the relevant employment laws and regulations and are therefore ignorant of the illegal nature of their children's work. This ignorance, coupled with the need for the income generated by children's work may explain why there are so few complaints about the employment of juveniles in exploitative or hazardous conditions. Also, the procedures for filing complaints can be so lengthy that they deter poor and often illiterate families from using them.

Another obstacle, in the fight against child labour is that there is usually a 'bond of silence' between parents and the employer.²¹ This bond of silence indicates that there are underlying social conditions that force children into work and force parents to co-operate with typically unscrupulous employers, such employers also do not keep registers with the names of children²² as required by law. The Kenya Employment Act expressly stipulates that

“Every employer who employs a juvenile shall keep and maintain a register...”²³

This secrecy about child labour by employers makes the phenomenon almost invisible. The result of this is that no children have actually been identified country-wide as illegal workers though it is general knowledge that they work in coffee, pyrethrum, sugarcane and tea plantations.²⁴

Furthermore, employers pay an intermediary who is an adult rather than the children themselves. This very true of the domestic sector.²⁵ In many cases of children working as maid servants, the employer usually pays the parents of the child worker directly.

²⁰ Ibid.

²¹ Valcarengi, Maria, Child Labour in Italy, London, Anti-Slavery Society, 1981, p. 24

²² Banerjee, S. Child Labour in India, London, Anti-Slavery Society, 1979, p. 41

²³ S. 31

²⁴ Supra, Note 13. p.4

²⁵ Anti-Slavery Report Child Labour In Morocco's Carpet Industry, London, Anti-Slavery Society, 1978, p. 11

Justifications for this according to such parents are numerous, the prominent one being that the children are too young to handle money. The employment contract then ends ~~by~~^{up} being actually between the parent and the employer instead of the child and the employer. This results in turn to the wanton exploitation of the child worker. Hard work is performed but the youngster gets no money.

Most of the child labour cases are not easily detectable since employers would normally claim that the working children are relatives or friends of the family.²⁶ With such an argument, they can easily escape the hook of the law. In the same vein, an employer may be vociferous in asserting that a child is working in a ship upon which only members of the family are employed, thus evading the stipulations of the **Employment of Juveniles at Sea (Medical Examination) Rules**, especially Rule 3 which is to the effect that no juvenile shall be employed in or on any ship other than a ship upon which only members of one's family are employed.

Under the guise that the children employed are relatives, the employers subject such juveniles to severe exploitation by underpaying them or not paying them at all, claiming that what they get in terms of food, accommodation and clothing is sufficient. This is dehumanizing and immoral. All measures possible should be taken to liberate such miserable and poor children from the merciless shackles of gross exploitation.

Some employers are so cunning that they usually swiftly shift their production activities to other cities if they are nabbed violating the law.²⁷ This is, however, uncommon in Kenya since the shifting of base is usually expensive. Employers who can barely eke out a living cannot be practically involved in this.

There is another issue that further mars any attempts aimed at eliminating child labour completely. In certain cases it may be found that laws prohibiting the practice may

²⁶ Mendelievich, Elias (ed.) Children at Work, Geneva: ILO 1979, p. 20

²⁷ banergee, S. Child Labour in Thailand, London, Anti-Slavery Society, 1980, p. 30

actually do more harm than good if there are no schools and no provision for compulsory education up to the minimum age fixed for entry into employment.²⁸

There are also some technicalities of the law which affect actual interventions to protect abused children. For example, a private citizen is constrained from instituting legal action on behalf of the child unless he or she can prove a specific legal interest, that is, *locus standi*.

The result of the above obstacles surfaces in the findings of a survey carried out by COTU in 1997. It revealed that there has been no court in Nairobi, Nyanza and western provinces of Kenya which has handled a child labour case, although other forms of child abuse had been prosecuted.

4.2.0 EFFORTS IN THE FIGHT AGAINST CHILD LABOUR

As a result of the inefficiency in the enforcement of protective legislation, efforts have been made within and without the country to restore the efficacy of the law in protecting children against economic exploitation.

The first concerted effort is the drafting of the Children's Bill . The state, through the Attorney- General first published the children's Bill of 1995, seeking *inter alia* to implement the provisions of the United Nations Convention on the Rights of the Child, 1989. The Bill was to ensure that the duties of the state are increased towards children in order to safeguard their indivisible and inalienable rights within the human family enshrined in the UN Declaration on the Rights of the Child in 1959.²⁹

But the Children's Bill of 1995 did not adequately supplement the shortcomings in the law. It ignored the child labour problem and thus was seen as proposing to enact a redundant piece of legislation. After several amendments on the original Bill, a more comprehensive instrument has now emerged. This is the Children's Bill 2001.

²⁸ Scault, George, The Needs of Children, New York; free press, 1963, p. 143

²⁹ UN General Assembly Resolution 44/25, CRC, 20th Nov. 1989

The Children's Bill 2001 incorporates Article 32 of the UN Convention on the Rights of the Child 1989 as well as article 15 of the African Charter on the Rights and Welfare of the Child by providing that every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's social development.³⁰

It was mentioned earlier in this chapter that there is no such rule or law mentioning 'child labour' concept *per se*. The Bill attempts to cure this ~~defeat~~ by tackling child labour expressly and not impliedly, for instance, by defining it as referring to any situation where a child provides labour for payment.³¹

It further provides that no child under the age of fifteen years shall take a direct part in hostilities or be recruited in armed conflicts.³² It is quite alarming that the present Acts of Parliament evade the issue of children in armed conflicts. If passed into law, the Bill will cure this defect and ensure the proper protection of children in case of a war outbreak in Kenya. It is highly hoped that the Bill, soon to be tabled in Parliament, will be passed into law to ensure that children are safeguarded from exploitative labour practices.

Efforts to counter the drawbacks of present legislation have also emerged from the work organizations such as CLAN (Children's Legal Action Network), ANPPCAN (African Network for the Prevention and Protection Against Child Abuse and Neglect and IPEC (ILO's International Programme on the Elimination of Child Labour).

CLAN is a charitable organization formed by the Coalition on Child Rights and Child Protection In Kenya in 1998.³³ This followed the realization that children have no voice in Kenya's legal system.

CLAN provides free legal advice and assistance to children in need of special protection like exploited child workers.

³⁰ Section 9(1)

³¹ Section 9(5)

³² Section 9(2)

³³ CLAN Brochure

IPEC provides assistance to countries in identifying and eliminating the worst child labour abuses. It targets bonded child labourers, children in hazardous working conditions and occupations and children who are particularly vulnerable, for example, very young working children and working girls. IPEC assists countries develop national policies and programmes which include; diagnostic analysis through data collection and research, identifying priority occupations and sectors for action, raising health services for the benefit of poor families and their children.

ANPPCAN also provides assistance with the sole aim of identifying and eliminating all forms of abuses against children.

The government has also initiated action through the children's department (Nairobi Provincial Office at Nyayo House). The Children Welfare Services (CWS) and the Juvenile Courts set up under section 3 of the Children and Young Persons Act³⁴ also ensure that children are shielded from economic exploitation. Currently, there is ^a ~~Draft~~ a Cabinet Memorandum on Child Labour Policy by the Ministry of Labour and Human Resource Development (revised 29th March 2000). This is a basis for governmental decision-making.

The FKE (Federation of Kenya Employers) has also produced guidelines on the employment of children. These guidelines are addressed to all members of the Federation, laying great emphasis on the Employment Act and also the Employment (Children) Rules of 1977, subsidiary legislation.

Briefly stated, there has been realization of the defects in the child labour legislation in Kenya and efforts have been made, on a serious note, to iron out the creases flawing legislative concerns for the plight of children at work in Kenya.

³⁴ Cap 143, Laws of Kenya

CHAPTER FIVE

CONCLUSION

5.1.0 SUMMARY OF STUDY

The first chapter of this dissertation commenced with the definition of the term 'child'. It was observed that there is no uniform definition since the laws touching on matters pertaining to children are so scattered over numerous acts of parliament that each statute has its own definition for purposes of its operation. After an elaborate definition of 'child labour', its various causes and determinants were looked into, emphasis being laid on poverty as being the greatest factor leading to the existence and magnification of the problem.

The types of work children do were also enumerated. It was seen that children work in households as domestic servants, in commercial agriculture, in forestry, and even on the streets. This paved way for a discussion on the consequences of child labour, followed closely by an explicit exposure of child labour being a violation of the rights of the child.

The focus of the discussion in chapter two centered on international child labour legislation. Various international legal instruments tackling child employment were looked into. Among other documents, the United Nations Convention on the Rights of the Child, various ILO conventions and recommendations and the African Charter on the Rights and Welfare of the Child had their provisions subjected to thorough examination.

Chapter three was an insight into the various Kenyan laws regulating the conditions of work for juveniles already in employment, such as the Employment Act, the Industrial Training Act and the Regulation of Wages and Conditions of Employments Act.

In chapter four, the efficacy of the law in protecting the child against exploitative engagement in work detrimental to physical, mental, spiritual, moral and social development was looked into. Emphasis was upon the flaws in the enforcement mechanisms put in place to curb the menace as the most conspicuous obstacle to the effective legal protection of working children against the worst forms of child labour.

There was a detailed analysis of the problems bedevilling the Kenyan labour inspection system such as gross understaffing, inadequate training, not forgetting lack of funds and means of transportation to enable the labour inspectors cover all areas of the country where employer-employee relationships exist. It was also a rather flagrant revelation that there seems to be no cases in the law report on child labour!

In conclusion, therefore, it is an indubitable fact that child labour still exists in Kenya today and will continue to be in existence if factors militating against the practice are not effectively addressed. In particular, as long as poverty is not eradicated or extensively minimised, this problem will still haunt the nation. The laws of Kenya purporting to shield children against economic

exploitation have successfully failed to adequately cushion working juveniles against severe forms of child labour.

In fact, there is no effort at all by the law to stem child labour. That there are provisions regulating conditions of working children is a clear proof that the law recognizes the existence of child labour, but only makes effort to regulate conditions under which the practice is undertaken, thus not endeavouring to do away completely with the vice. Indeed, a major stumbling block in efforts directed towards eliminating child labour is that it is difficult to detect the exploitation of children if they are working in the domestic service and in the informal sector in general.

The current Kenyan laws on children are extremely inadequate, outdated and have not kept pace with the socio-economic realities in Kenya today. Thus even in the backdrop of child labour legislation, children are being economically exploited and continue to perform work which is hazardous and likely to interfere with their physical, mental, spiritual, moral and social development. The result of the above is that child labour still remains a colossal problem in Kenya today. No wonder it is considered to be one of the worst forms of violations of the rights of the child.

5.2.0 RECOMMENDATIONS

Action should be taken on a broad front, social, economical and political, with governments, employees, trade unions and Non Governmental Organizations

working alongside each other.¹ The proposed suggestions in this dissertation encompass initiatives categorised into three broad clusters namely: prevention, protection and rehabilitation.

5.2.1 Prevention

This primarily comprises of measures to counter the fundamental causes of child labour. Poverty, the genesis of child labour in Kenya, should be alleviated. Initiatives aimed at promoting both rapid economic growth and access to production resources like land should be vigorously pursued. An enabling environment for investment and generation of employment opportunities should be created and developed. More specifically, poverty alleviation programmes should be prioritized by the government in line with the National Poverty Eradication Plan. Indeed, if the socio-economic conditions are improved, there will be no necessity for children to go out and work; there will be adequate income to sustain the most basic needs of the family.

The Government of Kenya should institute concrete action at the national level by reviewing the existing policies and shortcomings in the education system particularly in primary education. National efforts should be geared towards making primary education affordable (if possible, free), accessible and compulsory for all children of school-going age in the long term. This will

¹ Indeed, since NGOs are the best suited to reach communities at the grassroot level, their capacity and potential should be harnessed to supplement and complement the activities of other stakeholders.

surely enhance attendance and retention levels, thus contain the drop-out rate and nip child employment in the bud.

Rural-Urban migration which has a direct bearing on child labour should be checked. Rural development should be accelerated as propagated by the District focus strategy for Rural Development.

Urgent measures should be undertaken to launch community educational campaigns in order to educate and enlighten parents and the society as a whole about the dangers of child labour. Most people tend to view child labour as a natural, in some cases necessary, phenomenon. Indeed, some parents frequently are ignorant of the existence of the relevant laws and regulations on child employment and are therefore in most cases unaware of the illegal nature of their children's work.

There is need for information on the dangers of child labour to be made known to the public so that general awareness of the harmful effects to the child can help deter the practice. The print and electronic media are to play a key role ²in addition to other avenues of communication such as barazas and community drama. This will prick public conscience and change attitudes towards child labour.

² A Bequele and W. E. Nyers: First Things First in Child Labour: Eliminating work detrimental to children Geneva, ILO, 1995.

The government should incorporate child labour in the development plans and commit resources for affirmative action by inclusion of such concerns in the normal budgetary process to enhance sustainability.

5.2.2 Protection

Eradication of child labour is a gradual process warranting protective measures to insulate or cushion the children who are already working. Such measures would save them from the negative impacts of child labour. These initiatives recognize that many children will continue to work and hence efforts should be harnessed towards making the working conditions humane and hazard free.

Attention should be focussed on the shortcomings and reform of child labour legislation. Child labour laws should cover those juveniles toiling in the most hazardous conditions. Child work in commercial agriculture should not be exempted from coverage. In fact, children working in the informal sector or in family enterprises should be given adequate legal protection.

Kenyan law should correspond to national obligations under international labour laws and human rights conventions . The drafters of the children's bill should be lauded for their admirable attempts at bringing Kenyan child laws in line with the requirements of the various international instruments.

There is need for legislation to go further and make provisions for terms and conditions of work. This will aid in breaking down the state of helplessness

into which the present legislation paradoxically flings the child. Stricter penalties should be imposed upon employers who contravene or disregard the provisions of statutes. In connection to this, all employers who have children in labour force must be required or compelled to submit a register of juvenile employees to the labour officer regularly. This will help in monitoring the true dimensions of the problem. Failure to submit such a register should be followed by a stringent penalty which is to provide enough deterrence. If possible, longer jail terms should be imposed.

The administrative machinery needs to be tightened by increasing the number of law enforcement officials, paying regard to the expansion of the various sectors of the economy. Infact, strengthening labour inspection ensures that enforcement of law is improved. Labour Inspectorate is a powerful tool in the detection, surveillance and suppression of child labour. The government should intensify efforts that enhance the functioning of labour and factory inspectors. A package comprising of adequate logistical support and better training should be looked into to step up enforcement.

The current number of labour inspectors and labour officers countrywide is grossly inadequate to ensure that inspection is carried out in all parts of the country. More inspectors and officers should therefore be employed. Enough transportation should be availed to labour inspectors so that they can effectively reach and inspect establishments outside major towns. The inspectors should also be armed with excellent counselling skills. Indeed, lessons could be borrowed from Hong Kong, which is one of the striking

examples of what can be achieved by strong legislation, a well staffed inspectorate and vigorous enforcement³. In that country, the fine for illegal employment of children is 10,000 Hong Kong Dollars (1,300 US Dollars).⁴ Inspections are persistent and carried out by 244 inspectors of the Women and Young Persons division of the labour department.

Efforts should be focussed on the most vulnerable groups of children and those activities, which will expose them to hazards. Methodologies for identifying and evaluating work hazardous to children also need to be developed or improved. The government should deploy personnel to look into the issue of child labour in the informal sector where attention has not been given.

Employers should be prevented from hiring children by giving them incentives that militate against child labour, for example, tax rebates for best policies against child labour. For children who are already working, wages and working conditions should be commensurate to the value of their work.

Conventions No. 182 on the worst forms of child labour should be ratified. Likewise, the African Charter on Human and People's Rights, which addresses itself to children's rights,⁵ should be ratified too.

The government should ensure that proper baseline surveys are carried out, probably annually to establish the extent and nature of child labour and

³ Ibid

⁴ Ibid

facilitate the Ministry of Labour and Human Resource Development to carry out continuous research and situational analysis on child labour, and integrate a monitoring and tracking system.

If the above suggestions are implemented, then perhaps Kenya shall witness the emergence of child labour case – law! It is quite shocking that in this research, only one child labour case was encountered, that is, Isaji Manuji Vs Mzee Bin Ali⁶ NGOs should be encouraged to file suits on behalf of abused working children in the courts of justice.

5.2.3 Rehabilitation

This is primarily concerned with the withdrawing of working children from hazardous environments and re-integrating them to situations that are conducive to their growth and development. Child workers of school going age should be placed into formal schools. Where this is impracticable, the option of non-formal education tailored for ex-child workers will be appropriate.

The government should promote the establishment of drop-in centres for purposes of recuperation, both physical and psychological. Hazardous work situation, subjection to violence, abuse and other forms of trauma require intensive guidance and counselling, nutrition and health care to restore normality. Working children should be re-united with their families.

⁵ Article 18 (3)

⁶ (1917) 7 KLR 37, P.38

But most importantly, child labour should be ultimately eradicated. The major challenge is for all and sundry to rise to the occasion and take urgent action to eliminate child labour.

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