



FEDERATION OF
KENYA EMPLOYERS

The Voice of Employers

MEMBER BRIEFING

Sustainable Migration



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MIGRATION POLICIES IN VIEW OF CHANGING EMPLOYMENT LANDSCAPE

A call for stronger dialogue

INTRODUCTION

Due to the multitude of “push-pull” factors in the continent, labour migration has been steadily on the rise. While Kenya is mainly a destination and transit country for people in mixed migration flows from East Africa, it is also a country of origin for both high-skilled and low-skilled migrant workers to the Middle East and the Gulf countries. The high rate of unemployment, the socio-economic and environmental conditions in Kenya as well as the higher wages and increased opportunities in countries of destination are major factors driving migration in Kenya.

As a favourable destination for migrant workers in East Africa, Kenya hosts significant numbers of both high-skilled and low-skilled workers. Due to its strategic location, Kenya is also a regional hub and destination for irregular migration and human trafficking. The majority of migrant workers, especially the irregular kind, take part in the informal economy due to restrictions in accessing the formal labour market.

LEGAL AND POLICIES FRAMEWORK ON LABOUR MIGRATION

Kenya has ratified ILO Convention No. 143 on Migrant Workers, and Convention 97 on Migration for Employment. As a Partner State of the East Africa Community (EAC) and signatory to the East African Community Common Market Protocol (EAC-CMP), Kenyans benefit from visa-free entry; access to Partner States’ labour markets; and the right to residence and establishment, according to certain criteria. Through this framework, regular labour mobility and migration take place between Kenya and the other EAC Partner States.

Kenya is also a member of the Common Market for East and Southern Africa (COMESA) and the Inter-Governmental Authority on Development (IGAD). The COMESA’s Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements (1984) is in force but is not fully implemented. The COMESA Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence was adopted in 2001, however, it is still in the process of being signed and ratified to enter into force¹. The IGAD is developing a protocol to allow for the free movement of persons among its members.

To enhance the protection of Kenyan Migrant Workers, Kenya has also signed a bilateral labour agreement with some of the host countries of Kenyan migrants including the Bilateral Labour Agreements (BLA) with the Kingdom of Saudi Arabia, the State of Qatar and the United Arab Emirates (UAE).

¹ Burundi, Kenya, Rwanda and Zimbabwe have signed the protocol on free movement of persons, but only Burundi has fully ratified it.

Kenya's policy frameworks governing labour migration is also guided by the Migration Policy Framework for Africa and Plan of Action (2018 – 2030), the Common African Position (CAP) on the global compact for safe, orderly and regulatory migration and the IGAD Regional Migration Policy Framework and Action Plan². The Government has developed a National Labour Migration Policy and Strategy, but this has yet to be adopted. Regular migrant workers in Kenya are governed by Kenya's national labour laws and policies including the National Employment Policy and Strategy, Immigration and Citizenship Act, 2011; Counter-Trafficking in Persons Act, 2010; National Employment Authority Act, 2016; Employment Act, 2007; Labour Institutions Act, 2007 and the Labour Relations Act, 2007 which apply equally to Kenyans and regular migrant workers.

Most efforts by the Kenyan government to date have focused on promoting labour emigration and the protection of Kenyan workers abroad. Labour immigration, on the other hand, is not considered as important to national development and therefore attracts less interest from the authorities. The fact that most of the migrant workers in Kenya are part of the informal economy makes it difficult to appreciate the tangible and intangible value of their economic activities.

ISSUES AND CHALLENGES

- 1. Restrictions in workers' movement across the region.** The EAC-CMP on Free Movement of Workers came into force in July 2010, however both workers and employers are still constrained in their efforts to utilize the freedom of movement of workers. Kenya still imposes restrictions with a minimum age of 35 years and a monthly salary above US\$2000 and United Republic of Tanzania imposes high permit fees making it impossible for young people to be beneficiaries. In addition, the occupation list in the Schedule for Free Movement of Workers in the Protocol only includes qualified skilled workers. Low-skilled workers are largely excluded.
- 2. Difficulties and complexity in getting a work permit.** Work permits must be requested by employers and are only granted if the employer can prove that it was not possible to find a Kenyan citizen with the required qualifications. In addition, obtaining a work permit in Kenya is administratively complex and may require long waiting times, making it difficult for the company to implement an intra-company transfer. Furthermore, different work permit systems and regimes among EAC member states, and lengthy, inconsistent and bureaucratic processes can lead to corruption.
- 3. Outdated labour laws and regulations.** The inflexible nature and lack of adaptive mechanisms of some labour laws and regulations surfaced during the COVID-19 pandemic when companies and employers were struggling to survive but unable to innovate and exercise discretion in a timely and effective manner to face the unexpected economic shock. There is now an opportunity to review labour legislation in line with new post-pandemic realities.

²The EAC is in the process of finalising the EAC Labour Migration Policy Framework.

- 4. Fragmented policy documents and uncoordinated implementation** and administration of labour migration by the different agencies coupled with inadequate resources inhibit effective synergies and coordination of labour migration management and implementation of programmes.
- 5. Lack of a comprehensive legal framework and enforcement** of laws and regulations for labour migration. The Government is finalizing the Labour Migration Management Bill to reinforce the legal framework on labour migration management, but implementation is key.
- 6. The need for reliable, accurate and timely labour market information** on migrant workers. Data is currently not adequate.
- 7. “Mismatch” and “inadequate”** skills to meet market demand. National education systems do not align with labour market needs resulting in skills mismatches across industries and professions.
- 8. The prevalence of irregular migrant workers and informal economy.**
- 9. Absence of transferability and portability of social security benefits** among the Partner States.
- 10. Protection of migrant workers and prevention of exploitation, forced labour and human trafficking.**

The Federation of Kenyan Employer’s (FKE) approach to labour migration is based on Mobility, Development and Protection. FKE regards regular labour migration as a key pillar of economic integration and development and believes both countries of origin and destination benefit from fair, efficient and well-implemented migration policies that permit the free movement of workers when and where they are needed.

FKE supports clear, transparent, and efficient migration policies that are conducive to business, catalysing innovation, investment and entrepreneurship - the building blocks of sustainable growth and development. We underline the importance of putting in place well thought and practical policies that are predictable and adaptable for harnessing the developmental benefits of migration and meeting the fast-changing requirements of the business and the different groups of workers.

In this context, four priorities drive FKE’s policy framework on labour migration.

1. PREDICTABLE, CONDUCTIVE AND TRANSPARENT FRAMEWORK FOR THE MOBILITY OF SKILLS

The Common Market Protocol (CMP) came into force on 1st July 2010 provides for free movement of persons, labour, services, capital and goods across the EAC. FKE applauds the integration process as the facilitation of all factors of production to freely move across a common market within the EAC. This is a driving force for economic growth and job creation in the region. The free mobility of labour not only leads to macro-economic benefits but also is a very tangible benefit of regional integration. Employers benefit from free labour mobility by having better chances of matching job requirements with skills and qualifications when recruiting new employees, thus improving productivity and efficiency. However, the free movement of labour is still restricted by several barriers including complexity and cost of applying for work permits, skills recognition, minimum age and salary, portability of social security benefits across borders and the rights of workers in other EAC member states.

Further, migration systems should be predictable, conducive and transparent and be comprised of a variety of mechanisms to meet the need for human resources at all skill levels. Different instruments should be in place for different categories of migrants including high-skilled workers who help organizations fill managerial, executive and top research jobs with the most qualified candidates; intra-corporate transferees; and those on short-term assignments. However, policymakers view labour migration to a large extent from a security angle because of security threats within Kenya and its neighbouring countries. Thus, the policy has been restrictive rather than conducive.

FKE urges the Government to take the lead to accelerate the implementation of the EAC-CMP on Free Movement of Workers and make migration eco-systems more efficient and business-friendly by:

- ▶ Removing all restrictions on the free movement of labour in accordance with Article 10 of the EAC-CMP including the abolition of discrimination based on nationality in regard to employment, remuneration and other conditions of employment and work;
- ▶ Reviewing the immigration, employment and migration laws and policies and aligning them with the EAC-CMP;
- ▶ Harmonize fees, classification and procedures of work and residence permits, and forms as stipulated in the CMP, including rights of establishment and business;
- ▶ Strengthen the National Coordination Mechanism on Migration (NCM) to improve inter-ministerial and inter-agencies coordination in the management and implementation of labour migration policies and programmes, including finalising the draft National policy framework and strategy.

2. SKILLS DEVELOPMENT PROGRAMMES, SKILLS RECOGNITION SCHEMES AND SKILLS MATCHING FRAMEWORKS THAT RESPOND TO LABOUR MARKET REALITIES

To remain competitive in global markets, employers require a readily available pool of talented workers equipped with the right knowledge and skills to be employable and work in productive, secure jobs which grow enterprises and economies. From an investors' perspective, the ability to employ skilled migrant workers is imperative for successful business expansion. FKE regards labour migration as an opportunity to fill skill gaps, especially in green skills, the energy sector, and the blue economy. Skills exchange and transfer between the foreign and local workers is beneficial, as well as the networking occasions that come with it. In addition, low-skilled migrant workers with refugee or irregular status provide cheaper labour, notably in the agricultural sector and domestic work and are valued for their work ethic.

Skill development in Kenya is diverse and fragmented in various Ministries and State agencies providing different levels of qualifications in the country. These include the Commission for University Education, the Kenya National Examinations Council, the Technical and Vocational Education and Training Authority (TVETA), and the National Industrial Training Authority (NITA). The National Qualifications Framework Act, 2014, established the Kenya National Qualifications Authority (KNQA) and aims to establish standards for recognizing qualifications within and outside Kenya and to promote national and transnational mobility of workers. However, due to poor inter-agency coordination and weak linkages between training institutions and the labour market, the current system of recognition of skills and qualifications is inefficient³, does not align with labour market needs and public education and training and it does not lead to employment. This situation leads to national and regional skills mismatch, youth are not suitably prepared for the national and regional labour market. In line with Kenya's Vision 2030, which recognises the importance of linking education and the labour market, the need to create entrepreneurial skills and competencies, as well as strengthening of the public and private sector partnerships, the Government launched the National Skill Development Policy 2020 which provides a national framework for harmonising, planning, coordinating, development, management and utilisation of skills in Kenya.

In the EAC, the Inter-University Council for East Africa (IUCEA) coordinates inter-university cooperation and promotes the maintenance of internationally comparable education standards in the region. The IUCEA also works on the harmonization of curricula across the region and has developed a Regional Qualifications Framework for Higher Education, but it is not fully implemented. Moreover, a number of EAC mutual recognition agreements (MRAs) for professional services have been developed, including for accounting, engineering, architectural, and veterinary services enabling easy mobility of candidates in the above profession. However, the MRAs are not functioning well.

To support the Government in the implementation of the National Skills Development Policy and the EAC Treaty on Skills Development, FKE calls for:

- ▶ Proper coordination and networking of the inter-agencies to harmonize skills development in the Nation;

³ ILO, An assessment of labour migration and mobility governance in the IGAD region: Country report for Kenya, 2020.

- ▶ Developing and implementing more bilateral and regional agreements on recognition of diplomas, skill certification and validation of prior learning. Acknowledgment of universal work certificates in both destination and origin countries;
- ▶ Enhance Public-private partnership and collaboration that reflects employers' views to improve skills development, skills certification, recognition and matching;
- ▶ Higher engagement with the Kenyan diaspora particularly high-skilled Kenyans to return and transfer their skills or invest in the country;
- ▶ Leverage the use of technology in data collection, analysis and skill matching of demand and supply.

3. RESPONSIBLE RECRUITMENT AND PROTECTION OF MIGRANT WORKERS

Kenya is a popular destination especially among EAC member states. It is also a regional hub for irregular migration as a destination, origin and transit country. The majority of migrant workers take part in the informal economy due to restrictions in accessing the formal labour market. These workers are often low-skilled and at risk of being exposed to precarious and exploitative working conditions, especially in agriculture and domestic work. In addition, many Kenyans travel abroad to work particularly in the Gulf countries and there has been increasing concern of exploitation and unfair labour practices. In recent years the Government has made significant efforts to address the problem of trafficking and the protection of Kenyan migrant workers, for instance, the launching of a national referral mechanism, new registration requirements and the 2016 Code of Conduct for private labour recruitment agencies. The Government is also promoting the establishment of written, understandable, and enforceable employment contracts that serve as the basis for determining obligations and responsibilities.⁴

FKE strongly condemns any form of exploitation and abuse of migrant workers, and supports Government's initiative and effort to eradicate labour exploitation and human trafficking for the protection of migrant workers. In addition to ensuring better migration experiences for workers, FKE believes there is a strong business case for companies to uphold responsible recruitment and employment practices. Hiring in an unethical manner can result in enormous administrative, legal and reputational costs for businesses. Further, fair recruitment and employment practices tend to attract meritorious candidates which contribute to higher productivity, efficiency and competitiveness. FKE considers it is the duty of the Government to uphold human rights, consistent with international standards, including those of migrant workers, and to create an enabling legal and policy environment (including clear and consistent guidelines) that support the fair recruitment and employment of migrant workers. In this regard, FKE urges the Governments to initiate and

⁴ Ibid

lead efforts for effective and sustainable policy, regulatory and behavioural changes needed to more effectively and efficiently, promote fair recruitment and protection of migrant workers, by:

- ▶ Creating awareness and disseminating information to educate potential migrant workers and their employers on rights and responsibilities, including the migrant workers in Kenya for their social and economic integration in the country;
- ▶ Strengthen cooperation with host countries, more bilateral agreement to foster fair recruitment and portability of social security to enhance protection and security of workers;
- ▶ Establishing greater dialogue between countries of origin and destination, as well as employers and recruitment agencies to collectively find solutions to mitigate risks, by enhancing social security and recruitment frameworks;
- ▶ Support due diligence by the private sector to prevent and respond to risks of exploitation including forced labour, while ensuring labour mobility is not compromised and the environment for cross-border recruitment remains conducive for employers to fill employment needs;
- ▶ Digitalization of recruitment processes is key, and it can be facilitated to build more inclusive policies with better protection for migrant workers and more transparency for employers;
- ▶ Strengthen enforcement of laws and regulations;
- ▶ Adopting and implementing smart and efficient regulations that are conducive to transitioning from the informal to the formal economies such as facilitating business registration.

4. SOCIAL DIALOGUE AND CAPACITY BUILDING OF EMPLOYERS ORGANIZATIONS AND EMPLOYERS

FKE is active in policy discussions through continental, regional and national social dialogue. At the regional level, employers' representatives support the harmonisation of laws and skill recognition and were engaged in the drafting process of the EAC migration policy. At the national level, FKE and the Central Organization of Trade Union (COTU-K) contributed to the development of the national employment policy and takes part in various sectoral and National Migration Committees, including the Counter-Trafficking in Persons Advisory Committee.

The NCM is a government-led national platform for coordination on migration issues, however, it is mainly participated by the different government agencies, and social partners are not given a seat in the NCM. Social partners including FKE however, participate in the NCM Technical working group (TWG) on Labour Migration and Diaspora Affairs. Due to the increasing concern on low-skilled Kenyan workers to the Middle East and Gulf countries, the discussions in the TWG seem

to focus primarily on labour emigration of low-skilled local workers to the GCC, but not on labour immigration to Kenya. In addition, FKE and the COTU-K participate in a Task Force under the National Labour Board that deals with migration issues where they advocate for the vetting of Private Employment Agencies (PEAs) and their compliance with the international labour standards. This Task Force has influenced the regulation of PEAs. Their recommendations, which have been implemented by the Government, have included the deregistration of PEAs until they are all vetted, and the deployment of labour attachés to Middle Eastern countries.

To effectively participate and engage in the labour migration policymaking and debate, employers and employer organizations must have a good understanding of the migration issues and trends in the country, in the region and the world, and be able to conduct research and engage in evidence-based advocacy in labour migration policymaking and debate. Consequently, FKE urges:

- ▶ The Government to put in place mechanisms for active and continuous engagement with employers so that they can proactively voice their recommendations and proposals with their governments to have real impact;
- ▶ Improve the sharing of data and information with employers and stakeholder;
- ▶ Strengthening the technical capacity of employers and employer's organization in evidence-based advocacy in order to support their effective engagement and support to the labour migration policy making and debate.

CONCLUSION

Labour mobility constitutes one of the key priorities in Kenya's regional integration objectives. Demand for skills, especially in cutting-edge sectors constitute a crucial driver for employers to hire foreign labour. FKE calls for a predictable, conducive and transparent framework for the mobility of skills and free movement of workers within the region. We also call for greater engagement of social partners to have more robust and inclusive policy processes, and capacity building of employers' organization and employers to enable the effective participation in the migration policy debate and discussion.