KENYA JUDICIAL BENCH BOOK ON TRAFFICKING FOR SEXUAL EXPLOITATION

International Association of Women Judges Kenya Chapter
in Partnership and with Support from Equality Now

INTERNATIONAL ASSOCIATION OF WOMEN JUDGES KENYA CHAPTER

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HON. LADY JUSTICE HELLEN AMOLO OMONDI
JUDGE OF APPEAL AND PRESIDENT INTERNATIONAL ASSOCIATION OF WOMEN JUDGES KENYA CHAPTER

FOREWORD

The Judiciary's institutional blueprint, 'Social Transformation through Access to Justice' (STAJ), is dedicated to establishing a people-centred justice system that protects everyone, especially the vulnerable and marginalised. Trafficked women and children are among the most vulnerable members of our society.

This Bench Book on trafficking in persons for sexual exploitation aims to facilitate a greater understanding of this form of human trafficking, which predominantly affects women and girls. It seeks to enhance gender-responsiveness among all judicial officers and justice players. The Bench Book highlights the elements of the crime and identifies the institutional barriers that impede access to justice and redress for victims and survivors.

The Judiciary is uniquely positioned to ensure that relevant laws, particularly those relating to trafficking for sexual exploitation and other forms of gender-based violence, are interpreted through the lens of international law standards and norms. These laws must be effectively enforced to protect people, including vulnerable groups, from violence and its recurrence, hold perpetrators accountable, and provide effective remedies and reparations for victims.

This Bench Book is designed to sensitise judicial officers, including judges, magistrates, and other justice actors such as prosecutors, advocates, and probation officers. It aims to help them understand the dynamics of trafficking for sexual exploitation, identify potential victims, respond to their needs for support and protection, and adopt a human rights-based, victim-centred, gender- and child-sensitive, and trauma-informed approach to handling cases. Additionally, it addresses the legal and evidentiary issues that arise in trafficking for sexual exploitation cases.

Kenya acceded to the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), and domesticated the treaty through the Counter Trafficking in Persons Act (2010), among other legislations. This provides an all-inclusive national framework to effectively prevent and prohibit trafficking in persons, particularly trafficking for purposes of sexual exploitation.

I extend my gratitude to the International Association of Women Judges Kenya Chapter, along with Equality Now, for their commitment in compiling this Bench Book. I hope it will serve as a valuable tool in supporting the implementation of counter-trafficking laws in Kenya and ensuring justice for victims and survivors.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

ABBREVIATIONS AND ACRONYMS

CSAM	Child Sexual Abuse Material
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CoK	Constitution of Kenya
CPC	Criminal Procedure Code, Kenya
CRC	United Nations Convention on the Rights of the Child
CTiP Act	Counter Trafficking in Persons Act, Kenya
NRM	National Referral Mechanism Guidelines
Palermo Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the Convention on Transnational Organized Crime
PC	Penal Code, Kenya
PRC	Post Rape Care
SOA	Sexual Offences Act, Kenya
UN	United Nations
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
VPA	Victim Protection Act, Kenya

1 INTRODUCTION

1.1 Purpose of this Bench Book

Every Judicial Officer is expected to act independently in adjudicating matters before them, to interpret the Constitution in a manner that promotes its purposes, values, and principles, and to advance the rule of law and the human rights and fundamental freedoms in the Constitution's Bill of Rights. They are also expected to promote the development of law, contribute to good governance, and make decisions guided by the legal framework. Within this context, the recent introduction of Bench Books in Kenya has served to enhance access to justice by providing guidance to Judicial Officers in the criminal justice process and thus improving jurisprudence.

This Bench Book is intended to complement existing Bench Books and other legal resources that have been developed by and for the Judiciary in Kenya, including the *Bench Book on Labour Trafficking* (2022) and the *Bench Book on Criminal Procedure* (2018). Specifically, this Bench Book will:

- Provide a quick reference and guidance to Judicial Officers and justice actors when dealing with the offence of trafficking for sexual exploitation.
- Provide guidance on the adoption of the human rights based and trauma-informed approach and create awareness on stigmatisation of victims when handling cases of trafficking for sexual exploitation.
- Clarify and provide case examples from Kenya and other jurisdictions on proving the elements of the offence of trafficking for sexual exploitation.
- Provide examples from other jurisdictions similar to Kenya as persuasive references in adjudicating trafficking for sexual exploitation cases.
- Contribute to a deeper understanding of the offences and redress provided in the Counter Trafficking in Persons (CTiP) Act and related laws.
- Raise awareness of the gendered dimensions of trafficking for sexual exploitation, highlighting it as an offence that takes advantage of the structural and intersecting forms of sex- and gender-based discrimination and inequality that are inherent in Kenya's patriarchal society, which disproportionately affect women and girls.
- Enhance the capacity and gender responsiveness of Judicial Officers in their adjudicating cases of trafficking for sexual exploitation and the need for expeditious, efficient, and effective dispute resolution for these cases.
- Identify issues in pre-trial, trial, and sentencing of trafficking for sexual exploitation cases and indicate how Judicial Officers can use the different criminal procedures and evidentiary rules to deal with these cases.

1.2 Case citation and terminology

For ease of reference, this Bench Book includes a list of all cases cited and the pages on which they are mentioned. Full citations for each case are provided in the Case List, while throughout the text, relevant cases are identified by name, country, and year of determination.

Accused/Accused Person: Depending on the jurisdiction and the stage of proceedings, an alleged trafficker or other perpetrators may be referred to as a suspect, perpetrator, accused, accused person, or defendant. As this Bench Book focuses on Kenyan criminal proceedings involving trafficking in persons cases, it uses "accused" or "accused person" to refer to such alleged perpetrators.

Child: A child is an individual who has not attained the age of 18 years. This is based on the Constitution of Kenya and reiterated in the Children Act, the Counter Trafficking in Persons (CTiP) Act, the Sexual Offences Act (SOA), and the Victim Protection Act (VPA).

Child sexual abuse material (CSAM): "CSAM" refers to visual material that depicts acts of sexual abuse and exploitation of children or which focuses on their genitalia. While the term "child pornography" is often used in laws, it is increasingly understood to be inappropriate since it suggests a degree of consent on the part of the child. According to the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (Luxembourg Guidelines), the term "child sexual abuse material" more appropriately describes the abuse and exploitation of children while protecting the dignity of victims. This Bench Book will therefore refer to "CSAM" instead of "child pornography" unless it is in direct reference to a specific law or government policy.

Exploitation of children for commercial sexual acts: Use of the term "child prostitution" may be interpreted as implying that the phenomenon represents a legitimate form of labour or that the child has given their informed consent, which is not legally possible given their age and vulnerability. To avoid the risk of stigmatising children and to reflect their entitlement to protection, the term "exploitation of children for commercial sexual abuse" is preferred.

Judicial Officer: Trafficking in persons cases may appear before a Judicial Officer at different levels of the Judiciary, and this Bench Book uses that term to refer to members of the Judiciary at all levels within the adjudication process. The Bench Book is primarily targeted at Judges and Magistrates; it can also be used by prosecutors, advocates, probation officers, and other actors in the criminal justice process.

Trafficking in Persons: This Bench Book will mostly use the term "trafficking in persons". While this crime is also known as "human trafficking", "trafficking in human beings" and/or "modern-day slavery", the term "trafficking in persons" is used in Kenyan law.

Trafficking for sexual exploitation: Other terms, such as "sex trafficking", are used to describe the act of trafficking in persons for the purpose of sexual exploitation. This Bench Book will use the term "trafficking for sexual exploitation", which is used in the interpretive section of the Counter Trafficking in Persons (CTiP) Act.

Trauma-informed approach: Shall refer to methods of working that are based on an understanding of the harmful effects of traumatic experiences together with fundamental principles of compassion and respect. Any form of professional communication with a person who has suffered trafficking in persons should be treated as an opportunity to help them to progress towards a long-term situation of safety, stability and well-being. In this context, States have an obligation to protect victims from further trauma and provide holistic services, including psycho-social counselling.

Victim: The term 'victim' in the Bench Book is used for: (a) contexts in which a person is under the control of traffickers or (b) contexts in which the formal recognition of a person's status as a victim of trafficking is directly relevant to obtaining specific legal rights and entitlements. The term 'survivor' is often used for all other contexts, emphasising the individual lived experience and the process of survival, rather than the limitations of victimhood. The Bench Book uses the term "victim" as that is the term used in the criminal justice system and the relevant law in Kenya.

2 UNDERSTANDING TRAFFICKING FOR SEXUAL EXPLOITATION

Trafficking in persons, also commonly referred to as human trafficking, is a form of modern-day slavery, a human rights violation, and a crime against the individual and the State. Globally, trafficking for sexual exploitation is the most predominant form, accounting for approximately half of all forms of trafficking[1], followed by trafficking for labour exploitation and other forms of trafficking.

Globally, women and girls consistently represent over 90 percent of all victims trafficked for sexual exploitation.[2] Thus, at its core, trafficking for sexual exploitation constitutes a manifestation of gender-based violence. Although the majority of victims of trafficking for sexual exploitation are women and girls, boys and men can likewise be trafficked for this form of exploitation.

While anyone can become a victim of trafficking for sexual exploitation, people facing multiple and intersecting inequalities and discrimination are disproportionately impacted. due to the vulnerabilities created. These inequalities include living in poverty, lack of viable economic and livelihood choices, discrimination and exclusion based on sex, gender, disability, class, ethnic and gender identity. Alienation from their family network and community is a frequent consequence of trafficking for sexual exploitation.

2.1 Defining trafficking for sexual exploitation

Article 3(a) of Palermo Protocol defines trafficking in persons as:

> "...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation."

The same Article of the Protocol defines "exploitation" as including, at the minimum:

> "...the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

The definitions outlined in the Palermo Protocol are also reflected in Section 3(1) of CTiP Act, which states:

> "A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of: -threat or use of force or other forms of coercion; abduction; fraud; deception; abuse of power or of position of vulnerability; giving payments or benefits to obtain the consent of the victim of trafficking in persons; or giving or receiving payments or benefits to obtain the consent of a person having control over another person."

1 United Nations Office on Drugs & Crime, Global Report on Trafficking in Persons (2022), https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.

2 *Id.*, at 33.

Section 2 of the CTiP Act defines "trafficking for sexual exploitation" as trafficking:

> "(a) with the intention of doing anything to or in respect of a particular person during or after a journey within Kenya or in any part of the world, which if done will involve the commission of an offence under the Sexual Offences Act, 2006; or
>
> (b) in the belief that another person is likely to do something to or in respect of the person trafficked, during or after the journey in any part of the world, which if done will involve the commission of an offence under the Sexual Offences Act, 2006."

Thus, if a person is trafficked and subjected to any of the offences under Kenya's Sexual Offences Act (SOA)[3], that would constitute trafficking for sexual exploitation.

2.2 Forms of sexual exploitation

There is no binding international legal definition of sexual exploitation, but a UN working definition helps to explain the breadth of sexually exploitative actions. It defines sexual exploitation as:

> "Any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially, or politically from the sexual exploitation of another."[4]

Further, the UN specifies that sexual exploitation can involve various acts, including "transactional sex", "solicitation of transactional sex", and "exploitative relationships". In other words, while the SOA criminalises many forms of sexual exploitation, there are other forms, which are not explicitly provided for under this law.

For example, as the world becomes more digitally connected, traffickers and other exploiters are increasingly using the internet and digital technology to identify, recruit and exploit their victims online and commit other forms of digital forms of sexual exploitation. This may include trafficking for the purposes of live-streaming acts of sexual abuse (webcamming), sexually coercing and extorting victims using recorded acts of sexual abuse, and/or taking and sharing intimate sexual images without consent (also known as image-based sexual abuse, as well as trafficking for the purpose of pornography production Further, the production of digital images of sexual exploitation by traffickers often results in life-long exploitation of the victims as images can rarely be removed from the Internet by victims, even after they have left the control of their traffickers, including in cases where their traffickers have been convicted.[5]

In the case of children, taking, possessing, sharing, and profiting from child sexual abuse material (CSAM) is a growing form of sexual exploitation, and children can be trafficked for this specific purpose. CSAM is criminalised under Section 2(h-j) of the Children Act (2022), which defines child abuse to include:

> "The use or exposure of a child in electronic or online platforms for purposes of exploitation in prostitution, pornography, or any other unlawful sexual practice."

3 See Section 2.5 of this Bench Book for a list of offences under the SOA.
4 *Glossary*, Conduct in UN Field Missions, https://conduct.unmissions.org/glossary (last visited July 22, 2024).
5 Organization for Security and Co-operation in Europe, National Referral Mechanisms - Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook (2022), https://www.osce.org/odihr/NRM-handbook.

Further, Section 2 of the CTiP Act includes other forms of exploitation for which a person can be trafficked, such as child marriage and forced marriage, as distinct from trafficking for sexual exploitation[6]. Such child marriages or forced marriage, which are in themselves crimes, are perpetrated by use of threat, force, or other forms of coercion, abduction, fraud, deception, or by way of giving payments or benefits to obtain the consent of the victim or obtain the consent of a person having control over another person. It should be noted that in the case of children, the means do not need to be proved, as long as the act and the purpose can be established, as will be discussed in Chapter 3.

2.3 The gendered nature of trafficking for sexual exploitation

The vulnerability of women and girls to trafficking for sexual exploitation is exacerbated by structural and systematic sex and gender-based discrimination and inequality, which manifests through gendered poverty, such as limited access to education, lack of viable employment opportunities, lack of control over financial resources, low socio-economic status of women and girls, gender-based violence and patriarchal norms.

These factors intersect with other forms of discrimination, including those arising from factors such as race, ethnicity, disability, and migrant status.

Due to the gendered nature of trafficking for sexual exploitation, it is important for Judicial Officers and justice actors to be vigilant to the risk of gender stereotyping, particularly of victims, that may occur in the administration of justice.

Gender stereotypes are preconceived, usually generalised views of how a particular gender behaves or how they should behave or which traits they have or should not have. Gender stereotyping, which refers to the practice of ascribing these views to individuals or groups, can result in a violation of human rights and fundamental freedoms.

In the context of sexual offences, including trafficking for sexual exploitation, harmful gender stereotypes can lead to an overly restrictive conception of the "ideal victim," leaving some victims' experiences to be criminalised or completely overlooked by the justice system. Women and girls often face secondary victimisation in the criminal justice system if they do not conform to such stereotypes, leading to their characters being called into question and/or being blamed for the violations against them on the basis that they should have acted or behaved in particular ways.

6 In its General Comment No.13, the UN Committee on the Rights of the Child characterises the sale of children for forced marriage as a manifestation of child sexual abuse and exploitation. Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence*, CRC/C/GC/13 (Apr. 18, 2011).

CASE EXAMPLE OF HARMFUL GENDER STEREOTYPING

Martin Charo v Republic (Kenya 2016)

The 24-year-old appellant had been convicted of defilement contrary to Section 8(1)(3) of the SOA, in that he intentionally and unlawfully had sexual intercourse with a child aged 13 years. Dismissing the appellant's conviction by a lower court, the appeal judge noted that: "It is true that under the SOA, a child below 18 years old cannot give consent to sexual intercourse. However, where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown-up who knows what she is doing."

The judge disregarded the elements of the crime required to prove the offence and shifted responsibility on to the victim by suggesting that she presented herself as an adult and enjoyed having sex with the accused person.

2.4 The international and regional legal frameworks

Kenya has signed and ratified international treaties relating to trafficking for sexual exploitation. The constitutional basis for the application of international and regional laws in Kenya is provided for in Articles 2(5) and 2(6) of the Constitution of Kenya, 2010. Beyond these Constitutional provisions, the Supreme Court of Kenya has also noted the applicability in the national context of non-binding international legal instruments, or what the court has referred to as "soft law".

2.4.1 International UN Conventions and Declarations relating to trafficking in persons

- **The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others**
  In its preamble, the Convention declares prostitution "incompatible with the dignity and worth of the human person."

- **The Universal Declaration of Human Rights (UDHR)**
  The UDHR is the first global instrument that highlighted all the rights and fundamental freedoms that deserve protection, setting out all human beings as being born free and equal. It highlights around 30 rights belonging to all, including right to life, liberty and security of person; no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms; and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The UDHR sets the standard that all rights are universal, interdependent, and indivisible.

- **The International Covenant on Civil and Political Rights (ICCPR)**
  Recognising the principles of the UDHR, the Covenant provides that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social, and cultural rights.

- **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**
  The Convention is built on three foundational principles: non-discrimination, state obligation, and substantive equality. It requires countries to eliminate discrimination against women and girls in all areas and promotes women's and girls' equal rights.

- **The Convention on the Rights of the Child (CRC)**
  Article 34 protects children from all forms of sexual exploitation and sexual abuse, their use in prostitution or other unlawful sexual practices, in pornographic performances and materials.

- **The Convention Against Transnational Organized Crime**
  The Convention is a global response to prevent and combat criminal offences of a transnational nature committed through organised crime. This includes crimes of trafficking in persons.

- **The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol)** serves as a comprehensive legal instrument that addresses trafficking. The purpose of the Protocol is stated in its Article 2 as:

  a) to prevent and combat trafficking in person with particular attention to women and children

  b) to protect and assist the victims of such trafficking with full respect for their human rights

  c) to promote cooperation among states parties in order to meet the above objectives

2.4.2 Regional Africa Union conventions and protocols relating to trafficking in persons

- **The African Charter on Human and Peoples' Rights** makes provision for a human rights regime for Africa and its peoples. Article 5 imposes the right for respect of human dignity and prohibits slavery, and all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment, and treatment.

- **The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)** affirms that women should not be subjected to exploitation or inhuman degrading punishment and treatment. Article 4 requires States to prevent and condemn trafficking in women and girls, prosecute the perpetrators of such trafficking, and protect those women and girls who are most at risk.

- **The African Charter on the Rights and Welfare of the Child (ACRWC)** also contains several provisions related to sex trafficking. Article 21 protects children from child marriages; Article 27 protects children from sexual abuse and sexual exploitation; and Article 29 protects children from sex trafficking, sale and abduction, and calls on States to prevent the abduction, the sale of, or trafficking of children for any purpose in any form, by any person, including parents or legal guardians of the child, and also forbids the use of children in any form of begging.

Additionally, several key observations and recommendations have been made during various treaty monitoring processes over the years, which provide critical insights into the scope of State obligations in the prevention and prosecution of trafficking for sexual exploitation.[7]

7 Details of the relevant international and regional instruments, along with specific examples of relevant soft law, and observations/recommendations made by treaty monitoring committees, are presented in Annex A and Annex B.

CASE EXAMPLES OF APPLICATION OF INTERNATIONAL INSTRUMENTS
Wanjiku & Another v AG & Another (Kenya 2012)
The court held that: "In the case of Kenya, international law provisions are part of the supremacy clause. Article 2(5) and (6) regulate the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasised in relation to international law. Second, the application of international law in Kenya is clarified to the extent that there is left no doubt that international law is applicable in Kenya."
AOG v SAJ & Another (Kenya 2011)
In this case, which was heard prior to the promulgation of the Constitution of Kenya 2010, the Court of Appeal held that: "The Judicature Act in Section 3 spells out the mode of exercise of jurisdiction of all the courts in this country. The courts may apply ratified Treaties and international customary law where there is no conflict with existing law or for purposes of removing ambiguity or uncertainty in our laws."
KKR v Republic (Kenya 2010)
In this case, which was determined before the enactment of the CTiP Act, the accused was convicted of defilement and trafficking of a child for sexual exploitation under the SOA. The Court of Appeal observed that although the SOA created the offence of trafficking, it did not define the term trafficking. The Court, thus, relied on the definition of trafficking provided under Article 3(a) of the Palermo Protocol.
Mitu-Bell Welfare Society v Kenya Airports Authority & Others (Kenya 2018)
Among the issues for determination in this case at the Supreme Court was the extent to which UN Resolutions, Declarations, Comments and Guidelines by UN bodies are relevant in the interpretation and application of rights by Kenyan Courts under the Constitution. The Court opined that these constitute what is called in international jurisprudence as soft law. The Court observed that "they are tools or aids directed to state parties to help the latter in implementing the treaty or better fulfilment of their obligations thereunder. Each state party is free to make use of the Guidelines, to the extent that is practicable under its legal system".

2.5 The Kenyan legal framework

Kenya has an ecosystem of laws that are relevant to the prosecution of trafficking for sexual exploitation. Fact patterns around this crime may involve constituent elements giving rise to various crimes under different laws. Trafficking for sexual exploitation often intersects with the commission of other crimes, for example, organised criminal activity, kidnapping, assault, fraud, immigration offences, and technology-facilitated sexual exploitation and abuse.

Law	Provisions relating to trafficking for sexual exploitation
Constitution of Kenya, 2010	The Bill of Rights provides fundamental rights for victims of trafficking for sexual exploitation: • Human dignity (Article 28) • Freedom and security of the person (Article 29) • Prohibition of slavery, servitude and forced labour (Article 30) • Access to information (Article 35) • Freedom of movement and residence (Article 39) • Health (Article 43) • Fair Administrative Action (Article 47) • Access to justice (Article 48) • Protection of the rights and welfare of victims of offences (Article 50) • Protection of children from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour (Article 53)
Counter Trafficking in Persons Act, Cap 61	This legislation criminalises trafficking in persons. It defines "sexual exploitation" in the context of trafficking in person to mean offences committed: a) With the intention of doing anything to or in respect of a particular person during or after a journey within Kenya or any part of the world, which involves the commission of an offence under the SOA (Section 2); or b) In the belief that another person is likely to involve the commission of an offence under the SOA (Section 2); The provision imposes a sentence of imprisonment of not less than 30 years or a fine of not less than 30 million shillings or both, and upon subsequent conviction, to imprisonment for life. The CTiP Act comprehensively criminalises all persons involved in the chain/ various stages of human trafficking (Section 3(5).

[The Children Act, Cap 141]()	This Act: ● Defines child trafficking (Section 2) ● Defines "child abuse" to include, among other activities, engaging a child in sexual exploitation in travel and tourism and child trafficking (Section 2) ● For child abuse, a sentence of imprisonment is imposed of a term not exceeding 5 years or a fine not exceeding 2 million shillings, or both (Section 22) ● Defines child abuse to include CSAM, i.e. the use or exposure of a child in, electronic or online, platforms for purposes of prostitution, pornography, or any other unlawful sexual practice; and/or the use of a child's images for purposes of pornography or sexual gratification (Section 2) ● For CSAM, a sentence of imprisonment is imposed on conviction: imprisonment for a term not exceeding 10 years; or a fine not exceeding 2 million shillings; or both (Section 22)
[The Sexual Offences Act, Cap 63A]()	This Act makes provisions for sexual offences and is directly linked to the CTiP Act, as seen in the definition of trafficking for sexual exploitation. "Sexual exploitation" in the context of trafficking in persons means the commission of an offence under the SOA, including: ● Rape and attempted rape (Sections 3 and 4) ● Sexual assault (Section 5) ● Compelled or induced sexual acts (Section 6) ● Acts which cause penetration or indecent acts committed within the view of a child, family member, or person with mental disabilities (Section 7) ● Defilement and attempted defilement Sections 8 and 9) ● Gang rape (Section 10) ● Indecent acts[8] with a child or adult (Sections 11 and 11(a)) ● Promotion of a sexual offence with a child (Section 12) ● "Child sex tourism" (Section 14) ● "Child prostitution" (Section 15) ● "Child pornography" (Section 16) ● Exploitation of Prostitution (Section 17) ● Prostitution of persons with mental disabilities (Section 19) ● Incest by male person and female person (Sections 20 and 21) ● Sexual harassment (Section 23) ● Sexual offences relating to a position of authority and persons in a position of trust (Section 24 and 25) ● Cultural and religious sexual offences (Section 29)

8 Section 2(1) defines an "indecent act" as an unlawful intentional act which causes (a) any contact between any part of the body of a person with the genital organs, breasts, or buttocks of another, but does not include an act that causes penetration; (b) exposure or display of any pornographic material to any person against his or her will.

Penal Code, Cap 63	This Act defines criminal offences that may be committed alongside the offence of trafficking in persons. These include: • Grievous harm (Section 234) • Kidnapping (Section 254) • Kidnapping a person such as a minor, a person of unsound mind (sic) without the consent of their parent or guardian (Section 255) • Abduction (Section 256) • Wrongfully concealing or keeping in confinement kidnapped or abducted person (Section 261) • Keeping brothels and premises for prostitution (Section 155 and 156) • "...exercising control, direction or influence over the movements of a "prostitute" in such a manner as to show that he/she is aiding, abetting or compelling her prostitution with any person..." and soliciting and living off the prostitution of another (Sections 153 and 154) Additionally, other provisions may be used against trafficking for sexual exploitation victims. These charges may be used in a manner that re-victimises trafficked women and others exploited in prostitution. For example: • Soliciting and living on the earnings of prostitution (Section 153) used to criminalise trafficked women selling sex
Prevention of Organised Crimes Act, Cap 59	This law is relevant in cases where an organised criminal gang commits the offence of trafficking and exploitation. The Act: • Defines organised criminal groups (Section 2) • Criminalises being a member of an organised criminal group (Section 3) • Defines "serious crime" in the context of organised crime to include any offences under Kenyan law punishable by a term of imprisonment of at least 6 months, or any such offences in another country if they would be unlawful if committed in Kenya (Section 2) • Upon conviction for engaging in an organised criminal activity, imposes a fine not exceeding 5 million shillings, or a sentence of imprisonment for a term not exceeding 15 years, or both (Section 4(1)) • Provides that if, as a result of organised crime, a person dies, the member of the organised criminal group shall, on conviction, be liable to be sentenced for imprisonment for life (Section 4(2))

[The Computer Misuse and Cybercrimes Act, Cap 79C]	This Act criminalises the unlawful use of computer systems and facilitates the prevention, detection, investigation, prosecution, and punishment of cybercrimes that may be related to trafficking for sexual exploitation. Specifically, the Act: ● Prohibits the publication of CSAM through a computer system, production and distribution or transmission of such materials, and possession of such materials in a computer system (Section 24) ● Prohibits wrongful distribution of obscene or intimate images (Section 37) ● Prohibits aiding and abetting in the commission of an offence under the Act (Section 42) ● Upon conviction, imposes a fine not exceeding 20 million shillings imposed, or a sentence of imprisonment for a term not exceeding 25 years, or both (Section 24)
Witness Protection Act, Cap 79	This Act provides for the protection of witnesses in criminal proceedings. The Act: ● Defines a "witness" as a person who needs protection from a threat or risk which exists on account that he/she is a crucial witness who has given or agreed to give evidence (Section 3)
Victim Protection Act, Cap 79A	This Act gives effect to the provisions of Article 50(9) of the Constitution by guaranteeing the rights of victims. The Act: ● Provides for the rights and responsibility of victims before, during, and after trial (Part II) ● Provides a range of provisions for victim services (Part IV) ● Establishes a Victim Protection Trust Fund (Part V)

The Immigration Act, Cap 172	Contains immigration offences. Some of the common offences include: entry without permit or pass (Section 4); and entry without a valid pass (Section 6). Additionally, under Section 13, a list of offences including: • Wilfully obstructing or impeding an immigration officer or a police officer in the exercise of any of his powers under this Act • Refusing or neglecting to answer any question, to furnish any information, to produce any document, to attend at any place or to submit to medical examination, when required under this Act • Harbouring any person whom he knows or has reasonable cause to believe to be a person who has committed an offence under this Act • Failing to comply with any term or condition imposed by an entry permit or pass, being a term or condition which he is required to comply with • Not being a citizen of Kenya, engaging in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorised to do so by an entry permit, or exempted from this provision by regulations made under this Act Note that this Act also confers power to immigration officers as well as the court to make an order to remove persons who are in Kenya unlawfully (Section 8). Foreign nationals who are in fact trafficking victims may be charged and/or punished under these offences resulting in their detention and/or deportation. Authorities should exercise caution and screen potential violators for trafficking indicators to ensure compliance with the non-punishment principle contained in Section 14 of the CTiP Act.

Example applications of the law

The following examples illustrate the fact patterns of various hypothetical cases involving trafficking for sexual exploitation. Each example is accompanied by a list of possible offences that may be involved under Kenyan law, along with some of the possible perpetrators of those offences, and the possible sentences that may be imposed by the Courts.

Example 1

An organised criminal gang operates a business where young women and girls are sold for sex. The "business" is advertised on the internet. The gang uses extortion, violence, threats, and intimidation to control victims and receives money from those buying sexual services. The victims are driven to various "appointments" in and around Mombasa. The sexual abuse is video recorded, and the criminal gang sells the material to online platforms.

Possible Offences	Possible Perpetrators	Possible Sentences
Trafficking for sexual exploitation contrary to Section 3(1) as read with Section 3(5) of the CTiP Act	Any person involved in or who abets and aids the acts, means, and purpose elements which constitute the crime of trafficking in persons.	Upon conviction, imprisonment of not less than 30 years or a fine of not less than 30 million shillings or both, and upon subsequent conviction, to imprisonment for life.
Organised criminal activities contrary to Section 3 as read with 4 (1) of the Prevention of Organised Crimes Act	Any person who is a member of an organised criminal group.	Upon conviction, a fine not exceeding 5 million shillings or imprisonment for a term not exceeding 15 years, or both. If any victim of organised crime dies, the member of the organised criminal group shall, on conviction, be liable to imprisonment for life.
"Child pornography" contrary to Section 24 of the Computer Misuse and Cybercrimes Act	Any person who publishes, produces, downloads, distributes, or possesses CSAM.	Upon conviction, a fine not exceeding 20 million shillings or imprisonment for a term not exceeding 25 years, or both.
Wrongful distribution of obscene or intimate images (Section 37) of the Computer Misuse and Cybercrimes Act	A person who transfers, publishes, or disseminates, including making a digital depiction available for distribution or downloading through a telecommunications network or through any other means of transferring data to a computer, the intimate or obscene image of another person	Upon conviction, a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or to both.

Unauthorised interference to a computer system, program, or data contrary to Section 16(1) of the Computer Misuse and Cybercrimes Act	Any person who publishes, sells, hires, distributes, exhibits, imports, exports, or advertises material or otherwise profits from CSAM.	Upon conviction, a fine not exceeding 10 million shillings or imprisonment for a term not exceeding 5 years, or both.
Abuse of a child contrary to Section 22 of the Children Act	Any person who engages in sexual exploitation of children in travel and tourism and child trafficking. This would include persons who pay for sex with children.	Upon conviction, imprisonment for a term not exceeding 5 years or a fine not exceeding 2 million shillings, or both.
Abuse of a child contrary to Section 22 of the Children Act	Any person who, through any electronic system, network, or other communication technology, proposes or solicits to meet a child for the purpose of engaging in sexual activities contrary to the provisions of the SOA. Any person who transmits CSAM, or in any other way subjects a child to online abuse, harassment, or exploitation, whether through social networks, playing online games, or by use of mobile phones or other electronic devices.	Upon conviction, imprisonment for a term not exceeding 10 years or a fine not exceeding 2 million shillings, or both.

Example 2

A tour operator in Kwale recruits girls and women between the ages of 16 and 22 years from all over the county using social media platforms for “hostess jobs”. However, on arrival in Kwale, he tells them that their role is to tend to the needs of the tourists and to be available to provide whatever the tourists require. After a few weeks on the job, he tells them they can only keep their jobs if they have sex with the tourists. If they refuse, they will not receive any wages. The tourists pay the tour operator for arranging the sexual acts.

Possible Offences	Possible Perpetrators	Possible Sentences
Trafficking for Sexual Exploitation contrary to Section 3(1) as read with Section 3(5) of the CTiP Act	Any person involved in or who abets and aids the acts, means, and purpose elements which constitute the crime of trafficking in persons.	Imprisonment of not less than 30 years, or a fine of not less than 30 million shillings, or both, and upon subsequent conviction, to imprisonment for life.

Indecent act with child or adult contrary to Sections 11 and 11(a) of the SOA	Any person who commits indecent acts, defined to mean "any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration."	With a child, upon conviction, imprisonment for a term of not less than 10 years; and with an adult, upon conviction, imprisonment for a term not exceeding 5 years, or a fine not exceeding 50,000 shillings, or both.
Child sex tourism contrary to Section 14 of the SOA	A person, including a juristic person, makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a child.	Upon conviction, imprisonment for a term of not less than 10 years and, where the accused person is a juristic person, a fine of not less than 2 million shillings.
Prostitution of a child (in respect of children under 18 years) contrary to Section 15 of SOA	Any person who permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or acts as a procurer of a child for the purposes of sexual intercourse.	Upon conviction, imprisonment for a term of not less than 10 years.
Abuse of a child contrary to Section 22 of the Children Act, where child abuse is defined to include engaging a child in sex tourism and trafficking of a child	Any person who engages in child sex tourism and child trafficking.	On conviction, imprisonment for a term not exceeding 5 years, or a fine not exceeding 2 million shillings, or both.
The exploitation of a person through prostitution, contrary to Section 17 of the SOA	Any person who intentionally causes or incites another person to be prostituted and intentionally controls any of the activities of another person relating to that person's prostitution, and does so for or in expectation of gain for him or herself or a third person.	On conviction, imprisonment for a term of not less than 5 years, or a fine of 500,000 shillings, or both.

Example 3		
The parents of a girl aged 13 years have married her off as a second wife and relocated her from their village to that of her "husband". She is required to engage in sexual activities with her "husband".		
Possible Offences	**Possible Perpetrators**	**Possible Sentences**
Trafficking for Sexual Exploitation contrary to Section 3(1) as read with Section 3(5) of the CTiP Act	Any person involved in or who abets and aids the acts, means, and purpose elements which constitute the crime of trafficking in persons.	On conviction, imprisonment of not less than 30 years, or a fine of not less than 30 million shillings, or both, and upon subsequent conviction, imprisonment for life.
Abuse of a child contrary to Section 22 of the Children Act where child abuse is defined to include trafficking of a child	Any person who engages in acts of trafficking of a child.	On conviction, imprisonment for a term not exceeding 5 years, a fine not exceeding 2 million shillings, or both.
Failure to protect a child from child marriage contrary to Section 23 (1)(c) of the Children Act	Any person who subjects a child to marriage which is defined as marriage or cohabitation with a child, or any arrangement made for such marriage or cohabitation.	Upon conviction, imprisonment for a term of not less than 3 years, or a fine of not less than 500,000 shillings, or both.
Defilement contrary to Section 8 of the SOA	Any person who commits the act of penetration with a child.	Upon conviction, where the child is between 12 and 16 years old, imprisonment for not less than 15 years.

3 ELEMENTS OF TRAFFICKING FOR SEXUAL EXPLOITATION

In line with the Palermo Protocol, the CTiP Act defines trafficking in persons (including for sexual exploitation) in terms of its three constituent elements: the act (what is done); the means (how it is done); and the purpose (why it is done).

The act and the means are the actus reus (material or physical elements); the purpose is the mens rea (mental element).

The constituent elements of trafficking for sexual exploitation can be defined as follows:

Act	Means	Purpose
The "act" element of trafficking for sexual exploitation is met when a person: • recruits, • transports, • transfers, • harbours, or • receives another person for the purposes of sexual exploitation.	The "means" element of trafficking for sexual exploitation is met when a person commits the act by: • threat, force or other forms of coercion, • abduction, • fraud, • deception, • abuse of power or of position of vulnerability, • giving payments or benefits to obtain the consent of the victim of trafficking in persons; or • giving or receiving payments or benefits to obtain the consent of a person having control over another person for the purposes of sexual exploitation.	The "purpose" element of trafficking for sexual exploitation is met when the means are used: • with the intention of doing anything to or in respect of a particular person, during or after a journey within Kenya or in any part of the world, which will involve the commission of an offence under the SOA; or • in the belief that a person is likely to commit the same offences against another person.

Each element may or may not constitute a separate criminal offence. For example, recruiting or transporting a person is generally a lawful activity, while fraud and use of force are unlawful and may be actionable under other criminal statutes.

Whether the conduct is lawful or not, in the absence of the other two elements it would not constitute trafficking in persons (defined in the CTiP Act as including trafficking for sexual exploitation). In the case of trafficking of children, the act and purpose are sufficient to establish trafficking.

An act of trafficking in persons may be committed internally (within the borders of Kenya), online (digital space), or internationally (beyond the borders of Kenya).

CASE EXAMPLES OF ELEMENTS OF TRAFFICKING IN PERSONS
Benard Onyandi v Republic (Kenya 2018)
On appeal, the High Court Judge highlighted the following: ● For the purposes of establishing the offence, the prosecution must show that the accused person engaged in all three elements of the offence (please note the exception regarding children where the means do not have to be established). ● The ultimate purpose of trafficking in persons is the exploitation of the trafficked person. ● Every participant in every stage of the process is guilty of the offence, and an accused need not participate in all stages to be guilty. If the prosecution establishes that the accused was part of the chain and committed only one act in the chain, they would be guilty of trafficking in persons.
Muhammed Asif v Republic (Kenya 2017)
The High Court highlighted that: ● The offence of trafficking is within the category of continuous crimes. Engaging in just one of these trafficking "stages" is sufficient. ● Therefore, different persons or groups of people may be responsible for different aspects of the trafficking crime. ● Thus, the offence is formulated to capture the different actors involved, including those who do not directly exploit the victim, so long as they were aware that their actions contributed to the purpose of exploiting or facilitating the exploitation of a person.
Rantsev v Cyprus and the Russian Federation (ECHR 2010)
In this case, where a victim had entered Cyprus from Russia, the European Court of Human Rights held that where trafficking occurs across borders, investigations and evidence of trafficking may be received between the countries involved. ● When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. Relevant evidence and witnesses may be located in all States. ● In addition to the obligation to investigate events occurring in their territories, Member States must also cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.

3.1 ACT element

To satisfy the "act" element, the accused person must have carried out or was engaged in any of the specified acts of recruitment, transportation, transfer, harbouring, or receipt of a person or persons. The accused may be engaged in one act or a series of acts in the commission of the offence of trafficking. The acts may be carried out by one or more persons, (including a company, or association or body of persons corporate or incorporate) with each accountable for their role in the trafficking process.[9]

Below we examine each of the "acts" in the context of trafficking for sexual exploitation[10].

9 Interpretations and General Provisions Act (1956) Cap. 2 § 3(1).

10 For details of each "act," see Section 3 of the United Nations Office on Drugs & Crime, Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 27 (2020), https://www.unodc.org/documents/human-trafficking/2020/TiP_LegislativGuide_Final.pdf.

3.1.1 Recruitment

"Recruitment" refers to the act of drawing a person into a process through different techniques including grooming[11] orally, through advertisements, or online through the internet. In transnational cases, recruitment can involve activities in the country of origin, of transit, or of destination; for example, involving legal or semi-legal private recruitment agencies or even romantic partners.

CASE EXAMPLES OF RECRUITMENT
S v Emmanuel Uche Odii & Others (South Africa 2015)
The accused recruited the victims of trafficking for sexual exploitation orally and telephonically with the promises of jobs as domestic workers, and later coerced them into prostitution.
United States v Weylin O. Rodriguez (US 2015)
The accused lured several minors through various methods, including promising them jobs as models. He later advertised the victims on Backpage.com and forced them to solicit for sex, exerting control over them with severe beatings and threats involving guns.
United States v Rivera (US 2012)
The accused recruited, hired, and harboured many undocumented Latin American immigrants to work as waitresses in his bars. After the women agreed to work as waitresses, the accused directed them to solicit patrons to buy them alcoholic beverages, which the women were required to consume. Eventually, he forced them to engage in sexual acts with the patrons in exchange for money, which he kept.
Criminal Case No.06-2875 (Philippines 2011)
The victim was recruited from the Philippines to Malaysia by the 1st and 2nd accused persons on the promise of a job as a hotel receptionist, but was coerced into prostitution by the 3rd accused when she got there. Even though the 1st and 2nd accused were not in the jurisdiction of the Court, the Court found that when they proposed to and persuaded the victim to accept a job as a hotel receptionist in Malaysia and promised her a monthly salary, they had already committed the act of recruitment.
S.M. v Croatia (ECHR 2018)
The trafficker recruited an underage girl through Facebook, leading her to believe that he would help her get a job but instead, he arranged for her to provide sexual service.
State v Jonas (Namibia 2019)
The accused recruited victims by means of coercion, deception, abuse of power or a position of vulnerability with the intent of sexually exploiting the victims.

11 Grooming refers, in the context of human trafficking, to the solicitation of adults and children for all forms of exploitation, including sexual exploitation. "Grooming/online grooming" refers to the process of establishing/building a relationship with an adult or child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with that person. "Online grooming is the process by which an individual befriends a person for online sexual contact, sometimes with the involvement of webcams that can allow 'sharing' of the exploitation among networks of child sexual abusers, and sometimes extending to a physical meeting to commit sexual abuse." The areas of cyberspace that enable abusers to groom potential victims include chat rooms, social networking sites, gaming platforms and instant messaging.

3.1.2 Transportation

"Transportation" covers the acts by a carrier by land, sea, or air by any means or kind of transportation. Transportation may occur over short or long distances, within a local community, country, or across national borders.

CASE EXAMPLES OF TRANSPORTATION
S v Emmanuel Uche Odii & Others (South Africa 2015)
The 1st accused made travel arrangements for the victims of trafficking for sexual exploitation from Durban to Pretoria, where they were later coerced into prostitution.
Geoffrey Mutemi Manzi v Republic (Kenya 2020)
The acts of the appellant who transported the victims to the airport fell within the definition of trafficking under the CTiP Act.
R v Lorenc Roci & Vullent Ismailaj (UK 2005)
The appellant arranged the immigration of adult women from Lithuania for the purposes of sexual exploitation in prostitution. There was a high degree of planning and organisation, and some evidence of threats and restrictions to the women's liberties and the confiscation of their passports.
Dos Santos v The State (South Africa 2017)
The accused recruited and arranged for the transport of the victims from Mozambique to South Africa, harboured them, and forced them to perform sexual acts.

3.1.3 Transfer

Transfer refers to transportation of a person but can also mean the handing over of effective control over a person to another.

CASE EXAMPLES OF TRANSFER
State v Jonas (Namibia 2019)
The accused transferred the victims through arranging their transport, collecting them from the bus, housing them, and then taking them to the location of sexual exploitation.
Uganda v Umutoni (Uganda 2014)
While the court noted some contradictions in the evidence of one of the victims as to how she left home from Gahanga to Inyanza in Rwanda, the court noted that whether she left her home with the accused or left that home alone and met the accused later and they travelled together to Kampala, the essence of being transported and transferred from Rwanda to Kampala had been proved.

3.1.4 Harbouring

"Harbouring" may be understood differently in different jurisdictions and may refer to accommodating a person at the point of departure, transit, or destination, before or at the place of exploitation, or it may refer to steps taken to conceal a person's whereabouts.

Harbouring can also be understood to mean holding a person. It can take place before the exploitation, during the exploitation, and alongside the exploitation.

According to UNODC's interpretation of the Palermo Protocol the accused does not need to be the owner of the premises where a victim is harboured.[12] For example, they may be harboured in a hotel room, on a ship, or even online.[13]

CASE EXAMPLES OF HARBOURING
S v Emmanuel Uche Odii & Others (South Africa 2015)
The 1st accused harboured the victims of trafficking for sexual exploitation in his flat.
State v Koch (Namibia 2022)
The accused invited five girls to his house, where he sexually abused and exploited them. By allowing the girls to be present in his house in order to exploit them sexually, the court held the accused had received and harboured them, and looked to the Shorter Oxford Dictionary to define harbouring as to "give shelter or refuge to" and concluded: "[A]n act of harbouring or receiving … would be complete if there is evidence to show that the accused allowed or tolerated the presence in his dwelling of the [victims] to facilitate the pursuit of his unlawful intention with them."
State v John Mponda (Malawi 2017)
The accused received and harboured three young girls, and they stayed in his house, which also housed a bar. Although they were approached with job offers of "selling" in a restaurant in Lilongwe, they were expected to have sex with clients. The victims were expected to earn money by serving alcohol at the bar and having sex with bar patrons.

3.1.5 Receipt

"Receipt" of a person is the correlative of "transfer" and may refer to the arrival of the person, the meeting of a person at an agreed place, or the gaining of control over a person.

CASE EXAMPLES OF RECEIPT
State v Mabuza & Chauke (South Africa 2014)
The accused received the girls when they were brought to his house for him to abuse and exploit them sexually.

12 United Nations Office on Drugs & Crime, Issue paper: The Concept of 'Harbouring' in the Trafficking in Persons Protocol (2021), https://www.unodc.org/documents/human-trafficking/The_Concept_of_Harbouring_Issue_Paper.pdf.
13 This is contrary to the court's decision in *Alibhai v Republic* (Kenya 2022).

3.2 MEANS element

This element refers to the means used by traffickers to accomplish the acts. The means describe various ways in which perpetrators exercise control over or manipulate their victims.

The prosecution is required to provide evidence of: the use of force or other forms of coercion; abduction; fraud; deception; abuse of power, influence, or position of vulnerability; or giving and receiving payments or other benefits to obtain the consent of the victim or to a person having control over another person. The consent of a victim of trafficking in person to the intended exploitation shall not be relevant where any of these means has been used.

In cases involving children, the recruitment, transportation, transfer, harbouring, or receipt of a child for the purposes of exploitation shall be considered "trafficking in persons" even if it does not involve any of the aforementioned means. Proof of the child's age is usually obtained from the birth certificate or other documentary evidence, followed by the testimony of the parents, or from the court's own observation and common-sense assessment.

CASE EXAMPLE OF APPLICATION OF MEANS
Uganda v Kagoro Godfrey (Uganda 2002)
This case demonstrated how the court may use different evidence to establish whether the victim is a minor, including birth certificate or oral testimony.

Below we examine each of the "means" in the context of trafficking for sexual exploitation.[14]

3.2.1 Threat

Threats may be related to physical, psychological, emotional, or economic outcomes. Note that nothing is said in the definition as to the person (or possibly property) against whom (or which) the threat or force is directed. It can be directed at the victim or a third party directly connected to the victim (for example family members or friends).

Considerations:

- Threats may include threats of physical violence or deprivation, such as withholding food or drugs to which victims are addicted.
- Threats to harm family members and/or loved ones.
- Threats do not need to be violent to be effective in controlling the victim. For example, the trafficker might threaten the victim (or the victim's family members) with financial harm, deportation, or shaming.
- Victims who have been trafficked into another country may fear arrest for illegal entry and possible deportation, and traffickers may reinforce such fears by convincing victims they will be arrested, interrogated, and punished by the authorities if they leave the house or complain to the police.
- Victims of trafficking for sexual exploitation may fear stigmatisation, discrimination, social exclusion or punishment by their families and communities (for example honour killing).

14 For details of each "means," see Section 3 of the United Nations Office on Drugs & Crime, Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 27 (UNODC, 2020), available at: https://www.unodc.org/documents/human-trafficking/2020/TiP_LegislativGuide_Final.pdf.

- Victims forced to engage in illegal activities may fear arrest and prosecution for activities such as theft, prostitution, drug use, or association with organised criminal groups.
- Traffickers sometimes rely on cultural beliefs and practices as a means of coercion and control. They may use witchcraft ceremonies to convince victims that something terrible will befall them or their family if they attempt to run away or fail to repay their "debt" to the trafficker.
- Threats do not need to be objectively reasonable. It may be sufficient to prove that the person who utters the threat intends that it be taken seriously, or that the subject of the threat was subjectively intimidated.
- Threats that may seem irrational or unreasonable to one person may be perceived as completely credible by someone else, whether by virtue of their culture, gender, education, age, or unfamiliarity with local practices.

CASE EXAMPLES OF THREAT
State v Mabuza & Chauke (South Africa 2014)
One of the accused persons threatened the victims with a gun, and another threatened them by telling them they had nowhere to go and would starve if they left.
R v Chen & Others (UK 2012)
The accused told the victims that her boyfriend was a powerful gang member, that their irregular migration status prevented them leaving, and she would kill them if one of them ran away.

3.2.2 Force

Force can include physical assault, such as being hit, kicked, punched, stabbed, strangled, burned, shot, or raped; confinement, such as being locked in a room or closet, handcuffed, tied up, bound, or otherwise physically prevented from moving or leaving a situation; or drugging a person to incapacitate him/her.

Sex traffickers frequently use sexual abuse and rape to terrorize victims. As their sense of dependency and social isolation increases, victims can become bonded to their traffickers and exploiters who lure them into trafficking for sexual exploitation through engaging in a romantic relationship.

CASE EXAMPLES OF FORCE
United States v Gates (US 2004)
The 1st accused recruited women and girls to come live with him and coerced them into prostitution. He used physical force, psychological coercion, and sexual abuse to compel the women to keep working for him and the 2nd accused who ran the day-to-day affairs of the prostitution business. The 1st accused beat the victims who disobeyed or disappointed him and engaged in sexual acts with many of the women, including children below the age of 16.
United States v Rivera (US 2012)
The accused and his co-conspirators used violence, including sexual and physical abuse, fraud, and threats of deportation to compel the victims to earn money for him through prostitution and to prevent them from reporting the prostitution and sexual abuse to the police.
State v Onyekachi Okechukwu Eze (South Africa 2017)
The victims were assaulted, locked in apartments, and raped; one was forcefully returned on several occasions after escaping.

3.2.3 Other forms of coercion

Coercion can also encompass subtle forms of conduct, similar to those captured by "coercive control."[15] Such conduct extends beyond physical abuse and covers, for example, sexual coercion and tactics to intimidate, degrade, isolate, and control victims. Coercion may also be linked to abuse of power or abuse of position of vulnerability of the victim. Other forms of coercion would include blackmail, extortion, and other unjustified demands. Generally, coercion can encompass the use of physical or psychological pressure, force, or threat thereof[16].

Common forms of coercion in cases involving trafficking of persons include:

- **Confiscation of passport, travel documents, or identity documents:** Victims are often dependent upon and intimidated by their traffickers, who frequently confiscate their identity or travel documents, thus limiting their ability to return to their home country or seek assistance or protection from the authorities.
- **Debt bondage:** Many traffickers bind their victims to debts arising from the costs of transferring the victims to a new location and coerce or force the victims into prostitution to earn money on the pretext that they will pay off the debt. The debts are often so high that the victim is bound for many years of exploitation. The definition of debt bondage[17] makes no reference to the concept of voluntariness; it does not envisage that an individual could consent to debt bondage.
- **Drug addiction:** Traffickers often use drugs to lure and control their victims. They may target victims who abuse drugs and promise to supply them with drugs as a means of coercing them into exploitation. They may also encourage or compel drug use as a means of controlling victims and fostering dependency on the trafficker.
- **Confinement and isolation:** Victims are sometimes confined and isolated by their traffickers. The purpose of isolation is to deprive the victims of any social support and to make victims dependent on the traffickers or the abusive boss.
- **Spiritual and cultural beliefs:** Traffickers may use witchcraft, juju, or other spiritual and cultural beliefs to coerce someone into cooperating with the trafficker. In jurisdictions where the belief is commonly known and understood, no further explanation may be necessary. However, where it is not, expert evidence may help to explain a belief that may otherwise be seen as irrational, especially before the court.
- **Intimate partner trafficking:** Traffickers may cultivate a fake 'love' or 'care' relationship with victims that can take the form of boyfriend/ fiancé relationships, pastoral figure relationships or other forms of close friendship, in order to deceive them into situations of trafficking. Women and girls particularly may be groomed and trafficked by men who are posing as lovers and boyfriends. Traffickers may convince their partner that the exploitation is for the benefit of the relationship, the family, for financial security or to support a substance or other dependency. Alternatively, they will exert control over their partner to coerce their compliance.
- **Trafficking by a family member (s):** Victims may be trafficked by their own family members either intentionally, or after becoming unknowingly complicit in a trafficking process. Almost half of identified cases of child trafficking begin with the involvement of some family member.[18]

15 See Evan Stark, How Men Entrap Women in Personal Life (Interpersonal Violence): The Entrapment of Women in Personal Life, 2019

16 For more details, see The Judiciary, Kenya Judicial Bench Book on Trafficking in Persons 24 (2022).

17 The Supplementary Slavery Convention, Article 1(a), defines debt bondage as: "the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined."

18 IOM, Counter Trafficking Data Collaborative, accessed August 2024

CASE EXAMPLES OF COERCION
R v Imani Nakpangi (Canada 2008)
The accused manipulated the girls to believe they were in a romantic relationship with him, and then used threats, intimidation, and physical violence to control the girls. When one victim wanted to quit, the accused imposed a $100,000 exit fee on her.
R v Kovacs (Australia 2009)
Although the Filipino victim had telephone access and was not locked up or prevented from leaving the shop or house, she was found to have been coerced and under the traffickers' control, as she knew no one except her traffickers in the country, lived in a remote location, had her passport confiscated, was in desperate need of money to support her family, and knew that her circumstances would bring cultural shame on her and her family.
Uganda v Natukunda Faith (Uganda 2012)
In this case the victims were compelled to surrender their passports and tickets and were sexually exploited to repay their travel costs. They had no work permits or travel documents and insufficient funds to get away. The victims were subject to a ritual involving their fingernails and hair and were told their private parts would rot if they failed to pay their debt.
State v Onyekachi Okechukwu Eze (South Africa 2017)
Using drugs to keep the complainants in an altered state of consciousness, employing fear and the threat of harm, and exploiting their addiction gave the accused power over them, to the extent that they were inhibited from indicating their unwillingness or resistance to being trafficked.
S v Emmanuel Uche Odii & Others (South Africa 2015)
The 1st accused forced the victims of trafficking for sexual exploitation to smoke or swallow drugs, such as rock cocaine, before sending them out onto the street for prostitution.
United States v Campbell (US 2014)
The accused enticed the women to join his "family" by offering them comfortable places to live and masseuse jobs. Once he had gained their trust, he required the women to break ties with their relatives, confiscated their documentation, renamed them, branded them with tattoos, abused them, and coerced them into prostitution.
Nigeria v Favour Anware Okwuede (Nigeria 2009)
The two victims were promised jobs in Italy but were taken to Niger and coerced into prostitution. The accused took the victims to a native doctor who performed a ritual to bind the victims to the accused and ensure they would not betray her.

3.2.4 Abduction

"Abduction" means intentionally taking a person and unlawfully restricting their movement to interfere with their liberty.

CASE EXAMPLE OF ABDUCTION
Uganda v Umutoni (Uganda 2014)
Two Rwandan girls were promised work in a supermarket in Uganda by the accused, left their homes in Rwanda without their parents' permission and went with the accused, crossing the border illegally. The court held that the accused's actions amounted to abduction as the girls were minors, and were transferred without their parents' consent by someone they barely knew.

3.2.5 Fraud

Fraud[19] is any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads, or attempts to mislead, a party to obtain a benefit, whether directly or indirectly, whether for oneself or for a third party. Fraud overlaps significantly with deception, but employs deception with the intention to deprive the victim of something valuable (money, property, a service, or a legal right).

One possible example of fraud, as opposed to deception, is where a victim applies for jobs abroad through a legitimate agency but is approached outside the agency's office by someone who persuades the victim to use their agency instead, as they offer free travel costs. Upon arrival at the destination, the victim discovers they will be subjected to sexual exploitation instead of the promised job. In this case, the victim has been deceived into being deprived of the opportunity to obtain proper employment with a legitimate agency. While the use of fraudulent identity or travel documents may be an indicator of trafficking, it is not sufficient to prove trafficking. This type of fraud is committed against the government, not the victim. For fraud to qualify as a means of trafficking, it must be committed against the victim and for the purpose of exploiting him or her.

CASE EXAMPLES OF FRAUD
United States v Garcia (US 2021)
The defendant engaged in coercion, force, and fraud to cause women to engage in commercial sex acts. Specifically, between 2013 and 2019, he recruited young women to participate in commercial sex act videos, which were later posted on pornography websites, GirlsDoPorn (GDP), GirlsDoToys (GDT), and Pornhub, without the women's consent. He duped the women by making false representations that the videos would not be posted online, made available in the US, or be seen by anyone the women knew.

19 Penal Code (1930) Cap. 63 Section 312 ('Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.').

3.2.6 Deception

“Deception” shall mean words or conduct that cause someone to believe something that is false. In the trafficking in persons context, deception frequently involves misrepresentations as to the nature of the job for which victims are recruited, the location of jobs, their end employer, living and working conditions, the legal status in destination countries, and the travel conditions, among other things. For example, a person may believe, based on the promised offer, that they will be a domestic worker, but they are then exploited sexually.

Traffickers may entice victims with false promises that play on the victim’s vulnerability, needs, and desires, such as promises of money, a good job, “pleasure trips” or other benefits, marriage, or shelter for children who have run away from home. There are cases from other jurisdictions where women are deceived into prostitution after having been promised jobs, such as waitresses, massage therapists, bar maids, dancers, or childcare workers.

CASE EXAMPLES OF DECEPTION
R v Dobie (Australia 2009)
The victims came to Australia knowingly to “work in prostitution” but were promised flexible hours, weekly days off, and generous wages. The court held the accused had no intention of keeping his promises.
R v Kovacs (Australia 2009)
The Filipino victim was promised a job as a domestic worker in Australia, given her vulnerable state of poverty. The perpetrator “married” her for the purposes of obtaining a visa to Australia. Upon arrival to Australia, she was subjected to domestic servitude for long work hours, very little and sometimes no pay. Her passport was confiscated and her movements restricted. She was further subjected to repeated rapes. The deception of the victim relates to the actual conditions of her work in Australia and the payment she would receive for it. This formed the basis of her exploitation.
Criminal Case No.2009-337 (Philippines 2011)
The defendants wilfully and unlawfully trafficked nine women from various cities of Metro Manila and other parts of the Philippines, by means of fraud, deception, or taking advantage of their vulnerability. Some of the victims were promised work as administrative assistants in Philippines and overseas, but they were instead coerced to provide sexual services in the cybersex den. The victims were forced to establish internet connection chats online and offer sexual services to users and engage in prostitution. If the victims broke the internal rules, the accused would use threats.

3.2.7 Abuse of power or of a position of vulnerability

“Abuse of power” means using one’s power over another to take advantage of that person. In some countries, the concept has been interpreted to include situations where a person has power over another person by virtue of their relationship and uses that to their advantage. For example:

- A parent or guardian who abuses their power over a child by pressuring, ordering, or persuading them to engage in exploitation, such as forcing the child to beg, work, or go with a trafficker.
- A teacher who abuses his or her position of power over students by making them engage in exploitation to receive good grades or serves as a recruiter.

- A police officer, immigration officer, or other official who abuses their authority to assure that a trafficking victim complies with the trafficker's directives and does not escape, for example, by instructing the victim what to do or say (such as going to a particular immigration officer at the airport) or collecting, holding, and passing the victim on to another trafficker.
- A religious or community leader, who is in position of authority and has trust, and recruits or controls victims of trafficking

"Abuse of a position of vulnerability" is where a person intentionally uses or otherwise takes advantage of an individual's personal, situational, or circumstantial position of vulnerability. It is not sufficient to establish vulnerability; it must also be shown that the vulnerability was abused. The prosecution must provide evidence that:

- The victim was in a position of vulnerability;
- The accused intentionally or otherwise took advantage of the vulnerability; and
- The accused took advantage of the vulnerability to recruit, transport, transfer, harbour, or receive that person for the purpose of exploiting him or her.

The existence of vulnerability is best assessed on a case-by-case basis. Vulnerability may be:

- Personal, based on a victim's age; family or relationship history; or their physical or mental disability.
- Situational, for example a victim being in a foreign country or a different part of the country, where they are socially or linguistically isolated.
- Circumstantial, resulting from the victim's lack of employment or their economic destitution, as well as resulting from displacement due to conflict or natural disasters.

Vulnerabilities can be pre-existing or created by the trafficker:

- Pre-existing vulnerability may include poverty; mental or physical disability, health condition or injury; age; gender; pregnancy; previous sexual abuse; culture; language; belief; family situation; marginalization or irregular status. Children from any socio-economic background or demographic profile who lack the consistent protection of appropriate adult carers are vulnerable to trafficking.
- Created vulnerability may include social, cultural, or linguistic isolation; irregular status; financial debt or dependency cultivated through drug addiction, a romantic or emotional attachment, or cultural or religious rituals or practices.

Abuse of a position of vulnerability may be used in conjunction with other "means" to demonstrate how the victim's vulnerability may have made them particularly susceptible to deception or coercion and allowed them to be trafficked.

Factors influencing vulnerability may include:

- Race, gender, caste, ethnicity, culture, religion, sexual orientation, low socio-economic circumstances/status, situation of debt, and/or being associated with criminality, prostitution or substance dependency.
- Marginalisation, discrimination or stigma in the wider society, e.g. persons belonging to national minorities;
- History of communal trauma and cultural loss;

- Adverse childhood experiences;
- Lack of official birth registration;
- Poverty and destitution;
- Unsafe and low-quality housing and infrastructure;
- Lack of access to employment, including situations of generational/long-term unemployment or dependence on social assistance schemes, and/or high levels of informal and exploitative employment;
- High rates of exposure to violence (direct and/or indirect) including domestic/intimate partner violence, gang violence, etc.;
- Substance dependency;
- Pre-existing mental or physical disabilities, illnesses and conditions;
- Natural disasters, wars. communal violence, economic crises and recessions; or
- Status of a migrant, asylum seeker or a refugee.

Children from any socio-economic background or demographic profile who lack the consistent protection of appropriate adult carers are vulnerable to trafficking. Those who are specifically at risk include:

- Orphans or unaccompanied minors;
- Children who suffer poverty and destitution, living on the streets;
- Children who are victims of armed conflict or war, pandemics and natural disasters;
- Children who have mental health problems, intellectual disabilities or learning difficulties;
- Children in mixed migration flows, particularly unaccompanied minors separated children;
- Children living in residential children's homes, foster homes or social services care;
- Children in dysfunctional family settings, who experience or witness domestic violence, criminality and/or substance dependency. In some cases, children who appear to be in protective family environments may be at risk of trafficking for sexual exploitation by family members through ritual child abuse, grooming, or exposure to paedophile networks.[20]

20 Organization for Security and Co-operation in Europe, National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons (2022), https://www.osce.org/odihr/NRM-handbook.

CASE EXAMPLES OF VULNERABILITY
Samwel Okoth Nyakinye v Republic (Kenya 2016)
The appellant intentionally and unlawfully made travel arrangements for a child with the intention of committing a sexual offence against her. He was charged and convicted with the offence of intentionally and unlawfully causing travel arrangements of a child within the borders of Kenya with the intention of facilitating a sexual offence against a child aged 13. In confirming the conviction, the High Court held that the appellant took advantage of the trust placed upon him as an adult and immediate neighbour of the victim's parents.
Siliadin v France (ECHR 2005)
The court noted that the victim's vulnerability and dependence in her relationship with the couple who exploited her, was proved by the fact that she was unlawfully resident in France, was aware of that fact and feared arrest, that her exploiters nurtured that fear while promising to secure her immigration status – a claim that was confirmed by her uncle and her father – and by the fact that she had no resources, no friends and almost no family to help her.
State v Onyekachi Okechukwu Eze (South Africa 2017)
One of the victims narrated in her testimony that she had been placed in the social welfare system, together with her siblings, when she was only 6 months old after she was raped by her father. During her time in care, she was separated from her siblings. She was subjected to bullying and eventually started to use drugs. Following an abduction and further substance abuse, she was coerced into prostitution on fear that her family would be harmed.
ECLI:NL:GHARN:2010:BO2994 (Netherlands 2010)
The accused made the victim become attached to him and put her in a dependent situation. The court opined that the victim could no longer freely decide whether she was going to 'prostitute' herself, or continue to 'prostitute' herself.
R. v Wallace (Canada 2009)
The court noted the so-called "lover-boy scenarios," where an offender seduces his victim and once an intimate relationship has formed begins to use the emotional bond to manipulate and control his victim. It is an aggravating factor that the complainant was in an intimate relationship with the appellant. As the Court has noted, there are fiduciary duties owed to intimate partners, and "they are entitled to expect protection from their partners, not exploitation."
R v Urizar (Canada 2010)
The accused met the victim, who was 18 at the time, in a bar. They started seeing each other. The accused was very nice to her, buying her clothes and meals at restaurants. He convinced her to start work as a stripper and to use drugs. She was physically, verbally, emotionally, and sexually abused by him. The accused locked her in a bedroom in an apartment and refused to let her go.

3.2.8 Giving or receiving benefits

Under the CTiP Act, the "means" element includes:

- Giving payments or benefits to obtain the consent of the victim of trafficking in persons; or
- Giving or receiving payments or benefits to obtain the consent of a person having control over another person.

This recognises that receipt of a payment or benefit may be part of the trafficker's scheme to deceive and coerce a victim into complying with exploitation. In such cases, neither the victim's initial consent nor the receipt of a benefit negates the manipulative impact of this means.

Where the victim is subject to the control of another person, the trafficker may need to obtain the other person's consent to gain control over the victim. In such cases, the trafficker may offer a payment or benefit to induce that person to consent to transferring control over the victim to the trafficker. For example, a trafficker might promise a parent to provide care and schooling for their child if they allow the child to come with the trafficker.

Other examples of persons who may have control over another include:

- A religious figure over his congregation members;
- A parent over a child or a husband over a wife;
- Debt collector over the indebted person;
- A prison guard may have control over an inmate;
- A kidnapper may have control over their victim;
- An employer may exercise control over their staff;
- A landlord over tenants struggling to pay their rent;
- A teacher, principal, or matron in a boarding school may have control over a student.
- A manager or staff member of an orphanage, care home, or other residential facility may have control over residents.

3.3 PURPOSE element

The third constituent element of trafficking in persons is the purpose for which the acts are done, which is exploitation. In the context of this Bench Book, it must be for the purpose of sexual exploitation – which are the offences provided for in the SOA[21] and other forms of sexual exploitation perpetrated on online and digital spaces. The courts uphold that, as per Article 5(2) of the Palermo Protocol, if the intent to exploit was real, proof of actual exploitation is not required to prove the offence of trafficking in persons has taken place.

CASE EXAMPLES OF PURPOSE
Criminal Case No.06-242304 (Philippines 2009)
A child victim who had been taken aboard a boat for purposes of sexual exploitation was rescued before the exploitation transpired. Nevertheless, the accused was convicted of a trafficking offence and not of attempted trafficking. The court concluded that the defendant had recruited the victim for the purpose of prostitution. Instrumental to the conviction was a solid foundation of evidence, including testimony from a coast guard official, the mother of the victim, and a social worker who interviewed the victim; as well as documentary evidence and statements from the victim and others.
Burnstein v State of Israel (Israel 2005)
The accused acted as a broker between a person who wished to "purchase" women for prostitution (an undercover police agent) and persons "selling" two women for this purpose. Though the transactions never materialised, and the accused did not receive any payment, he was convicted of trafficking.
Geoffrey Mutemi Manzi v Republic (Kenya 2020)
The Court held that the offence of trafficking does not require actual exploitation and in this case sexual exploitation had taken place. Where no defilement takes place, but the person has indeed trafficked a child, then the intention to have the child for purposes of sexual exploitation should be sufficient.
State v Koch (Namibia 2022)
The accused was charged with various counts of trafficking of a child and committing or attempting to commit sexual acts with children below the age of 16. The victims were aged between 9 and 13 years, and the accused was 39 at the time of committing the offences. The counts on child trafficking dealt with the allegation that he had on several occasions, wrongfully and unlawfully recruited, and/or received, and/or harboured five female victims for the purposes of sexual exploitation. The victims regularly visited the accused's house where he exposed them to pornographic material. The court established his intent to subject the victims to sexual exploitation.

21 See Section 2.5 of this Bench Book for a list of offences under the SOA.

The intention to commit the act falls within the parameters of trafficking, and the courts may convict an accused person of trafficking and/or allied crimes.

CASE EXAMPLES OF CONVICTION ON PROOF OF INTENTION TO TRAFFIC
Attorney General of the Federation v Constance Omoruyi (Nigeria 2006)
The victims were still in Nigeria when they were apprehended by law enforcement. They had not engaged in any sexual acts. The accused was found guilty of an attempt to organise foreign travel for prostitution and an attempt to place the victims in servitude as pledge for a debt. The court relied on evidence which included the testimony of a "juju" doctor regarding an oath taken by the victims that they would not flee and would pay their debts. Additionally, there was testimony from law enforcement and the accused's statements, which were confessional in nature. The conviction was ruled upon though the victims did not testify.
United States v Jungers (US 2013)
The accused were convicted of attempted trafficking of a child for sexual exploitation. Both accused persons were apprehended following a sting operation in which police posted an advert online, pretending to be a man offering his girlfriend's underage daughters for sex. The defendants were arrested when they came to the location where they thought they would meet the children for sex. The convictions were affirmed on appeal.

There are also examples of cases where the courts erred in not convicting accused persons on the basis that the exploitation did not take place.

CASE EXAMPLES OF WRONGFUL ACQUITTALS
John Njenga Njeri v Republic (Kenya 2018)
The appellant had attempted to engage in sexual intercourse with the victim, but she successfully resisted. The Court erroneously claimed that proof of sexual intercourse is crucial to prove "sexual exploitation," holding that since sexual intercourse was not proved beyond reasonable doubt, and that the fact of a broken hymen does not per se amount to proof that there was sexual intercourse, then the charge of harbouring the complainant for sexual exploitation was not proved.
Joseph Fundi & Another v Republic (Kenya 2013)
The court erroneously noted that: "All in all, it is clear that the offence of defilement was not established. The basis of the charge in the 1st count (trafficking for sexual exploitation) was that the 2nd Appellant was getting PW1 for the 1st Appellant to go and have sex with her. Without proof of the defilement then even count 1 cannot stand."

4 BEFORE AND DURING THE TRIAL

The trial process in cases of trafficking in persons for sexual exploitation is provided for in the Criminal Procedure Code (CPC), while a detailed procedure is articulated in the *Criminal Procedure* Bench Book[22]. A sample charge sheet under the CTiP Act can be found in Annex E of this Bench Book.

4.1 Adopting a trauma-informed approach

Victims of trafficking for sexual exploitation have typically endured various forms of sexual, psychological, and physical violence, all of which can cause significant ongoing trauma. A trauma-informed approach should therefore be incorporated throughout the criminal justice process, including the trial, to avoid unintentionally re-traumatising victims and to ensure that the credibility of their testimony and statements is not discredited due to inconsistencies related to trauma.

Trauma is any experience that overwhelms one's ability to cope. It disrupts the rational thought process and impairs the ability to handle stress, perceive when a threat is in the past, and manage emotions. Victims often experience re-traumatisation when they are "triggered" or have flashbacks or intrusive thoughts that replicate the experience of their initial trauma when they have to discuss their trafficking history.

The symptoms of trauma can manifest in various ways among victims of trafficking for sexual exploitation. For example, traumatised victims may have difficulty recalling and recounting the details and chronology of events, which can give the impression that they are not credible witnesses. They may also be reluctant to disclose information about their experiences, either because of feelings of shame or because of the fear of potential consequences, such as physical harm/violence, detention, or deportation (either for themselves or for their family members).

In other words, a survivor who may appear to be uncooperative, combative, or difficult could in fact be experiencing overwhelming symptoms related to trauma, and/or mental health conditions such as post-traumatic stress disorder (PTSD), complex post-traumatic stress disorder (CPTSD), as well as depression and anxiety.

Taking a trauma-informed approach means that Judicial Officers should:

- Understand the nature and impact of trauma, including the relationship between triggers and symptoms and its effect on how victims may speak about their experiences.
- Remember that a sense of safety, stability, and security must be attained before a traumatised person can be expected to engage constructively with systems or services.
- Be aware that victims may remain in harmful environments and relationships, even while they participate in court proceedings (one of their traffickers, or those who collaborated with their trafficker, may even appear as family or "friends" in court).
- Address any trauma-related needs before, during, and after interviewing victims.
- Train staff to understand trauma, detect signs of re-traumatisation, and practice interview techniques that can mitigate the possibility of re-traumatisation.
- Create trauma informed environments throughout the criminal justice proceeding.
- Ensure a gender sensitive approach by providing female staff to accompany or engage with victims, when requested.

22 *See*, The Judiciary, Republic of Kenya, Criminal Procedure Bench Book (2018), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Judiciary CriminalProcedureBenchBook.pdf.

In all communications with victims, consider the following:

- It is extremely difficult for any person to give a stranger information that is highly personal or painful. Victims' lives have often been shattered through sequential, traumatic events including violence and loss, so they can find the prospect of providing personal information extremely distressing. Therefore, information should only ever be requested or discussed within the remit of a professional task and in an appropriately confidential environment.
- Do not give the impression that the only important task of a meeting is simply to gather as much information as possible, or act in a hurried or impersonal manner. In the course of trafficking, victims often become used to having the significance of their lives and emotions disregarded and diminished by others. Maintaining contact with them relies upon consistent kindness and professionalism.
- Always demonstrate sensitivity when approaching distressing questions concerning their experiences of sexual exploitation. In some cases, it will be helpful to introduce a sensitive topic before asking a question (for example 'I am now going to ask about your experience with the accused and their associates ...' I have some questions about the person who brought you to this country...'), and check if they feel able to go ahead.
- When sensitive information arises in the course of an interview or discussion, the victim's feelings about it should be briefly and respectfully acknowledged. Recognising that information is distressing does not undermine professional objectivity or prevent professionals' ability to later review an account in full and come to a different conclusion. Brief acknowledgment is appropriate, and enables the conversation to progress forward without lingering for too long on a difficult subject.

It is important to be aware that trafficked persons may not self-identify as victims. In some cases, they may make initial statements that seem to protect the perpetrators, and/or may run away from or avoid law enforcement and service providers who are trying to assist them due to lack of trust or fear. They may also display maladaptive behaviours, such as engaging in drug or alcohol abuse due to being addicted during trafficking or as a trauma coping mechanism. They may be homeless or not have a permanent residence or may have criminal records due to crimes committed while being trafficked. Understanding the reasons behind a victim's actions will help greatly in building rapport and trust, whether in preparing a victim-witness for trial or in providing appropriate services.

4.2 The National Referral Mechanism Guidelines for assisting victims of human trafficking in Kenya

To enhance protection and assistance for victims of trafficking, Kenya developed National Referral Mechanism (NRM) Guidelines for Assisting Victims of Trafficking. The NRM applies to any person who is a victim of trafficking in persons in Kenya, irrespective of nationality, country of origin or immigration status, and to any Kenyan citizen (whether residing within or outside the country). The NRM Guidelines recognise that a victim's needs are often complex and wide, and they set up channels, at the national, regional and county level, for coordination, collaboration, and effective communication amongst service providers.[23]

The NRM Guidelines set forth nine guiding principles:

1. **Victim until otherwise proven**

   Any individual presumed to be a victim of trafficking should be treated as such until otherwise proven. If found not to be a TIP victim, the individual should not be criminalised but accorded appropriate support in accordance with the Victim Protection Act CAP 79A.

2. **Non-discrimination**

   All service providers involved in victim assistance should carry out their services with no form of discrimination or bias whatsoever.

3. **Respect for and protection of human rights**

   Victim assistance should be provided in a manner that respects the human rights and basic dignity of the trafficking victim.

4. **Personalised treatment and care**

   Every victim of trafficking has personalised needs. Services geared towards victim assistance and protection should be sensitive and focused on the individual needs of the victim.

5. **Comprehensive approach to assistance**

   Victims of trafficking often have multiple needs that require assistance through the cooperation of multiple service providers. Coordination is important to ensure that these various needs are holistically met.

6. **Informed consent**

   The victim's informed consent should be sought throughout the process of referral, care and assistance. Service providers should disclose relevant information, actions, policies and procedures in a language the victim understands.

7. **Bona fide participation**

   The victim should be encouraged to participate as much as possible in decision-making throughout the process.

8. **Confidentiality**

   All information related to the victim should be treated with due regard for the victim's right to confidentiality and privacy. Any information shared should be on a 'need-to-know' basis and with the victim's informed consent.

9. **Best interest of the victim**

   Protection services and assistance provided should be in the best interest of the victim, as the victim's health, security and legal safety are paramount.

23 Organization for Security and Co-Operation in Europe, National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons 16–24 (2022), https://www.osce.org/odihr/NRM-handbook.

The NRM includes the following special considerations for interviewing children:

- **Qualified same-sex staff:** Only qualified staff trained in the special needs and rights of children should question child victims. Wherever possible, questioning should be done by staff of the same sex, taking into account the child's best interest.
- **Prior knowledge:** Find out as much information as possible about the child's case prior to the interview. Make clear and friendly introductions to establish rapport with the child.
- **Trustworthy guardian:** Children's interviews should be conducted in the presence of a parent or trusted guardian, psychologist or social worker as appropriate.
- **Simple and informal:** Keep the atmosphere simple and informal. Structure the interview in an age-appropriate manner and do not rush. Do not insist on an interview.
- **Open-ended questions:** Open-ended questioning will allow the child to give their own account. Avoid leading questions.
- **Monitor movements, facial and behavioural changes:** Pay attention to signs that the child has told all they know, and do not press for details the child cannot recall.
- **Self-esteem and final reassurance:** Keep assuring the child that they did not commit any wrong. Close the interview with reassurance that the child has done well and that the interviewer will be available whenever the child needs to talk again.

The NRM establishes standard operating procedures for identifying victims of trafficking. The purpose of identification is two-fold: to establish whether the individual fits within the definition of trafficking in persons in Section 3 of the CTiP Act and to support victims of trafficking to access the relevant services within the shortest time possible, including the criminal justice system.

Those services include:

- **Physical care:**
  - Clothing and hygiene products
  - Food
  - Safe and adequate shelter
  - Protection

- **Health care:**
  - Medical examination and treatment
  - Surgery
  - Medication

- **Psychosocial support:**
  - Trauma therapy
  - General counselling

- **Legal assistance:**
  - Victim-witness protection
  - Legal representation in court
  - Legal counselling (keeping the trafficking victim informed of the processes, procedures, potential consequences, risks involved and available assistance). The victim should understand that access to assistance, protection, and reintegration services is not contingent on willingness to cooperate with law enforcement regarding prosecution of the case

- Immigration services
- Civil claim for damages

- **Empowerment:**
  - Life skills;
  - Education;
  - Vocational skills training.[24]

4.2.1 Good practices for dealing with presumed victims of trafficking

Once a person has been identified as a presumed victim of trafficking, the Standard Operating Procedures[25] call for an initial needs assessment of the victim to identify and address any emergency needs and refer the victim to appropriate protection, shelters and medical health facilities.

There are several options open to Judicial Officers when handling potential trafficking victims, whether in civil, criminal, or family and children matters:

- Use other court staff to notice and report interactions (such as coaching, controlling or threatening behaviour, indications of fear, or of a romantic relationship) between parties when the Judicial Officer is not in the court.
- In family and children's cases, particularly where the Judicial Officer believes a trafficker may be seeking guardianship or adoption of a victim or victim's child it is further recommended, the case be continued to establish the situation more clearly.
- Do not accept a guilty plea where the accused person may have committed a crime due to being a trafficking victim.[26] People who have been trafficked are victims and witnesses of serious crime. If they are criminalised themselves it deters them from providing valuable information on crimes committed against them and therefore results in the loss of vital intelligence that could be utilised by law enforcement to prosecute and convict their traffickers. Traffickers are known to prevent victims from future cooperation with law enforcement by forcing them to commit crimes or to otherwise believe they are complicit in criminal offences and activities.
- Continue a criminal case to allow proof that the crime was committed due to the use of force, fraud, or coercion if it negates criminal intent.
- To the extent a victim of trafficking is involved in unlawful activities as a direct consequence of their situation as a trafficked person, avoid detaining, charging or prosecuting them.
- Refer the matter for further investigation.
- Refer the victim for support services.

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24 The United Nations High Commissioner for Human Rights has developed *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (May 20, 2002) (including Guideline 6 on protection and support for trafficked persons). Also available at United Nations Office on Drugs & Crime, Protection, assistance and human rights Tool 8.3,https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_8-3.pdf.

25 Standard Operating Procedures for Investigating and Prosecuting Trafficking in Persons in Kenya, https://www.odpp.go.ke/wp-content/uploads/2023/11/STANDARD-OPERATING-PROCEDURES-FOR-INVESTIGATING-AND-PROSECUTING-TRAFFICKING-IN-PERSONS-IN-KENYA.pdf.

26 States have an obligation under the Palermo Protocol to establish procedures that exempt victims of trafficking from punishment or prosecution for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts. Inter-agency Co-ordination Group against Trafficking in Persons (ICAT) (2020), Issue brief: Non-punishment of Victims of Trafficking.

Judicial Officers should be alert to ensuring the safety of potential victims. In many cases, the trafficker or someone connected to the trafficker may be in the courtroom, and the victim may be unable to speak freely about their situation. If not removed from the trafficker's control, the victim may be in danger if they disclose anything or provide information outside what they have been coached to say. Further, when a victim is charged criminally and given bail, it may increase the trafficker's control over the victim (who may be family, a romantic partner or friend, and may have posted the bail). Judicial officers need to be careful and use discretion in how they proceed. If referring the victim to services ensure that the address and /or location of the services are not publicised as to enable the trafficker to locate the victim.

4.3 Upholding the rights of victims

A victim-centred approach requires that Judicial Officers uphold the rights of victims. The Courts have a duty to respect, promote, protect, and fulfil the rights of victims. This duty extends to ensuring that police, prosecution, defence counsel, and other persons in contact with the victims do not violate these rights. They should also educate others about the need to protect the victims' rights.

Article 50(9) of the Constitution guarantees victims' protection, welfare, and rights. These rights, if properly understood, should not undermine those of the accused[27] or the public interest.

CASE EXAMPLE OF UPHOLDING RIGHTS OF VICTIMS
Joseph Lendrix Waswa v Republic (Kenya 2020)
The appellant appealed against the decision of the Court of Appeal in upholding the decision of the High Court which permitted the victim's counsel to participate in the trial of the appellant on condition that the said participation should not supersede the role of the prosecutor). The Supreme Court held that: "We agree with these sentiments that the trial Judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim's interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary. Therefore, we fail to see how the 'participatory rights of the victim' violate the 'fair trial' rights of the accused. A victim can participate in a trial in person or via a legal representative."

Legal provisions that guarantee the participation of victims in the trial include:

- Protection of victims and witnesses (VPA Sections 10 and 11 and Witness Protection Act Section 24);
- Timely hearings and effective case management (VPA Section 9, CoK Article 50);
- Secure waiting area (VPA Section 22(1));
- Privacy and confidentiality (CTIP Act Section 11, CoK Article 50, VPA Section 8, and WPA Section 6);
- Media restriction (CoK Article 50 and VPA Section 8);

27 The rights of an accused person are provided for in the Constitution under the Bill of Rights, as well as in various other Kenyan legislation. For details, see Annex C.

- Plea agreement (CPC Section 137, Plea Agreement Policy)[28];
- Bail and bond (Constitution Article 49, Bail, and Bond Policy Guidelines); and
- Special measures for hearing victim testimonies (Witness Protection Rules of the Court and SOA Section 31(4)(5).

4.4 Protection of victims and witnesses

For a fair and just hearing, the parties to the proceedings should have equal standing, and witnesses should be protected as provided in the Constitution. Article 50(8) of the Constitution provides that members of the public or the media may be excluded from a hearing provided the exclusion is necessary to protect witnesses and/or other vulnerable persons, among others. Further, the Evidence Act provides that:

- all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, health impairments or lack of legal capacity (whether of body or mind), or any similar considerations (Section 125);
- the court may forbid any questions or inquiries that it regards as indecent or scandalous unless questions relate to facts in issue or to matters that need to be known in order to determine whether or not the facts in the issue existed (Section 159); and
- the court shall forbid any questions that appear to have an intention to insult or annoy or which, though proper in itself, appear needlessly offensive (Section 160).

4.4.1 Special measures for the protection of victims and witnesses

Trafficking for sexual exploitation may be linked to organised and serious crime, potentially placing victims and witnesses in situations with a high risk of intimidation.

Under the WPA (Part III), victims and witnesses are protected from intimidation. Even before prosecution of their case the victims and witnesses should be provided with security to protect them from any further harm. Measures for security include placing victims and witnesses in a place of safety, providing police protection, providing appropriate shelter, and/or relocation.

According to the Witness Protection Rules of the Court under the WPA victims and witnesses should be protected while giving evidence in court. Measures that should be taken to avoid disclosing their identity, to ensure their lives or physical well-being are not endangered, and /or they do not experience any emotional and psychological harm. Such protections include:

- Expunging identifying information from the court records;
- Redacting identifying information from documents and information disclosed to the accused or their advocate;
- Giving testimony through image or voice distortion or alteration devices or behind a screen;
- Assigning a pseudonym;
- Conducting hearings in closed sessions;
- Prohibiting any party in the proceedings from disclosing any information to a third party of the protected witness;

28 Plea Agreement is not applicable in cases of minors for lack of capacity to enter into any agreement.

- Assigning a separate waiting room for a witness and ensuring that there are different arrival times so that the witness does not run into the accused at any time at court;
- Allowing evidence to be given without the witness being physically present, e.g. through audio-visual technology.

These measures can also reduce the discomfort involved in testifying before an audience, particularly when revisiting traumatic events involving sexual exploitation and abuse.

Articles 24 and 25 UN Convention against Transnational Organized Crime (UNTOC) enjoins State Parties to adopt appropriate measures to protect witnesses and victims of crimes from potential retaliations or intimidation, and to provide them with assistance and protection. Witness protection has a twin track approach of securing the physical safety of the witness and the maximum co-operation of the victim in the criminal justice process. Assessing the reasons and needs for protection of a victim-witness is a dynamic and continuous process. It includes the assessment of prevailing circumstances, consistent communication with the victim and decisions that are based on their individual risk assessment and protection needs.

Witness protection measures for victims are relevant to all stages of criminal justice proceedings. They include:

- Police protection;
- Measures to secure and/or monitor traffickers/defendants;
- Witness protection programmes;
- Treatment of victims of trafficking as vulnerable witnesses throughout investigations;
- Evidentiary rules of protection ('special protection measures') when testifying in court (anonymity, shielding, video conferencing) and additional measures for minors;
- Use of unmarked transport, non-uniformed police and concealing identity of victim wherever possible;
- Permitted anonymity procedures to protect victims in line with Kenyan laws;
- Early warning systems to notify victim-witnesses if there is a change in the threat(s) they face;
- Safe and appropriate accommodation based on risk assessment and safety planning;
- Temporary relocation in safe areas/accommodations;
- Advice about offline and online communications, including with family members, friends and all others who may potentially place them at risk;
- Advice on areas, locations and vicinities where victim witnesses are at risk of seeing traffickers or traffickers' associates; and
- The public nature of the hearing (including by the media) needs to be balanced against protecting the anonymity of the victim witness.

In determining the nature of protection to be granted, the court considers whether the measure is: (1) necessary in the light of an objectively justifiable risk; and (2) proportionate with the rights of the person making the accusation or testifying against the accused.

Any measure used should not prejudice the rights of the accused to a fair trial.

CASE EXAMPLES ON PROTECTION OF WITNESSES AND VICTIMS
S v Mokoena (South Africa 2008)
In this case, where the applicants cited minors involved individually and by name, the court held that the minors could be seriously harmed if they were identified, regardless of the outcome of the application. Accordingly, the court ordered that the minors were not to be identified by the media or anybody else, by name or otherwise, either directly or indirectly.
Charles Muturi Macharia v Standard Group & Others (Kenya 2017)
In this case, the Supreme Court delivered a judgement on the protection of minor's identity where they are in conflict with the law. Within the judgement, the court espoused the principles that need to be adhered to by journalists in reporting cases, especially those involving children.

4.4.2 Use of intermediaries during trial

Article 50 (7) of the Constitution recognises the use of intermediaries in court proceedings, while other laws[29] also provide for the use of intermediaries where a witness or victim is vulnerable (for example if the witness is the victim, if they are children, or if they have mental disabilities). Intermediaries should always be considered useful for victims of trafficking of any age and provided as standard for children's cases. Their function is to facilitate complete, accurate and coherent communication with the vulnerable witness or vulnerable defendant. Section 31 of the SOA also gives the court power to declare any witness as vulnerable, on its own initiative or at the request of the prosecution or of the accused or by request of any other witness not determined as vulnerable themselves, based on the following criteria:[30]

- Age
- Intellectual, psychological, or physical impairment
- Trauma
- Cultural differences
- The possibility of intimidation
- Race
- Religion
- Language
- The relationship of the witness to any party to the proceedings
- The nature of the subject matter of the evidence
- Any other factor the court considers relevant

Possible intermediaries include a parent, relative, psychologist, counsellor, guardian, children's officer, or social worker. The object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness. The role of the intermediary includes:

- Acting as a medium through which an accused person or complainant may give evidence to the court (Article 50 (7) CoK, Sections 31(4) and 31(7) SOA).
- Providing other forms of support for the witness, such as requesting a break when the vulnerable witness needs one.

29 Sexual Offences Act, No. 3 (2006) Kenya Gazette Supplement No. 52 Sections 31, 32; Victim Protection Act (2014) Cap. 79A Section 17; Witness Protection Act (2008) Cap. 79.

30 Victim Protection Act (2014) Cap. 79A Section 17 adds to these criteria by including: dependency on the accused; trauma; gender; the nature of the offence committed against them; and/or health status.

- Assisting a vulnerable witness, such as one with psychosocial disability to overcome anxiety.

CASE EXAMPLES OF USE OF INTERMEDIARIES
John Kinyua Nathan v Republic (Kenya 2017)
The Court of Appeal elaborated the procedure for conducting proceedings through an intermediary and his/her role. The court found that because of the reality that a child of tender age, or elderly person, or a person affected by a disease of the body or mind may have difficulties relating to the trial court events relating to the crime, the role of an intermediary in such situations is imperative.

4.4.3 Protecting the best interest of the child

The CRC Committee draws keen attention to the fact that child victims and witnesses are in need of special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent possible hardship and trauma that may result from their participation in the criminal justice process. The Committee calls on all those involved in the judicial process to assist children in all possible ways in situations where those children have been the subjects of victimisation.

Child victims and/or witnesses have the right to dignity, which needs to be protected. Article 50 of the Constitution and Section 222 of the Children Act protect the rights of the child during judicial proceedings. Children must be treated with dignity and compassion considering the best interest of the child, and each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected.

The best interest of the child principle provides that in all matters involving the child, the paramount consideration should be the wellbeing of the child. A child testifying in court faces a high degree of mental stress, and the courts must create an atmosphere that is conducive to speaking freely about the events relating to the offence committed against them.

In all cases involving a child victim, the Judicial Officer should always consider appointing an intermediary.

CASE EXAMPLE OF BEST INTEREST OF THE CHILD
S v Mokoena (South Africa 2008)
In the judgement for this case, within a section on the child victim and the child witness in the criminal process, the High Court stated that: "At the very least, the criminal procedure and the courts should administer the criminal justice system in such a fashion that children who are caught up in its workings are protected from further trauma and treated with proper respect for their dignity and their unique status as vulnerable young human beings."

4.5 Considerations for hearing victim and witness testimony

The successful prosecution of cases involving trafficking for sexual exploitation often depends on the content and credibility of the testimony of victims and other witnesses.

Common misconceptions about the nature of sexual exploitation, and a lack of understanding of the dynamics of power and control involved in trafficking and sexual exploitation more broadly, can result in the interpretation of certain factors as lending support to the defence.

Care should be taken to avoid misinterpreting the following as a defence.

4.5.1 Consent of victim(s)

In trafficking in persons cases, the victim's consent is irrelevant and cannot be used by the perpetrator as a defence. Section 3(2) of the CTiP Act states that, the consent of a victim of trafficking in person to the intended exploitation shall not be relevant where any means specified in Section 3(1) is used. Further Section 3(3 provides that the recruitment, transportation, transfer, harbouring, or receipt of a child for the purposes of exploitation shall be considered as trafficking in persons even if it does not involve any of the means stated in Subsection 1.

CASE EXAMPLES ON IRRELEVANCE OF CONSENT
Joseph Parashuku v Republic (Kenya 2013)
The appellant was charged with the offence of child trafficking contravening Section 13(a) of the SOA (before the repeal of the provision). The facts were that he intentionally removed a 15-year-old girl from her parents' custody to Tanzania with the intent to facilitate the commission of a sexual offence against her. He pleaded guilty to the charges. On appeal, the court held that the issue of consent did not arise as a child could not consent to having sexual relations with an adult.
R v Wei Tang (Australia 2008)
The victims signed contracts stating that they would "work as prostitutes" and that they would be required to repay debts for their travel expenses. The court noted that their consent to do both did not prevent a finding of slavery, as they were under control and treated as property by the accused.
S v Madjiedt (Namibia 2022)
The victim had gone to live with the applicant (accused) person who was employed in Angola. This was by mutual arrangement between the victim's mother and the applicant. The applicant argued that the charge of trafficking could only be prima facie sustained if there was proof that the transfer and transport of the victim was unlawful and intentional and secondly that it was for sexual exploitation. The consent of a parent in cases of children does not vitiate the commission of an offence. The State argued that although there was consent between the parents for the child to go to Angola, that did not permit the applicant to have sexual intercourse with the child. The court also decided that the State had presented prima facie evidence of acts as well as an exploitative purpose, being that of sexual assault.

4.5.2 Expressions of gratitude/receipt of gifts

Receipt of a benefit or reward is not proof that the victim was not being exploited. Perpetrators often use gifts, privileges, or other benefits to groom, recruit and entrap their victims, and may provide gifts and privileges to the victim as a reward for "good" behaviour or to obtain "consent."

The court needs to look at the case in totality and the circumstances under which the victim was being given the benefits or rewards. For example, the trafficker may control the victim by creating an atmosphere of protection, love, care and romance, leading the victim to be attached to the trafficker despite the control and abuse.

4.5.3 Failure to report (or a delay in reporting) the crime

It should not be a defence that a victim did not report, or delayed reporting. In Kenya, there is no time frame within which criminal matters are to be reported. While it may be assumed that victims of trafficking for sexual exploitation will seek help and report at the first opportunity after a crime is committed, survivors of sexual violence typically face a range of personal, social, and structural impediments to reporting any offence made against them, including:

- lack of awareness of the definition of trafficking in persons and that they are a victim;
- being a member of a marginalised community or a national minority;
- direct threats by perpetrator(s) of physical harm or murder to victim and/or their family members;
- trauma/shame/stigma;
- fear that no one will believe them;
- trauma bonding or Stockholm syndrome;[31]
- fear of retaliation and intimidation;
- lack of trust in police;
- lack of knowledge of where to report and what to report; and
- corruption or compromise by family members, among others.

While delays in reporting can make it more difficult to establish whether an offence has been committed and/or to obtain sufficient evidence in support of a victim's case, late reporting should not prevent effective investigation and prosecution of a crime.

CASE EXAMPLES OF LATE REPORTING
114/1372/2006 (Romania 2010)
In this case, traffickers used threats and violence, which left the victim too scared to attempt to escape or report.
ECLI:NL:GHARN:2010:BO2994 (Netherlands 2010)
A victim may not report a trafficker where they are in a "romantic" or dependent relationship and the victim does not want to betray the trafficker.

31 Stockholm syndrome, psychological response wherein a captive begins to identify closely with his or her captors, as well as with their agenda and demands.

4.5.4 Return to exploitation

Victims may return to the same situation of exploitation, even after they have escaped for various reasons. This does not mean that they were not initially trafficked and exploited. Such reasons may include:

- attachment to the trafficker such as trauma bonding or Stockholm syndrome;
- low self-esteem, trauma, mental health issues, lack of a support system and stigmatisation;
- lack of provision for core needs, alternative accommodation, or means of income;
- lack of referral or provision of appropriate services through the NRM; and
- factors such as age or disability, which may increase dependency on others.

CASE EXAMPLES OF VICTIMS RETURNING TO EXPLOITATION
R v Shaban Maka (UK 2005)
The appellant was convicted of trafficking a 15-year-old Lithuanian into the UK for sexual exploitation. He deceived the child by promising her a well-paid job in the UK. The appellant met her at the airport and confiscated her passport. He took her to a house, where the next day, he sold her to another man for £4,000. This man raped the girl and sold her for sex in exchange for money in a brothel for several days. She escaped and contacted the appellant. The appellant picked her up and, together with the other man, sold her to a third man who also sold her for sex in a brothel. She escaped and contacted the appellant again. The appellant subsequently sold her in succession to three other men who exploited her in the same way. She eventually escaped and reported to the police. The sentencing court held that the conduct of the appellant had characteristics of slavery, with the victim being sold from one procurer to another.

4.5.5 Failure to escape or leave

In some cases, the victims may have the opportunity to leave or escape from the place where they are held, but for various reasons, they do not. The accused may use this as a defence that no sexual exploitation was taking place, and the victim was at the premises out of their own free will. Victims may not leave due to psychological or spiritual control by traffickers, fear of implications if they are found out or of reporting to the authorities, lack of options, or attachment to their exploiters. Courts should look at the totality of the available evidence. The reasons victims may not attempt to leave or escape include:

- methods of psychological or spiritual control by traffickers;
- threat by traffickers to report a crime committed by the victim in the process of being trafficked;
- the relationship of dependence between the traffickers and the victim;
- fear of the traffickers;
- attachment to the trafficker(s), e.g. through perceived “romantic relationships”;
- financial constraints/lack of money;
- having no valid/legal immigration documents;
- no community ties and no knowledge of where to get assistance;
- no local language skills; and
- the position of power of the exploiters over the victim and their families.

CASE EXAMPLES OF FAILING TO ESCAPE OR LEAVE
R v Lirong Liu (Tonga 2010)
The defence claimed that the victims could have complained to the police because they were free to move about and had access to a cellular phone. In view of the totality of circumstances, which included exploitation of prostitution, threats and confiscation of passport, the court convicted the defendants, nonetheless.
United States v Charles Floyd Pipkins & Andrew Moore (US 2004)
The defendants challenged their conviction of involuntary servitude because the victim was "free to go at any time." The court noted that the rules of the sex trade allowed the girls to move from one pimp to another on their own initiative. Despite this, the court did not accept the defendant's claim. The court considered that the victim was forced to sell herself for sexual services and to give the defendant all the money due to his threats and physical violence. He was forcing her to perform sexual acts for his benefit.
Brussels Criminal Court, 5 February 2016, 46th Ch (Netherlands 2016)
This case involved several defendants who, as part of a criminal gang, smuggled Nigerian women to Europe using false identity papers. Upon arrival, they had to sell sex and were also required to reimburse their travel costs. The victims were threatened with voodoo rituals before leaving Nigeria, and their families would be held accountable if they did not deliver. The victims could not go to the police as they were in a vulnerable position without money or a legal residence permit and without a fixed abode.
S.M. v Croatia (ECHR 2018)
In this case, the fact that the trafficker was a former police officer intimidated the victim not to report.

4.5.6 Inconsistent statements and reluctant or hostile witness

Where the victim or witness give inconsistent statements, courts should adopt a trauma-informed and survivor-centred approach to enable a conducive environment for victims to recollect and give credible evidence.[32] This should include a recovery and reflection period, which recognizes the serious crime that victims have suffered, their vulnerability as a result of trafficking and their need for time and support to access essential services and reflect (to an extent) upon their next steps. It should be granted to all victims of trafficking and should never be conditional upon the victim's co-operation with criminal investigations or proceedings. Application of a recovery and reflection period will result in more consistent and complete testimony from the victim and will facilitate informed consent and cooperation to the proceedings.[33]

The Court should strive to win the confidence of the witness and to build their trust. In many cases, victims are susceptible to the belief that leaving the control of traffickers or speaking about their experiences to others, will lead to increased harm rather than help. The Court should take into account, there may be instances where the victim's testimony is inconsistent, or even factually inaccurate. Reasons for this may include trauma, which makes it difficult for a victim to remember and recount what happened.

32 See Section 4.1 of this Bench Book for more details on the trauma-informed approach.
33 https://www.osce.org/odihr/NRM-handbook

CASE EXAMPLES OF INCONSISTENCY
Samwel Okoth Nyakinye v Republic (Kenya 2016)
The accused was charged with, among others, child trafficking contrary to Section 13 of SOA. The appellant had challenged the conviction citing contradiction in the evidence of PW1 and PW3 whom he alleged to have given contradictory/different dates of when the case was first reported to the police. The Court held as follows: "I find that even if there were differences in the dates of the first report, that difference was inconsequential and did not affect the main gist of the case, which was that the appellant intentionally and unlawfully caused travel arrangements of a child with the intention of facilitating a sexual offence against the child."

4.5.7 Witness demeanour

The demeanour of a witness may be affected or compromised by a number of factors, such as fear and intimidation, trauma, gender, culture, stigma, marginalisation, normalisation of socially negative behaviour due to trafficking history, history of substance abuse or criminality, or even age. It is up to the court to determine such demeanour, its impact on the victim's testimony, and how to address it. Judicial Officers must also consider that gender stereotypes and biases may also affect the way female victims and their testimonies are perceived.[34]

CASE EXAMPLES ON WITNESS DEMEANOUR
Omuroni v Republic (Uganda 2002)
The court held that: "Trial courts can decide cases one way or the other on the basis of the demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he/she has noted and upon which he/she relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make a favourable or unfavourable impression about the credibility of a particular witness."
Prosecutor v Dominic Ongwen (ICC 2020)
In this case, the court held that cultural biases could affect the court's impression of the demeanour of women giving evidence.

4.5.8 Evidence of a child

According to Section 124 of Evidence Act, a court can convict on the evidence of a child.

However, the court should be satisfied beyond reasonable doubt that the child is telling the truth and should record reasons for such belief. Therefore, the court should approach the evidence of a child with caution and be alert to inherent dangers of convicting on the evidence of a child.

34 See Section 2.3 of this Bench Book for more details.

4.5.9 Uncorroborated evidence

In situations involving trafficking of persons for sexual exploitation, the victim's testimony is often the only available evidence. Section 124 of the Evidence Act states that in such cases, the court may convict on the evidence of the victim alone without requiring any corroboration:

> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

CASE EXAMPLE ON ACCESSING CREDIBILITY
Minister of Basic Education, Sports and Culture v Vivier No & Another (Namibia 2011)
The Supreme Court noted: "The approach of the courts in assessing the credibility of a child witness and the reliability of their evidence is informed by the evidential risks associated with their, as yet, inchoate social, emotional and intellectual abilities: their suggestibility and imaginativeness, their capacity to accurately observe, remember, recollect and relate events and experiences, their appreciation of the duty and importance of being truthful when testifying and their, sometimes, incomplete comprehension of the – often complex – matters which they are required to testify about. These evidentiary concerns must always be individualised when courts assess the evidence of child witnesses, but given the gradual maturation of children's social skills and their emotional and intellectual abilities from infancy to adulthood, it normally follows naturally and logically that the younger a child witness is, the more pronounced these concerns become and the greater the measure of care required from the court in assessing the reliability of their evidence."

4.6 Admissible evidence in trafficking for sexual exploitation cases

For cases involving trafficking in persons for sexual exploitation, the prosecution must establish that an offence under the CTiP Act has been committed according to the elements of the offence (see Section 3 of this Bench Book). While the victim's testimony often represents the most crucial evidence, the law allows the use of a variety of other types of evidence.

Admissible evidence	Details
Digital forensic evidence	This evidence can be extracted from electronic devices (pursuant to a court warrant). It can include CSAM or other intimate images; and chat logs, advertisements on sites providing sexual services, videos on pornographic sites and other communications. Interactions between victims and accused persons on social media platforms can be used as evidence of recruitment or exploitation.
Documentary evidence	Photographs or videos, including of physical abuse and of chains, locks, and high fences can support statements about victims' living conditions or their presence in exploitative premises. However, it is important to note that victims can be transferred to and harboured in ordinary-looking accommodation with no signs of physical entrapment.
Physical evidence	Objects such as money, mobile phones, clothing, condoms, and sex toys found in the possession of the suspects or at a crime scene can also provide evidence of exploitation. "Slave" tattoos, electric shock devices, and plastic bracelets are all examples of the kinds of objects and physical abuses deployed by human traffickers to control, torture, and brand their victims, and which are crucial to securing a conviction.
Oral Evidence	Includes evidence of witnesses who can attest to elements of the offence. This may include family members, guardians, neighbours or any other witnesses.
Expert evidence	Includes evidence given by law enforcement officers, doctors, psychologists, civil society and survivor experts and others which can be used to support the evidence of the victim. Section 48 of the Evidence Act provides for expert or opinion evidence. Expert opinion may relate to factors such as: • Medical status, e.g. on the age of the victim; or on their sexual, psychological, and/or physical injuries; • Cultural context, e.g. the cultural meaning or implication of witchcraft or practices such as forced marriage and their impact on the victims; • Law enforcement testimony, particularly evidence involving proactive investigations into trafficking rings; • Survivor experts, who can clarify trafficking methodology and behaviour of the victim

CASE EXAMPLES ON ADMISSIBLE EVIDENCE
George Hezron Mwakio v Republic (Kenya 2010)
The court held that medical evidence was corroborative evidence.
Martinez Sardina (Argentina) (2014)
The court held that the report of the psychologist established the vulnerability of the girls who had been trafficked for sexual exploitation.

The Rapid Response Guide by the Office of the Director of Public Prosecution provides various examples of evidence of trafficking in persons that may be used to establish conviction under Section 3(3) of the CTiP Act, including:

- Passport, visa, and other travel documents/ travel history;
- Communication data;
- Advertisements through print or other media, oral advertisements, or other means;
- Documents proving ownership, leasing, tenancy, and/or occupation of premises used for exploitation;
- Money and evidence of payment or provision of goods and benefits to the child or his/her parents as consideration;
- PRC form and other relevant medical examination reports/P3 form;
- Forensic evidence analysed by a government chemist (hair, nail clippings, semen collected from scenes or clothing, etc.);
- Certificate for production of electronic evidence; and
- Facial recognition/visual identification of the perpetrator.

CASE EXAMPLES OF CONVICTION ON UNCORROBORATED EVIDENCE
Bernard Kebiba v Republic (Kenya 2000)
The court noted that the need for corroboration in sexual offences, while not in dispute, is only a rule of practice and is not required in law.
Makungu v Republic (Kenya 2003)
Among the grounds for appeal raised by the appellant was that his original conviction for rape was based on uncorroborated evidence. Upon consideration of relevant case law, the court held that in criminal cases involving a sexual offence where the only evidence is the testimony of the alleged victim of the offence, the court can convict based on that testimony if it is satisfied that the victim is telling the truth; and that the court must record the reasons for believing such evidence. Further, the court concluded that: "the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls."
Beatrice Akomo Ongito v Republic (Kenya 2013)
The court agreed with the trial court to rely on the testimony of one witness to convict the appellant when such testimony was not corroborated.
Abdullah bin Wendo & Another v R (EACA 1953)
The court held that "subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness."

State v Jonas (Namibia 2019)
In the High Court of Namibia, the accused was charged with the offence of trafficking in persons for sexual exploitation. The victim was the single witness in some material aspects. The court noted that it could convict on the evidence of a single witness if certain requirements were reached. The trial judge had to weigh the evidence, consider its merits and demerits, and decide whether it was trustworthy and whether, despite the fact that there were shortcomings or defects or contradictions in the testimony, it was satisfied that the truth had been told.
People of Philippines v Dhanyme Jamuad & Others (Philippines 2011)
In cases where it is the word of the complainant against the word of the accused, then the courts will rely on the evidence that is deemed to be credible. In this case, a defendant was convicted for prostitution, pornography, or sexual exploitation of minors. The court ruled that "a witness who testified in a categorical, straightforward, spontaneous and frank manner and remained consistent on cross-examination is a credible witness."

5 SENTENCING OF OFFENDERS

Sentencing is a discretion of the trial court based on the law, the circumstances of the case, the mitigating factors, the victim impact statement if any, and the Sentencing Guidelines. The trial court must be guided by the minimum or mandatory sentences provided by the relevant laws.

5.1 Mitigating factors

The Sentencing Policy Guidelines lists the following mitigation factors that may be taken into account in sentencing.

- Gravity of the offence
- A great degree of provocation
- Commitment to repairing the harm caused by the offender's conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction
- Negligible harm or damage caused
- Mental illness or impaired functioning of the mind
- Age, where it affects the responsibility of the individual offender
- Playing a minor role in the offence
- Being a first offender
- Remorsefulness
- Commission of a crime in response to gender-based violence
- Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police

Where a court fails to give an accused person the opportunity to mitigate, the sentence imposed can be questioned on appeal. Under Article 50(2)(p) of the Constitution, an accused person has a right to the benefit of the least severe of the prescribed punishments of an offence where the punishment has been changed between the time that the offence was committed and the time of sentencing.

CASE EXAMPLE ON MITIGATING FACTORS
State v Lukas (Namibia 2015)
In this case, the mitigating factors taken into account included the age of the accused when she committed the offence (20 years old); her personal history of becoming a mother at the age of 18 with children to support; the impoverishment and ill health of her family which made them unable to help care for her children; and the fact that she was also a first offender.
Maduku Mbashani & Another v Republic (Kenya 2019)
In this case, the fact that the appellants were first offenders was considered to reduce the trafficking sentence from 40 years to 30 years.
Julia Kaume v Republic (Kenya 2021)
The High Court noted that there were persuasive mitigating elements in sentencing the appellant namely the fact that she was repentant. She also pleaded poverty and illiteracy as factors that led to her attempt to sell her grandchild.

Where there are minimum or mandatory sentences provided, the trial court has the obligation to impose the sentence as provided by the law notwithstanding any mitigating factors.

CASE EXAMPLES ON MINIMUM/ MANDATORY SENTENCE
Republic v Gichuki Mwangi (Kenya 2024)
The state appealed to the Supreme Court from the judgement of the Court of Appeal which reduced the minimum sentence of 20 years' imprisonment, that was imposed on an accused by the trial court and upheld by the High Court, to 15 years' imprisonment. In allowing the appeal and reinstating the sentence of 20 years' imprisonment, the Supreme Court stated inter alia: **"Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence."** In this case, where the accused was charged with the offence of rape, the court noted that "courts were permitted but not obligated to impose the maximum sentence which the offender deserves but with clear judicial reasoning for the departure from the maximum expressly provided for by parliament and the emphasis for enhancement."

5.2 Victim impact statements

A victim has a legitimate expectation to participate in the proceedings up to the time of sentencing of an accused person. This right is expressed through the victim impact statement which may be made in writing or orally in court. Under Section 329(C) in Part IXA of the CPC, the court may receive and consider the victim impact statement in determining the sentence of the offender if it considers it appropriate. Relevant information that may be considered by a Court during the sentencing of a person accused of trafficking in persons for sexual exploitation includes:

- Social impact on the victim, including trauma, fear, shame, damage to relationships, and social isolation
- Physical health impacts, physical injuries, long-term physical effects, pregnancy, sexually transmitted infections
- Economic impact
- Financial consequences of being trafficked for purposes of sexual exploitation
- Psychological impact
- Impact on the victim's life and any concerns regarding their safety

Section 9 of the VPA states that the victim impact statement may be received at any time after the court convicts an offender but before sentencing the offender. It is not mandatory for the court to receive a victim impact statement, but the court may receive and consider it if it considers it appropriate.

In all cases where the court is to consider victim protection and welfare, the victim has a right to present such a statement (Section 12(3), VPA). A victim of a criminal offence may make an impact statement to the court orally or in writing, during the sentencing of the person convicted of the offence (Section 12(1), VPA), in accordance with the provisions of Section 329(C) of the CPC.

In considering Section 12 of the VPA and Section 329 of the CPC, the court has held that in proceedings of the trial court, which did not show that the victim had expressed their wish to make a victim impact statement and was refused to do so, and where the victim is at an age to make such a request and did not do so, then in such circumstances, the trial court was not at fault and not in breach of the provisions of the VPA.

CASE EXAMPLES OF USE OF VICTIM IMPACT STATEMENTS
S v Obi & Others (South Africa 2019)
In this case, the court considered the victim statement which provided details on the crime and the abuse of power by the relevant authorities who also abused them.
Tobias Wanjala Kalenda v Republic (2019) eKLR
The appellants were charged with multiple accounts in relation to fraud under the Penal Code. They filed an appeal raising multiple grounds including violation of their right to fair trial claiming the trial court misinterpreted provisions on Victim Impact Statement. The court determined that the Victim Impact Statement is not mandatory, but the court may receive and consider it if it deems it appropriate. Further that it is applicable where an offence has been committed and the impact is an economic one as in the instant case.

5.3 Aggravating factors

Where the law stipulates a minimum sentence to be imposed, the court may impose a harsher sentence where it is satisfied that substantial and compelling reasons are present justifying the court to impose a harsher sentence. Where the aggravating circumstances overshadow and outweigh the mitigating circumstances, the court will give the sentence that it considers effective and sufficiently severe to prevent and deter the repeating of the offence.

CASE EXAMPLE ON AGGRAVATING FACTORS
State v Jonas (Namibia 2019)
The court noted that regarding the interest of society, it was necessary to protect members of the society from individuals like the accused and the sentence must reflect the seriousness of the offence and at the same time must fit the offender.
R v Labrosse (Seychelles 2021)
In this case, which involved multiple counts of trafficking in persons, there were both aggravating and mitigating circumstances present. In considering the case, the court noted: “I bear in mind both the mitigating and aggravated factors that exist in this case. Having done so I find that the aggravation in this case overshadows its mitigations. It is trite to say that human trafficking in all its aspects is becoming a major problem in this country. I take notice of the increasing rate of reported cases of this crime and its negative impact that it is having both on our reputation and on the lives of the victims of human trafficking. In that regard I find that for a sentence to be effective, it has to be sufficiently severe so as to prevent and deter the repeating of the offence.”

The CTiP Act does not set out the aggravating factors that the court must consider at the point of sentencing. However, aggravating factors are provided under Rule 23.7 of the Sentencing Policy Guidelines, wherein factors that may be considered in trafficking cases include:

- Use of a weapon to frighten or injure a victim (the more dangerous the weapon, the higher the culpability);
- Grave impact on national security or public interest;
- Serious physical or psychological harm to the victim;
- Commission of the offence in a gang or group;
- Targeting of vulnerable groups such as children, elderly persons, and persons with disabilities;
- Intricate planning of the offence;
- High level of profit from the offence;
- Abuse of a position of trust and authority;
- Use of grossly inhuman and degrading means in the commission of an offence

CASE EXAMPLES OF AGGRAVATING FACTORS

S v Obi & Others (South Africa 2019)

The court considered the following aggravating factors under the South African Trafficking Act:

- Significance of the role of the convicted (the court determined he was the leader)
- Previous convictions (in this case he was deemed a first offender)
- Whether the convicted person caused the victim to become addicted on the dependence-producing substance (this was affirmed in addition to the fact that the first accused manufactured it)
- The conditions in which the victim was kept (they were kept in unhygienic conditions in this case per photographic evidence submitted)
- Period the victims were held captive (evidence to this effect showed that one was kept for a year and the other two kept for several days)
- Whether the victim suffered abuse and the extent thereof (the court considered the physical, emotional, psychological and mental abuse)
- The physical and psychological effect the abuse had on the victim
- Whether the offence formed part of organised crime
- Whether the victim was a child (all three victims were children in this case)
- The nature of the relationship between the victim and the convicted person (none in this case)
- The state of the victim's mental health (despite lack of submission of a victim's impact report, the court inferred the same in light of evidence submitted, as well as what would happen to a healthy individual exposed to such trauma)
- Whether the victim had any physical disability (did not apply in this case)

In sentencing, the court ordered a maximum sentence on the respective counts charged as well as a life sentence on each of the counts, including having the defendant's name included in the National Register for Sex Offenders.

George Hezron Mwakio v Republic (Kenya 2010)
The accused was convicted of trafficking a child for sexual exploitation. In sentencing, the court held that "the offence the accused has committed is aggravated as he forced the complainant, a girl child aged 15 years, to walk through bushes throughout the night to cross from Kenya to Tanzania in circumstances indicating that he had kidnapped/abducted her." He was sentenced to serve the maximum sentence. On appeal, it was held that the accused was a repeat offender, having earlier been convicted of rape. The court held the stiff sentence was called for and that it was neither harsh nor excessive. The offence was affirmed as aggravated, and the stiff sentence was confirmed.
Republic v Shawn Julie & Others (Seychelles 2021)
The accused committed various offences of trafficking children and pleaded guilty. The court considered not only the mitigating factors but also considered the seriousness of the offences. The court noted that offences committed against minors are especially serious. However, in imposing sentences, the court should not only consider punishment and retribution but also allow the convict the opportunity to return to society as a responsible citizen and reformed character.
State v Koch (Namibia 2022)
In enhancing the sentence on child trafficking charges in this case, the Supreme Court of Namibia noted that there were several aggravating factors which necessitated an increase in the sentence on trafficking charges. These factors included the tender age of the complainant and the fact that the respondent was in a position of trust in relation to the complainants. The respondent took advantage of the unfortunate circumstances to groom them for sexual exploitation.
S v Pretorius (Namibia 2022)
In this case, where the accused pleaded guilty and was convicted on charges of rape and trafficking of minor girls, the court held that the following were all aggravating factors: • that the accused's own daughter was the same age as the victims at the time of the offence was committed; • that there was more than one victim; and • that there were multiple incidents of sexual exploitation over a period. The advanced age of the accused was both a mitigating and aggravating factor, depending on the case and the public interest.
State v Lukas (Namibia 2015)
In this case, where the accused was charged with trafficking a child for sexual exploitation, the court considered several aggravating factors, including the abuse of the children's vulnerabilities, the motivation of greed, the damage caused to the children and the use of the accused person's position of power over children.

5.4 Sentencing options

The courts determine the sentencing options provided by the specific statute which creates the offences. The penalties for the offence of trafficking in persons are created by Section 3(5) and (6) of the CTiP Act. The law provides as follows:

Offence	Sentence
Trafficking another person for purposes of exploitation. (Section 3(5))	Not less than 30 years imprisonment, or a fine of not less than 30 million shillings, or both. Upon subsequent conviction, imprisonment for life.
Financing, controlling, aiding or abetting the commission of an offence. (Section 3(6))	Imprisonment for a term not less than 30 years, or a fine of not less than 30 million shillings, or both. Upon subsequent conviction, imprisonment for life.
Promotion of acts of child trafficking. (Section 4(3))	Imprisonment for a term not less than 30 years, or a fine of not less than 20 million shillings, or both. Upon subsequent conviction, imprisonment for life.
Promotion of trafficking in persons. (Section 5)	Imprisonment for a term of not less than 20 years, or a fine of not less than 20 million shillings, or both. Upon subsequent conviction, imprisonment for life.
Acquisition of travel documents by fraud or misrepresentation. (Section 6)	Imprisonment for a term of not less than 10 years, or a fine of not less than 10 million shillings, or both. Upon subsequent conviction, imprisonment for a term of not less than 10 years without the option of a fine.
Facilitating entry into or exit out of the country. (Section 7)	Imprisonment for a term of not less than 30 years, or a fine of not less than 30 million shillings, or both. Upon subsequent conviction, imprisonment for a term of not less than 30 years without an option of a fine.
Interfering with travel documents and personal effects. (Section 8)	Imprisonment for a term of not less than 10 years, or a fine of not less than 10 million shillings, or both. Upon subsequent conviction, imprisonment for a term of not less than ten years without the option of a fine.
Where, in the process of commission of an offence, the victim suffers any permanent or life-threatening bodily harm, or the person dies or is afflicted with any other threatening or terminal health condition. (Section 9)	Imprisonment for life.

Engagement in trafficking as part of an organised criminal group. (Section 10)	Imprisonment for life.
Disclosure of the name and personal circumstances of the victim of trafficking or any other information tending to establish the identity of a victim of trafficking. (Section 11(5))	Imprisonment for a term of not less than 5 years, or a fine of not less than 5 million shillings, or both. In the case of a body corporate, a fine of not less than 10 million shillings.
Publication of the proceedings of the court. (Section 11(5))	Imprisonment for a term of not less than 5 years, or a fine of not less than 5 million shillings, or both. In the case of a corporate body, a fine of not less than 10 million shillings.

5.5 Restitution and compensation

Under Section 13 of the CTiP Act, the court has powers to make an order for the persons convicted of the offence of trafficking to make restitution or to compensate the victim for:

- The costs of any medical or psychological treatment
- The costs of necessary transportation, accommodation, and other living expenses
- Any other relief that the court may consider just

The trial court must call for evidence in regard to the damages whether pecuniary or non- pecuniary damages, and give the perpetrator an opportunity to respond before awarding any compensation or making an order for restitution.

Where the court orders payment of both fine and compensation, the enforcement of the compensation order shall take precedence (Section 26 (2), VPA). The enforcement of an order of compensation or restitution shall be governed by the Civil Procedure Rules (Section 26(3), VPA).

All the awards for damages shall be taken from the personal and separate property of the person who committed the offence. Where the property is insufficient, the balance of the damages awarded shall be taken from the National Assistance Trust Fund for Victims of Trafficking established under Section 17(2) of the CTiP Act. The application for compensation is made by the prosecutor.

In terms of Sections 23 and 24 of the VPA, a victim has a right to restitution or compensation from the offender, and the enforcement thereof, for:

- Economic loss occasioned by the offence
- Loss or damages to property
- Loss of user over the property
- Personal injury
- Costs of any medical or psychological treatment; and
- Costs of necessary transportation and accommodation suffered or incurred as a result of an offence

The orders made are subject to the limitations and conditions set out in Section 23(3) of the VPA. The compensation order made against a convicted offender may be enforced as a judgement in civil proceedings. The compensation or restitution order made by a court against a convicted offender is in addition to any other sentence or order the court may make against the person. It is not for any purpose to be taken to be part of a sentence passed against the person and is not a bar to civil proceedings (as per Section 25 of the VPA).

Compensation is also a form of punishment. Section 31 of the CPC provides that a person convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment. In such instances, the court must make an inquiry for the purposes of compensation, and the accused must be given an opportunity to be heard. The court should satisfy itself with the accused's ability to pay the compensation and certify that the accused did not transfer funds to third parties in advance of the compensation judgement or after arrest. Where the accused does not have the means to pay, he should not be burdened with compensation orders he cannot meet. This will likely expose him to a further prison term when they default.

CASE EXAMPLES ON COMPENSATION
Prosecutor v Bosco Ntaganda (ICC 2019)
The court gave reparation orders to victims under Article 75 of the Rome Statute.
Selemani s/o Misusi v R (LRT 1973)
The elements the court must consider when ordering compensation were enunciated in this case as follows: • Compensation may be ordered only where the person entitled should have suffered material loss or a personal injury • Compensation would be recoverable in a civil suit • Such compensation is to be such as the court deems fair and reasonable[35]
R v Bagga (1989) 11 Cr App R (S) 497
The court must be satisfied that the offender either has the means available or will have the ability to pay within a reasonable time. When the Court is considering making a compensation order, they are under a duty to raise the matter so a proper enquiry into means can be made.
United States v. Lakireddy Bali Reddy, 2000-2001
Reddy was the leader of a trafficking for sexual exploitation ring and worked alongside his family. Reddy and his family brought Indian nationals into the US through the exploitation of the use of visas. The Indian nationals had the intention of making a living and being able to support themselves and family back home in India financially. The case was opened in 2000 and, in 2001, defendants were found guilty. There were three separately recorded compensation and restitution orders to specific victims. Among the orders, Reddy was ordered to pay compensation and restitution to the victims to the amount of US$ 2,000,000.

35 *See, also, Uganda v Karasa* (Uganda 1974); *Haining and others v R No 2* (Tanzania 1972); *Nyamhanga v R* (Uganda 1973).

Case 4 T 5/2010, Czechia, 2011
The victim was promised a well-paying job at a bakery out of the country by defendants P.K and M.K. The victim's ID and passport were confiscated by defendants and she was forced into prostitution (sexual exploitation). The defendants were ordered to pay compensation to victim(s) amounting to 45,000 CZK.

In the UK, the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court can make an order for compensation from an accused person suo moto or upon application by the victim. The court is under an obligation to give reasons if it fails to give a compensation order where it is mandated under Section 130(3). The court must consider any evidence or representation made by or on behalf of the accused or prosecutor to determine the amount of compensation.

Similar provisions are found in the Canadian Criminal Code, section 738 to 739 provide that the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person. This is also provided for under the Canadian Victim Bill of Rights, Section 16 which provides that victims have a right to have the court consider making a restitution order against the offender.

In New Zealand, Section 33 of the Sentencing Act gives a procedure to be followed before determining whether to order restitution:

> "To assist a court in determining whether to impose a sentence of reparation and its quantum and method of payment, a court may order a probation officer to prepare a reparation report. The report contains information regarding the loss, damage and/or harm suffered by the victim, the financial capacity of the offender (including by way of a declaration by the offender), the maximum amount an offender is likely to be able to pay, and the frequency and magnitude of payments where payment by instalments may be desirable."

Under Section 34 of the Sentencing Act, the probation officer responsible for preparing the reparation report must attempt to gain agreement between the victim and the offender on the amount of reparation that the offender should be required to pay. Information regarding the extent of any such agreement is to be included in the reparation report. The court is not bound by this agreement and must be satisfied that the agreement can, for example, realistically be paid and enforced and that it is sufficient to address the harm, loss, or damage suffered.

5.6 Confiscation and forfeiture of proceeds of crime

Section 17 of the CTiP Act provides for the confiscation and forfeiture of proceeds of crimes in addition to any other penalties prescribed under that Act or other laws. The court may order the confiscation and forfeiture of all the proceeds of crime related to the crime in favour of the National Assistance Trust Fund for Victims of Trafficking.

Under Section 17(3), if the property has been destroyed, diminished in value, or rendered worthless by any act or omission of the person convicted, directly or indirectly, or has been concealed, removed, converted, or transferred in order to avoid forfeiture of confiscation, then the person convicted shall, in addition to the penalty, be ordered to pay the amount equal to the value of the proceeds.

Further, the UN Convention on Transnational Organized Crime (UNTOC)'s Articles 12, 13 and 14 are devoted to the domestic and international aspects of identifying, freezing and confiscating the proceeds and instrumentalities of crime.

- **Article 12** requires parties to adopt measures, to the greatest extent possible within their legal systems, to enable confiscation of the proceeds, or property whose value is equivalent to the value of proceeds, and the instrumentalities of offences covered by the Convention. It also obligates parties to adopt measures to enable the identification, tracing, freezing and seizing of such items for the purpose of eventual confiscation. In addition, it obligates States to empower courts or other competent authorities to order that bank or other records be made available for the purposes of facilitating such identification, freezing and confiscation.
- **Article 13** sets forth procedures for international co-operation in confiscation matters. These are important procedures, as criminals frequently seek to hide proceeds and instrumentalities of crime abroad, as well as evidence relating thereto, in order to thwart law enforcement efforts to locate and gain control over them. A State party that receives a request from another State party is required by this article to take specific measures to identify, trace, and freeze or seize proceeds of crime for the purpose of eventual confiscation.
- **Article 14** addresses the final stage of the confiscation process: the disposal of confiscated assets. While such disposal is to be carried out in accordance with domestic law, Article 14 (2), calls on those requested to carry out confiscation to give priority consideration to returning the confiscated assets to the requesting State for use as compensation to crime victims or for restoration to legitimate owners."

Forfeiture of proceeds of crime is crucial in ensuring access to justice for victims of trafficking and combating human trafficking from a financial vantage point has many benefits that have helped develop—and are expected to play an increasing role in—powerful prosecutions in this area. As examples:[36]

- It deprives trafficking networks of the proceeds of criminal activities, reducing their ability to operate and commit further crime;
- It provides the means to establish state funds and compensate victims of human trafficking crime;
- Financial evidence highlights the traffickers' motive and knowledge;
- Financial evidence distinguishes the traffickers from the victims and other players and can also help identify other victims and perpetrators;
- Financial evidence helps distinguish gatekeepers and their roles;
- Financial evidence can enable additional charges and higher penalties;
- Financial evidence corroborates victims and other witnesses; and
- Financial evidence enables forfeiture and helps facilitate victim restitution orders.

It is pertinent for Judicial Officers to make orders for forfeiture of proceeds of trafficking for sexual exploitation, i.e. of proceeds of crime. Judicial Officers can also note Article 12 of UNTOC which mandates parties to make orders for identification, tracing, freezing, and forfeiture of the proceeds of crime.[37]

36 *See*, Elizabeth Wright, *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions*, 65 U.S. Attys.' Bulletin 79 (2017), https://www.htlegalcenter.org/wp-content/uploads/Follow-the-Money-Financial-Crimes-and-Forfeiture-in-Human-Trafficking-Prosecutions.pdf.

37 *See*, United Nations Convention Against Transnational Organized Crime art. 12, Nov. 15, 2000, 2225 U.N.T.S. 209.

Below are case examples:

CASE EXAMPLES ON FORFEITURE OF PROCEEDS OF CRIME
United States v. Chrishon Rogers (2021)
The U.S. District Court for the Eastern District of Texas ordered the forfeiture of $1.5 million in proceeds derived from a sex trafficking operation. The court found that the defendant had used fraud and coercion to compel victims into commercial sex acts, and the forfeited assets represented the illicit profits from these activities.
United States v. Sardar ELdarovich Gasanov and Nadira Gasanova (2003)
A researcher at the University of Texas at El Paso, and his wife Nadira Gasnova were convicted on multiple charges stemming from their involvement in human trafficking and immigration fraud. The couple illegally brought three Uzbekistani women into the United States by falsely representing their purpose of entry as academic research under J-1 visas. Instead of fulfilling promises of modelling careers, Gasanov and Gasnova exploited the women, coercing them into topless dancing in El Paso and confiscating over $500,000 of their earnings. The victims lived with the couple, who deducted living expenses and withheld their passports and visas, severely restricting their freedom. Following indictment in 2001, the Gasanovs were convicted of conspiracy to commit document fraud, conspiracy to harbour illegal aliens, and bringing illegal aliens into the U.S. for financial gain. They were sentenced to 60 months in prison each and ordered to pay restitution. Additionally, the court mandated the forfeiture of a residence and two vehicles acquired through their illicit activities.

5.7 Revision of sentence

While the court is guided by the provisions of Section 364 of the CPC, it is incumbent upon the applicant to prove the existence of incorrectness, illegality, and impropriety in the aggrieved orders of the subordinate court. It is only upon such proof that the court may exercise its powers of revision.

CASE EXAMPLE ON REVISION OF SENTENCE
Martha Awethia v Republic (Kenya 2021)
The appellant was convicted of four counts of trafficking in persons and sentenced to 5 years in prison. She sought a revision of the sentence, so that the remaining 2 years be changed to a non-custodial sentence. The court highlighted that it is incumbent upon the applicant to prove the existence of the incorrectness, illegality and impropriety in the aggrieved orders of the subordinate court and noted that it is only upon such proof that this court may exercise its powers of revision. It was established that the applicant had not passed this test, having failed to prove any such incorrectness, illegality or impropriety in the order of the trial court, so the court dismissed her appeal on the basis that she had failed to prove the case. The court also noted that the sentence of 5 years was both legal and lenient in view of the fact that the sentence for trafficking in persons was 30 years' imprisonment.

5.8 Victim immunity from prosecution/principle of non-liability

The CTiP Act recognises that victims of trafficking may commit certain offences. Section 14 provides that a victim of trafficking in persons is not criminally liable for any offence related to being in Kenya illegally or for any criminal act that was as a direct result of being trafficked.This is in line with the principle of non-punishment provided under international law.

Victims of trafficking for sexual exploitation may commit crimes in the course of being trafficked. They may be compelled to commit criminal and/or administrative offences directly connected to, with, or arising from, their trafficking situation. These offences may include, but are not limited to, shoplifting, cannabis cultivation, pickpocketing, forced begging, benefit fraud, drug trafficking, illegal charity bag collections, sham marriage, illegal adoption, metal theft (stealing pipes and other metals), and street crime. Victims may also be prosecuted for administrative and immigration offences on the basis that they have entered a country illegally, or prostitution. Victims of trafficking may also be forced to aid and abet further trafficking crimes of their traffickers, being used to target, groom and recruit victims and commit other elements of trafficking offences.[38]

Traffickers use victims to shield themselves from prosecution, including using victims to commit acts proximate to the exploitation itself. For example, recruitment of new victims, maintaining control over victims, collection of the proceeds from the exploitation, and the advertising of services. This exposes victims to greater risk of detection by law enforcement authorities and is one means by which traffickers evade criminal liability and enjoy impunity.[39]

The principle of non-liability (of the illegal acts committed by trafficked victims) can be through a duress-based provision, e.g. where a trafficked person is compelled or coerced to commit the offence; or through a causation-based provision, e.g. the offence committed by the trafficked person is directly related to the trafficking.

Where a victim of trafficking has been charged with any offence, they may offer as a defence the fact of being trafficked, this is notwithstanding any other provisions of any other law. Then the burden of proof shifts to the prosecutor to show that it is not the fact.

38 Organization for Security and Co-Operation in Europe, National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons (2022), https://www.osce.org/odihr/NRM-handbook.

39 United Nations Office on Drugs & Crime, Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis 5–6 (2020), https://sherloc.unodc.org/cld/en/bibliography/2020/female_victims_of_trafficking_for_sexual_exploitation_as_defendants.html. In addition, The HUDOC database provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions*, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions) pertaining to human trafficking. See European Court of Human Rights, HUDOC database.

CASE EXAMPLES ON VICTIM IMMUNITY
MK v Regina (UK 2018)
The applicant, who claimed to have been a victim of trafficking, sought to rely on the statutory defence afforded to such victims under the UK Modern Slavery Act of 2015. The court held that the defendant bears an evidential burden to raise the issue of whether she was a victim of trafficking or slavery. Having successfully done so, it is for the prosecution to prove, beyond reasonable doubt, that she was not. If the prosecution succeeds in that, the Section 45 defence will not avail the defendant. However, if the prosecution fails in this respect, the legal or persuasive burden of proof in respect of the other elements of the defence falls on the defendant. Therefore, if the defendant is over 18 years, she must prove on the balance of probabilities that she was compelled to commit the offence, that compulsion was as a direct consequence of her being or having been a victim of slavery or relevant exploitation, and that a reasonable person in the same situation as her and having her relevant characteristics would have no realistic alternative to doing the act which constitutes the offence.
Peter Wafula Juma & Others v Republic (Kenya 2014)
In determining the issue of shifting burden of proof, the court held that the legal burden of proof never shifts from the prosecution. The court concurred with Viscount Sankey L.C in *Woolmington v DPP* (United Kingdom 1935), wherein he said: "Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

5.9 International Mutual Assistance and Cooperation

5.9.1 Mutual Legal Assistance

In a large number of cases of trafficking in persons, national authorities need the assistance of other States for the successful investigation, prosecution and punishment of offenders, in particular those who have committed transnational offences. The ability to assert jurisdiction and secure the presence of an accused offender in the State's territory accomplishes an important part of the task, but does not complete it. Article 18 of the Organized Crime Convention calls for States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings.

The Convention provides that the following may be part of legal assistance requests:

- Taking evidence or statements
- Effecting service of judicial documents
- Executing searches and seizures
- Examining objects and sites
- Providing information, evidence, expert evaluations, documents and records
- Identifying or tracing proceeds of crime, property or instrumentalities for evidentiary purposes and their seizure for confiscation (see Article 13 of the Convention)

- Facilitating the appearance of witnesses
- Any other type of assistance not barred by domestic law

Kenya developed guidelines for international mutual assistance in 2018, based on the Mutual Legal Assistance Act, which provides the procedure for submitting a request for assistance. The Office of the Attorney General is the Central Authority for Mutual Legal Assistance in Kenya. Its functions are to receive, accede and ensure the execution of Mutual Legal Assistance requests. Mutual legal assistance is used by law enforcement;

- During investigations, prosecutions, judicial proceedings, consultations and service of overseas processes;
- Conducting investigative interviews in criminal investigations;
- Freezing and confiscating property acquired from proceeds of crime;
- Obtaining evidence to be used in civil asset recovery investigations and proceedings.

5.9.2 Extradition

Extradition is the formal process where a State requests from the requested State the return of a person accused or convicted of a crime to stand trial or serve a sentence in the requesting State. It is provided for under Article 18 of the Organized Crime Convention and it is also governed by the domestic law of the requesting state.

Extradition is governed by two key legislations in Kenya, the Extradition (Contiguous and Foreign Countries Act), Cap 76 and the Extradition Commonwealth Act, Cap 77.

Cap 76, Section 5 provides that a requisition may be made to the Minister for Foreign Affairs for a fugitive criminal of any country who is in or suspected of being in Kenya, who may, by order under his hand, signify to a magistrate that a requisition has been made and require the magistrate to issue his warrant for the arrest and detention of the fugitive criminal.

The magistrate may also issue a warrant of arrest without an order from the Minister, by issuing a report on such information or complaint and such evidence or after such proceedings as would, in the opinion of the magistrate, justify the issue of a warrant if the crime had been committed or the criminal convicted in Kenya. If the foreign arrest warrant is authenticated and there is sufficient evidence to justify committal for trial (as if the crime occurred in Kenya), the magistrate shall commit the prisoner to prison. If there is sufficient evidence to prove the prisoner was convicted of the crime, the magistrate shall commit them to prison.

Under Cap 77, the Attorney General must give written authority to proceed with extradition, based on a request from a designated Commonwealth country. A warrant for the arrest of a fugitive may be issued by a magistrate— (a) on receipt of an authority to proceed; or (b) without an authority to proceed, upon information that the fugitive is or is believed to be in or on his way to Kenya.

In both instances, the fugitive may be committed/ remanded as someone charged with the similar offence before the court before the extradition is effected.

CASE EXAMPLES ON EXTRADITION
Uzbekistan v D.G. Abdullov (Uzbekistan 2011)
The Republic of Uzbekistan accused D.G. Abdullov of human trafficking in relation to persons who were in a position of vulnerability or were materially dependent on the accused. These acts were committed more than once in relation to a minor. On the 18th of February 2011, the Russian Attorney General's office satisfied an extradition request that it had received from the Republic of Uzbekistan in relation to Mr. D.G. Abdullov (a citizen of the Republic of Uzbekistan). The Court refused to invalidate the extradition decision adopted by the Attorney General since it fully complied with Russian law.

ANNEX A: INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW ON TRAFFICKING FOR SEXUAL EXPLOITATION

UNITED NATIONS

The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others

Article 1 of the Convention obligates the state to punish any person who, to gratify the passions of another:

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person.

Article 2 also obligates the state to punish any person who:

(1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

Article 4 of the **Universal Declaration of Human Rights (UDHR),** which was adopted in 1948, stipulates: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." This provision was a formal recognition that slavery still existed; even if it had assumed different and new forms. Article 5 further stipulates that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Similarly, Article 8 of the 1966 **International Covenant on Civil and Political Rights (ICCPR)** provides that "no one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited; no one shall be held in servitude." The ICCPR provisions relating to slavery and servitude are non-derogable; that is, they cannot be suspended by a State (Article 4(2)). The inalienability of personal freedom renders consent irrelevant in regard to slavery and servitude; so it is not possible for any individual to contract themselves into a situation of slavery or servitude.

The issue of trafficking had been addressed explicitly under the **Convention of Elimination of All Forms of Discrimination Against Women (CEDAW)** adopted by the UN General Assembly in 1979. Article 6 of CEDAW requires State Parties to take all "appropriate measures including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". The CEDAW Committee has issued a number of General Recommendations that offer guidance to State Parties on interpretation and implementation of the provisions of the Convention, including:

- General Recommendation No.38 (2020) on trafficking in women and girls in the context of global migration, which contextualises the implementation of the obligations of the State parties to combat all forms of trafficking.
- General Recommendation No.35 on gender-based violence against women, updating General

Recommendation No.19, which highlights the particular vulnerability of trafficked women and those in prostitution.

The Convention on the Rights of the Child (CRC), adopted in 1990, has substantive reference to trafficking. Article 35 requires States to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form including sexual exploitation and sexual abuse. This includes:

a) the inducement or coercion of a child to engage in any unlawful sexual activity;

b) the exploitative use of children in prostitution or other unlawful sexual practices; and

c) the exploitative use of children in pornographic performances and materials (Article 34).

The **Committee on the Rights of the Child** has also issued key General Comments relevant to the discourse on sex trafficking, including:

- General Comment No.13 (2011) on the right of the child to freedom from all forms of violence, which reiterates that sexual abuse and exploitation of children includes exploitation of children in prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking and sale of children for sexual purposes and forced marriage.
- General Comment No.20 (2016) on the implementation of the rights of the child during adolescence, which underscores that the vulnerability to trafficking can increase during adolescence.
- General Comment No.25 (2021) on children's rights in relation to the digital environment, which contextualises how the digital environment may open up new ways to perpetrate violence against children. The Committee recommends that State parties should develop and update anti-trafficking legislation so that it prohibits the technology-facilitated recruitment of children by criminal groups.

The United Nations adopted the **Convention Against Transnational Organised Crime** in December 2000. The Convention was deemed to be a demonstration of the international community's political will to answer a global challenge with a comprehensive global response. The goal of this treaty is to prevent and combat criminal offences of a transnational nature committed by organised crime. The Convention is supplemented by two optional Protocols, one designed to combat "Trafficking in Persons, especially Women and Children" and the other to address the "Smuggling of Migrants by Land, Air and Sea".

Article 12 requires States Parties to adopt to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

States Parties are also obligated to take measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of Article 12 for the purpose of eventual confiscation.

Article 24 provides that each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

The UN **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Palermo Protocol)** provides assistance to and protection of victims of trafficking in persons. Article 6 states that:

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

   (a) Information on relevant court and administrative proceedings;

   (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organisations, other relevant organisations and other elements of civil society, and, in particular, the provision of:

   (a) Appropriate housing;

   (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

   (c) Medical, psychological and material assistance; and

   (d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

OBSERVATIONS BY TREATY BODIES

Several treaty monitoring bodies have made key observations and recommendations to Kenya in the area of trafficking for sexual exploitation.

The CEDAW Committee Periodic Reports on trafficking and sexual exploitation of women and Girls. Kenya's 6th Periodic Report expressed concern about the trafficking and sexual exploitation of girls stemming from poverty and from their need to provide support to their families. It was also concerned about the growing phenomenon of sexual exploitation in travel and tourism in the country leading to increased prostitution, especially of young girls and women from disadvantaged backgrounds.

Ten years later, during the consideration of Kenya's 8th Periodic Report, the CEDAW Committee expressed concern regarding vulnerable groups – including women and girls in refugee camps – that remain at risk of trafficking for sexual exploitation. The committee was also concerned about the low level of prosecutions of traffickers.

The Committee on the Rights of the Child, in its concluding observations on the combined third to fifth periodic reports of Kenya, on the topic of sexual exploitation and abuse, expressed concern about the high level of exploitation of children in prostitution and CSAM, particularly in the tourism and travel sector. It recommended that Kenya implement effectively the Sexual Offences Act 2006, and the National Plan of Action Against Sexual Exploitation of Children in Kenya 2013-2017.

The UN Human Rights Committee (HRC), which is mandated to monitor implementation of the International Covenant on Civil and Political Rights, expressed concern about allegations of trafficking of children and exploitation of children in prostitution, as well as Kenya's failure to prosecute and punish trafficking offences and to provide adequate protection to victims.

The UN Committee Against Torture (CAT) expressed concern over the persistence of widespread violence against women and children in Kenyan society, including in the form of sexual exploitation and trafficking, as well as the high levels of impunity for such crimes.

The UN Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that provisions relating to the trafficking of persons and children for sexual exploitation are rarely enforced, and that when they are, sentences imposed on traffickers are often lenient.

AFRICAN UNION

Article 5 of **The African Charter on Human and People's Rights** contains prohibitions on slavery. It specifies: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited."

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) Under Article 4 requires States are required to enact laws to prohibit violence against sexual women, to prevent and condemn trafficking in women and girls, prosecute the perpetrators of such trafficking, and protect those women and girls who are most at risk. Article 4 (2) specifies inter alia that: "States Parties shall take appropriate and effective measures to:

(c) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;

(e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;

(g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;…"

The African Charter on the Rights and Welfare of the Child (ACRWC) also contains several relevant provisions related to sex trafficking. Article 21 protects children from harmful social and cultural practices, including child marriages. It provides:

(1) States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child -on the grounds of sex or other status.

(2) Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

Article 27 protects children from sexual abuse and sexual exploitation. It provides:

States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent;

(a) the inducement, coercion or encouragement of a child to engage in any sexual activity;

(b) the use of children in prostitution or other sexual practices;

(c) the use of children in pornographic activities, performances and materials.

Article 29 protects children from sex trafficking, sale and abduction. It provides: States Parties to the present Charter shall take appropriate measures to prevent:

(a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;

(b) the use of children in all forms of begging.

ANNEX B: DETAILED CASE LAW ANALYSES

To illustrate the challenges that may arise while relying on the uncorroborated evidence of the victim or of the child alone, two detailed cases are analysed in Annex B.

CASE EXAMPLE
Hadija Uwajeneza v Republic (Kenya 2014)
The facts of the case The appellant had been charged with trafficking for sexual exploitation of two girls aged 15 under Section 18 of the SOA. The charge concerning the second victim failed due to lack of evidence, hence the case involved the first victim. The appellant brought the first victim into Kenya from Rwanda with the promise of enrolling her into a school. However, when she arrived, she was made to carry out domestic work. The appellant travelled to Tanzania and came back with someone she claimed was her brother, who demanded to have sex with the first victim, but she refused. The appellant travelled for a month, leaving the victim with the alleged brother. After some time, they relocated to another area, where they were visited by a man who also wanted to have sexual relations with the first victim. But the first victim refused again, even after the appellant informed her that she would receive USD 1,000 and the establishment of a business for her in Malawi. In 2006, the appellant enrolled the first victim in a primary school and continued to live with her. Sometime later, she beat and threw both victims out of the house. The two escaped to a neighbour's house, who requested the appellant to take them back, but the appellant refused. Eventually, the victims lodged a report with the police alleging that the appellant had sexually exploited them during their stay with her. *Evidence adduced* The primary evidence relied upon was mainly oral testimony. There were no medical reports presented to establish the sexual exploitation and abuse. The first victim made a sworn statement detailing her experience with the appellant. The appellant noted that she had facilitated their entry into Kenya but did not exploit them. She intended to educate them until they misbehaved and stole from her. A teacher also swore that the appellant had enrolled the victims in the primary in 2006 and 2007. The court noted that the second victim had not provided evidence to establish that the appellant had sexually exploited her. Hence the court dismissed the charge relating to the second victim. However, the first victim was able to inform the court of the sexual advances from various men and that, at certain times, they had sexually defiled. Therefore, the trial court sentenced the appellant to pay a fine of 2 million shillings and, in default, to serve a 15-year sentence.

Determination by the Court of Appeal

The Court of Appeal noted that the evidence was lacking because the only evidence was the first victim's testimony that the appellant left her with another man for one month and that, on another occasion, the appellant tried to persuade her to have sex with a man who offered to pay her some money and to start a business for her. The court also noted that the main elements of Section 18 of the SOA include a) the movement of a person across the border; and b) the main intention of committing any crime under the SOA. Therefore, there must be evidence that the accused person was an active participant in the action of facilitating the movement across the border, as well as in facilitating the commission of the sexual offence.

Further, the court referred to the definition of trafficking under the Palermo Protocol and noted that the element of purpose – in this case, sexual exploitation – was not met, stating that "The evidence of sexual exploitation was very remote, and we find that it does not support the charge and that it is perverse to let it stand." The court accepted the appeal and quashed the conviction.

Analysis

In this case, the only evidence relied upon was oral testimony. Section 124 of the Evidence Act provides that the testimony provided by a minor is sufficient to establish a conviction, however, it is possible to adduce more evidence where adequate investigations have been carried out to limit the possibility of an acquittal. The case ultimately failed to proceed for lack of evidence to establish sexual exploitation. This also happened in the case of *Kenneth Kiplangat Rono v Republic* (Kenya 2010), which was also set aside for failure to establish sexual exploitation. The court deduced that since there were no medical records to ascertain defilement, the offence could not be established.

Despite this conclusion, the purpose of the trafficking (in this case, sexual exploitation) need not have been fulfilled: it would have been sufficient to establish an intention to sexually exploit, as per Article 5(2) of the Palermo Protocol, which states that the prosecution does not need to prove that the actual exploitation took place (for details of this principle and its application, see Section 3.3 of this Bench Book).

CASE EXAMPLE

Alibhai v Republic (Kenya 2022)

Facts of the case

The accused was charged with 11 counts in relation to the trafficking of 12 women and girls, jointly with other actors, into Kenya for purposes of exploitation. The facts demonstrated that the victims had been promised jobs as dancers in a nightclub in Mombasa. The trial court convicted and sentenced the appellant to 30 years imprisonment. His appeal was based on grounds including:

- The victims came to Kenya voluntarily, seeking greener pastures.
- The appellant did not own or lease any premises, house, or building for the purpose of promoting trafficking in persons, publish, export, or import any material for purposes of promoting trafficking, and did and did not manage, run, or finance any job recruitment agency for the purposes of promoting trafficking.
- That the trial Magistrate erred in law and fact in finding that the monies confiscated from the premises were proceeds of crime and were in the appellant's possession, notwithstanding there was no evidence to connect the appellant to the control or receipt of monies in the tins/buckets.
- That the trial Magistrate erred in law and fact in finding that there was interference with the victim's travel documents by the act of keeping them.
- That the sentence imposed by the trial Magistrate was manifestly excessive and arrived at on the wrong principle that the Court has no discretion in imposing sentences.

The prosecution's case relied on the testimonies from the victims as well from immigration officers, who all gave sworn testimony on their entry into Kenya, their work and experiences. The testimony highlighted the following in support of the prosecution case:

- The victims had been recruited on the basis that they would be given dancing jobs in a club in Mombasa where they would be paid per month and also access tips from customers.
- The appellant had paid the expenses for the victims to come to Kenya, and he picked up some of the victims at the airport/ made arrangements for them to be picked up.
- The victims' passports were kept either by the Appellant or the driver who was under the employ of the appellant.
- The victims were never permitted to go out alone and would always be accompanied by persons under the employ of the appellant. Some of the victims were allowed to tour the city on certain occasions under the supervision of the house manager.
- The victims were permitted to speak to their loved ones on specific days between 3 PM and 6 PM using the company phone before proceeding to the club.
- Some victims testified working the early hours of the morning, such as 3 AM.
- The appellant collected the money the victims earned, and it was put in respective tins with their names, and he had promised to send money back to their families despite any evidence being submitted to support this claim.
- The victims ranged from 16 to 35 years old.

Under cross-examination, the victims claimed they were not forced to come to Kenya, that they were treated fairly, and were not subjected to any sexual exploitation. However, reports from civil society organisations, media, and claims before the trial court by the prosecution noted that there were instances of sexual exploitation, although this had not been effectively captured due to the language barriers between the victims and authorities. The victims were Nepalese nationals.

Determination by the Court

The court focused on their entry into Kenya and noted that they had consented. Further, the court alluded that they were not living in a state of slavery, and no evidence was provided to show that the appellant exercised any form of control over them. Moreover, they were paid above the minimum wage of 10,107 shillings per month and never complained about their working conditions. The victims even managed to send money back to their families, and they also negotiated their pay.

The court further contended that the element of harbouring the victims was not established given there was any evidence adduced to prove that he was the owner of the bar where the victims were working and the owner of the premises where they were staying was unknown. The court provided that despite evidence that the appellant recruited the victims either directly or indirectly, there was no evidence to establish any form of exploitation, including sexual exploitation. The appeal was allowed on this basis, and the conviction was quashed.

Analysis

The case raises several issues for Judicial Officers to consider:

- There seems to have been a greater focus on how the victims arrived and whether their stay was legal, and less on establishing the "purpose" and if there was an intention by the appellant to sexually exploit the victims.
- The court could have looked more into the abuse of the victims' position of vulnerability in the recruitment process and once they were in Kenya. These were women and girls from poor backgrounds in search of employment opportunities and at a greater risk of being trafficked into exploitative work and sexual exploitation.
- The Court could have considered that the victims may likely have been in fear of reprisals if they testified that they had been sexually exploited, especially by their families or communities once they returned home. Further, the language barrier could have prevented the full depiction of all the events since their arrival in Kenya. The facts also demonstrate that the women and girls were in the control of the Appellant.
- That the victims consented to travel to Kenya to work as dancers is not necessary to establish the crime of trafficking in persons. Under the CTiP Act, the consent of the victim is irrelevant. It should not remove perpetrators' accountability over the charges of trafficking in persons.

An analysis of the witness statements showed a lack of clarity and understanding by the investigation officer of the manifestation of trafficking for sexual exploitation, as none of the statements pointed to any form of exploitation. Rather, victims essentially spoke to their illegal presence in the country and little about exploitation.

The case also demonstrates the need for protection of the rights of victims of trafficking in persons. When they were rescued from the club, their photos were splashed on the national daily newspapers. The victims were also later detained at a police station for close to one week without the benefit of a lawyer or the provision of counselling.

ANNEX C: RIGHTS OF VICTIMS

The various rights of victims involved in the criminal justice process in Kenya – and the proper application of those rights according to relevant legislation – are as follows:

Right	Application	Relevant legislation
Access to justice and fair treatment	• To access prompt redress. • To access measures that minimise. inconvenience to victims, e.g. numerous adjournments of court proceedings. • To have confidentiality and data protection. • To have access to information regarding their cases. • To access legal aid support. • Non-refoulement. • Non-punishment principle (non-liability to being prosecuted for criminal offences directly resulting from the trafficking experience).	• CTiP Act • Victim Protection Act • Article 6 of the Palermo Protocol
Right to participate in criminal proceedings	• To participate in the trial process and have their voices heard not only as witnesses but as rights holders. • To have a representative of their choice. Such a representative includes a lawyer who according to judicial decisions can make submissions on their behalf. • Includes the right to examine and cross examine witnesses.	• Articles 259, 20(3) and 27 and Article 20(3) of the Constitution as read with the Victim Protection Act
Right to be treated with humanity and dignity	• To be treated with humanity and respect for their dignity and human rights. • To have violations against them investigated effectively and promptly. • To be provided with effective remedies including reparations. • To ensure their safety, physical and psychological well-being, and privacy as well as of their families.	• The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law • Victim Protection Act

Right to confidentiality	● Persons involved in the investigation and trial of an offence under this law, are required to observe the right to privacy of the victim of trafficking and their witnesses. ● The trial may be held in camera and with no information which may establish the identity of the victim. ● The proceedings may also not be published to protect the confidentiality of the victim. ● Members of the public may be excluded from proceedings. ● Only listed individuals may be present at any sitting of a children's court, among them duly accredited journalists or duly registered media professionals. ● Child witnesses will be protected under listed measures, including prohibiting publication of their identities and of their families, protection from unreasonable intrusion from health professionals and confidentiality of their communication with victim support service providers or any other person.	● The Victim Protection Act ● Article 50(8) of the Constitution recognises that in some instances the press or other members of the public can be excluded from proceedings to protect witnesses or vulnerable persons. ● Section 93(4) of the Children Act ● Section 94 of the Children Act
Services and support	● To receive the necessary material, medical, psychological, and social assistance through governmental, voluntary and/or community-based means, including appropriate reintegration assistance to aid their recovery. ● Consideration of age, gender and special needs of victims when aiding such as housing, education, and care. ● Where appropriate, to access fair compensation and restitution to victims, their families, or dependants.	● CTiP Act ● Victim Protection Act ● Palermo Protocol

Access to information	● Access to information. ● To receive information on arrangements, progress and actions before, during and after criminal investigations. ● Information must be clear and comprehensible for victims, whether it is in written or verbal format. All relevant information should be carefully explained in a language they fully understand (with interpretation or translation as necessary) as early as possible in any process. Special provisions should be made for those with disabilities. Information materials should be provided in victim's first language and should include: ● Law enforcement contact details with specific victim support/liaison officers; ● Protection measures for victims' immediate and longer-term safety; ● Access to free, specialist legal advice and representation; ● Rights of witnesses, court procedures and special protection measures; ● Right to non-conditional referral and access to NRM services; ● Residence permits and other forms of international protection in Kenya; ● Right to return voluntarily to their country of origin if they choose to do so; and ● Children should be provided with information and materials in a child-friendly and age-appropriate manner which set out children's rights, and any decisions that are made.[40]	● Article 35, Constitution of Kenya; ● Section 19, Victim Protection Act ● National Referral Mechanism - Joining Efforts to Protect the Rights of Trafficked Persons- Second Edition.

40 Organization for Security and Co-Operation in Europe, Guidance on Trauma-Informed National Referral Mechanisms and Responses to Human Trafficking (2023), https://www.osce.org/odihr/549793.

ANNEX D: THE RIGHTS OF THE ACCUSED

Right	Relevant legislation
Right to be presumed innocent	Article 50(2) (a) Constitution of Kenya
Rights connected with preparation of defence	Article 50(2)(b)(c), Constitution of Kenya
Right to Public Trial (however, the press or the public may be excluded, if it is necessary to protect witnesses or vulnerable persons, morality, public order, or national security)	Article 50(2)(d), Constitution of Kenya Section 77(1), Criminal Procedure Code (CPC) Article 50(8), Constitution of Kenya
Right to an expeditious trial	Article 50(2) (e), Constitution of Kenya
Right to be Present during trial (unless the accused person's own conduct makes it impossible for the trial to proceed)	Article 50(2)(f), Constitution of Kenya
Right to an advocate of one's choice (or one provided by the state in some instances)	Article 50(2)(g) (h), Constitution of Kenya Section 43(3) Legal Aid Act
Right to remain silent and not testify at all during the proceedings	Article 50(2)(i), Constitution of Kenya Section 222(2) Children Act, 2022
Right to evidence (by being informed of the charges, provided with the prosecution evidence) and to challenge any evidence that has been presented against him or her	Article 50(2)(j)(k) Constitution of Kenya
Right not to incriminate oneself	Article 50(2)(i), Constitution of Kenya
Right to an interpreter where the trial is held in a language that the accused person does not understand	Article 50(2)(m) Constitution of Kenya Section 198(1)(2) CPC Section 222(4) Children Act
The principle of legality which protects one from being convicted for an act or omission that was not an offence in Kenya or international law at the time of the commission of the offence	Article 50(2)(n) Constitution of Kenya
Right to protection from double jeopardy (protecting one from being convicted in respect of an act or omission for which the accused person has previously been either convicted or acquitted)	Article 50(2)(o) Constitution of Kenya
Right to the least severe punishment	Article 50(2)(p) Constitution of Kenya
Right to court records or proceedings during the trial	Article 50(5)(a), Constitution of Kenya

ANNEX E: SAMPLE CHARGE SHEET

REPUBLIC OF KENYA
CHARGE SHEET

First Name	Surname or Father`s Name	Identity Card or Passport No.	Gender	Tribe / Nationality	Apparent Age	Address (include District and Location where applicable)

CHARGE	TRAFFICKING IN PERSONS CONTRARY TO SECTION 3(1)(d) AS READ WITH SECTION 3(5) OF THE COUNTER TRAFFICKING IN PERSONS ACT NO. 8 OF 2010
PARTICULARS OF OFFENCE (See Second Schedule of C.P.C)	XX XX : On diverse dates between 24th March 2015 and 11th April 2015 at YY Sub County within ZZ County, jointly with others not before the Court, trafficked by receiving and harbouring GH for purposes of sexual exploitation by means of deception.

If Accused Arrested	Date of arrest	Without or with warrant	Date Apprehension to court	Bond or Bail and amount	Is Application made for summons to issue
YES	11/04/2015	W/O	12/04/2015	CUSTODY	NO

Remanded adjourned to	REPUBLIC THROUGH ZZ POLICE STATION	
Complainant and Address	REPUPLIC THROUGH ODPP	
Witnesses	1. GH 2. KM 3. LN 4. MN	
Sentence Court and Date	……… CM's COURT AT ZZ ON 12/04/2015 If fine is paid…………………………………………………	

……………………………………………………… ………………………………………………………

NAME & RANK OF PROSECUTOR

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