

PROTECTING REFUGEES RIGHTS IN KENYA: UTILISING INTERNATIONAL REFUGEE INSTRUMENTS, THE REFUGEE ACT 2006 AND THE CONSTITUTION OF KENYA AS CATALYSTS

BY KARIUKI MUIGUA*

1.0 INTRODUCTION

In this article the writer takes a critical look at the Refugees Act 2006. It is argued that refugee rights are constitutional rights and the passing of the Refugee Act has enhanced that position. Further International Refugee Instruments are fully applicable in the Kenyan Courts and the human rights enshrined therein should be realisable in full. Refugees however face numerous difficulties and their rights are often breached. The writer calls for cooperation between Government, United Nations High commission for Refugees (UNHCR), Aid Agencies and other key players who deal with refugees to ensure that their human and constitutional rights become a reality. Kenya should discharge its duties towards refugees-the duties are imposed on it by international law, municipal laws and the Constitution. It should acknowledge its international human rights obligations and make the lives of refugees happy and bearable.

1.1 BACKGROUND

The refugee problem is one that Kenya cannot afford to ignore. Kenya has a large number of refugees from neighbouring countries. The refugee debate focuses on migration, forced migration. It is a discourse on human rights. It concerns duties that countries owe foreigners under international law and the rights of such persons who include refugees. Alienage is characteristic of refugees.

* LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; MCI Arb; CPS (K); MKIM; Dip. In Law (KSL); Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; PhD student at the University of Nairobi, Advocate of the High Court of Kenya.

The author wishes to acknowledge **Juliette Lorraine Odhiambo**, a legal researcher and **Karanja Muchiri** (LLB) for their assistance in updating the paper in view of the Constitution of Kenya 2010.

The law disallows countries from excluding aliens who are seeking asylum (non-refoulement principle). Several International Conventions shed light on how such aliens should be treated once they are in the country that is supposed to give them surrogate protection. In this paper such conventions or treaties shall be referred to as International Refugee Instruments (IRI).

Kenya is a signatory to a host of Conventions and treaties dealing with the issue of refugee and their protection. The conventions and treaties have now been fully domesticated vide section 16 of the Refugees Act which is to the effect that every recognised refugee and every member of his family living in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party.¹ Further, by dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions that have been ratified by Kenya now form part of Kenyan law. The Constitution of Kenya 2010 also offers a number of protections to refugees vide Chapter IV which guarantees the fundamental rights and freedoms of the individual.

How effective has the protection of refugees in Kenya been in spite of the existence of International Refugee Instruments and the Constitution of Kenya? Is the Refugees Act 2006 going to enhance the protection? The factual situation in respect of refugee rights in Kenya is grim. They face numerous difficulties and their human rights are often breached. Most refugees in Kenya live in squalid conditions in refugee camps where food, water, sanitation and shelter are not adequately provided. Potential refugees are often times not allowed into Kenya. Some who have found their way into the country find themselves languishing in the Kenyan jails for being in Kenya illegally.

Can the provisions of the Refugees Act, the International Refugee Instruments and the provisions of the Kenyan Constitution be used as catalysts geared towards protecting refugee rights in Kenya? Refugee rights are human rights. The writer takes the view that they ought to be enhanced. The question of whether International Refugee Instruments are applicable to Kenya is no

¹ Section 16 (a) of the Refugees Act

longer relevant in the light of the passing of the Refugees Act 2006 and Articles 2(5) and 2(6) of the Constitution of Kenya 2010.

The challenge is to effectively use the structures now in place for enhancement and realisation of refugee rights. A critical look at the Refugee Act is attempted in this paper since it provides the legal and institutional framework within which such protection of refugee rights is to be realised. The Refugees Act 2006 was assented to on 30th December 2006.² It is an Act of Parliament to make provision for the recognition, protection and management of refugees and connected purposes.³ The Act lays down the institutional and legal framework for the recognition, protection and management of refugees.

The Act establishes various offices and institutions which include a Department of Refugee Affairs⁴ and the office of Commissioner for Refugee Affairs⁵, the Refugee Appeal Board⁶ and the Refugees Affairs Committee.⁷ The Act lays down provisions relating to recognition of refugees, asserts the principle of non refoulement⁸ and codifies the rights and duties of refugees in Kenya.⁹ The welfare of women and children is emphasised and the Commissioner is required to ensure that specific measures are taken to ensure the safety of refugee women and children in

² Act no. 13 of 2006. The Refugee Bill had been published in 2003 and was awaiting enactment. The date of commencement of this Act is by notice.

³ Refugees Act - Preamble

⁴ Ibid section 6 (1)

⁵ Ibid section 7

⁶ Ibid section 9

⁷ Ibid section 8

⁸ Ibid section 11

⁹ Sections 18 of the Refugees Act. The principle is to the effect that in refugee should be returned or expelled to the frontier or territory where his life or freedom could be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (see Article 33 of the UN Convention Relating to the Status of Refugees 1957, as modified by the Protocol of 31st January 1967)

designated areas.¹⁰

Can the Refugee Act be used as a catalyst geared towards enhancing the realisation of refugee rights? Are the principles enshrined in the International Refugee Instruments going to be easier to realise? Will the constitutional rights of refugees be easier to recognise and enforce? These questions are germane to the refugee protection and human rights discourse.

2.0 CONCEPTUAL CLARIFICATIONS

The Refugee Act provides for a statutory refugee and a prima facie refugee.¹¹ A person is recognised as a statutory refugee for the purposes of the Refugees Act if such a person:

a. owing to a well founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country; or

b. not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.¹²

Prima facie refugee: A person shall be a prima facie refugee if such person:

...owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹³

Asylum: means shelter and protection granted by government to persons qualifying for refugee status in accordance with the provisions of the Refugees Act and in accordance with International Conventions relating to refugee matters.

¹⁰ Section 23, Refugees Act..

¹¹ Section 3 (1) & section 3 (2)

¹² Ibid section 3 (1) (a) & (b)

¹³ Ibid section 3 (2)

Asylum seeker is defined under the Refugee Act as a person seeking refugee status in accordance with the provisions of this Act.¹⁴

International Refugee Instruments as used in this paper include:

- The Universal Declaration of Human Rights¹⁵
- The Geneva Convention Relative to the Protection of civilian persons in time of war 1949.¹⁶
- Protocol Additional to the Geneva Conventions of 12th August 1949 and Relating to the Protection of Victims of International Conflicts (Protocol I) 1977.¹⁷
- Convention Relating to the Status of Refugees 1951 (hereinafter referred to as the Refugee Convention)¹⁸
- Convention Relating to the Status of Refugees (1967)¹⁹
- Organisation of African unity (Now African Union) Convention Concerning Specific Aspects of Refugee problems in Africa 1969 (OAU Convention)²⁰

¹⁴ Refugee Act section 2

¹⁵ Article 14 provides that everyone has a right to seek and enjoy in other countries asylum from persecutions. This right may not be invoked in the case of prosecutions arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

¹⁶ Article 44, This Act protects refugees during war. Refugees cannot be treated as enemy aliens.

¹⁷ Article 73 “persons who before the beginning of hostilities were considered stateless persons or refugees ...shall be protected persons ...in all circumstances and without any adverse distinction.”

¹⁸ This was the first international agreement covering the most fundamental aspects of a refugee s life. It spelt out a set of human rights that should be at least equivalent to freedoms enjoyed by foreign nationals living legally in a given country and in many cases those citizens of that state. It sought to assure refugees of the widest possible exercise of fundamental rights and freedoms. The Convention notes (in its preamble) that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees.

¹⁹ The 1967 Protocol removed the geographical and the time limitations written into the original Refugee Convention under which mainly Europeans involved in events occurring before 1st January 1951 could apply for refugee status.

²⁰ . The OAU Convention accepted the 1957 Convention and expanded the definition of a refugee to include people who are compelled to leave the country not only as a result of persecution but also owing to external aggression, occupation, foreign domination and events seriously disturbing public order. (Article 8 & 2)

- International Covenant on Civil and Political Rights 1966 (ICCPR)²¹
- Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (Article 3)²²
- Convention on the Rights of the child (Article 22)²³
- Declaration on the Elimination of Violence Against Women 1994²⁴
- African Charter on the Rights and Welfare of the Child 1990 (Article 13)²⁵
- The Cartagena Declaration on Refugees (1984)²⁶
- Statute of the Office of the United Nations High Commissioner for Refugees.²⁷

²¹ Articles 2, 12, 13: This is the main international treaty on civil and political rights and it stipulates that a state should ensure the civil and political rights of all individuals within its territory and subject to its jurisdiction (Article 2). The Covenant also guarantees freedom of movement and prohibits forced expulsion Article 12

²² Article 3(2) states that as consistent pattern of gross and massive violations of human rights are circumstances which a state should take into account when deciding on expulsion. The monitoring body of this Convention, the Committee Against Torture has established some fundamental principles relating to the expulsion of refused asylum seeker. It offers important protection to refugees and their right not to be returned to a place where they fear persecution.

²³ Article 22 of this Convention stipulates that state parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee “...shall receive appropriate protection and humanitarian assistance in the enjoyment of rights...state parties shall provide co-operation in...efforts to protect and assist such a child and to trace parents or other members of the family of any refugee child...for re -unification with his or her family...In cases where no parents or other members of the family can be found the child shall be accorded the same protection as any other child...deprived of his or her family environment...”

²⁴ This UN Declaration recognizes the particular vulnerability of refugee women while calling for the elimination of violence against women.

²⁵ This treaty stipulates special provisions of refugee children that are unaccompanied by parents or guardians.

²⁶ The refugee definition of the Cartagena Declaration builds upon the OAU Convention and adding to it the threat of generalized violence, internal aggression, and massive violation of human rights. Although not formally binding the Cartagena Declaration has become the basis of Refugee policy in the region covered by the Organisation of American States (OAS) and has become incorporated into the national legislation of a number of states.

²⁷ Pursuant to a decision of the General Assembly the office of the United Nations High Commissioner for Refugees (UNHCR) was established as of 1st January 1951. The statute of the office is annexed to resolution 428 (v) adopted by the UN General Assembly on 14th December 1950. According to the statute the Commissioner is called upon *inter alia* to provide international protection under the auspices of the United Nations to refugees falling within the competence of his office.

3.0 REFUGEES ACT 2006 (HEREINAFTER REFERRED TO AS THE ACT)

The Refugee Act 2006 establishes a Department of Refugee Affairs. This is a public office responsible for all administration matters concerning refugees in Kenya and it is mandated to coordinate activities and programmes relating to refugees.²⁸ The office of the Commissioner for Refugee Affairs, an office in the public service is created vide section 7(1). This Commissioner for Refugee Affairs shall be the head of the Department of Refugee affairs.

The Commissioner is Secretary to the Refugee Affairs Committee. He or she is to coordinate all measures necessary for promoting the welfare and protection of refugees and advise the minister thereon. The Commissioner for Refugee Affairs is mandated to formulate policy on refugee matters in accordance with International standards.²⁹ The Commissioner for Refugee Affairs is supposed to ensure in liaison with United Nations Agencies and any other institutions the provision of adequate facilities and services for the protection, reception and care of refugees within Kenya; The Commissioner is also supposed to promote durable solutions for refugees granted asylum in Kenya;³⁰ receive and process applications for refugee status;³¹ manage refugee camps and related facilities,³² and solicit funds for refugee assistance programmes³³ inter alia.

The office of the Commissioner for Refugee Affairs is thus laden with heavy responsibility. The writer is of the view that the holder must be a person who is committed to upholding the human rights of refugees. He is in charge of receiving and taking care of the needs of refugees. He is also

²⁸ Section 6 (1) & (2)

²⁹ Ibid section 7 (2) (c)

³⁰ Ibid section 7 (2) (e)

³¹ Ibid section 7 (2) (g)

³² Ibid section 7 (2) (k)

³³ Ibid section 7 (2) (n)

in charge of promotion of durable solutions and refugee assistance programmes. It is hoped that this institution will carry out its mandate and ease suffering of refugees. The refugee rights are now legal rights under a Kenyan statute. They should be upheld and protected within this legal framework. The lack of a legal and institutional framework for the regulation of refugee affairs can no longer be used as an excuse to deny them of their rights.

The Refugee Affairs Committee is established under section 8(1) of the Act. The Committee is supposed to assist the Commissioner, in matters concerning the recognition of persons as refugees for the purposes of the Act. It has a wide membership consisting of representatives from various ministries including:

- The ministry responsible for provincial administration and internal security
- The ministry responsible for refugee affairs
- A representative from the Ministry of foreign affairs
- A representative from the ministry responsible for local government
- A representative of the Attorney General
- A representative for the Ministry of health
- A representative of the ministry responsible for Finance and Planning
- A representative from the Department of migration
- A representative from the department of police
- A representative from the National Security Intelligence Service
- A representative from the Department of National Registration Bureau.³⁴

This wide representation in the Refugee affairs committee can serve to ensure that refugee rights are respected. A situation where a single Ministry or person makes decisions regarding whether or not refugees are to be allowed into Kenya or are to be granted asylum is no longer tenable. This can only be good for the refugees. Decisions made by this committee where various government departments are represented would consider financial, health and security implications of decisions made in respect of refugees. This is vital as the interests of other Kenyans also have to be taken into

³⁴ Section 8(3) (a)-(k)

account.

Section 8 (4) provides that at least one third of the members of this committee shall be women. The inclusion of women in governance issues is in the writers view a positive development. Their views should be taken on board considering that a sizeable number of refugees are women. It is arguable that their issues can only be fully understood by fellow women. The Refugees Affairs Committee shall also include a representative from the host community and one member from the civil society for the purpose of assisting and advising the Committee.³⁵ This broadened representation by diverse persons can ensure in the writers view that a wide range of opinions are taken into account before decisions are made.

The Act establishes a Board known as the Refugee Appeal Board to consider and decide appeals under the Act.³⁶ Any person aggrieved by a decision of the commissioner under the Act may appeal to the Appeal Board within 30 days of receiving the decision.³⁷ An appeal against the decision of the Appeal Board lies to the High Court.³⁸ The Appeal Board is free to regulate its proceedings as it deems fit.³⁹ It is hoped that hearings by the board will conform with the tenets of natural justice and the constitutional right to a fair hearing.⁴⁰

Section 11 makes provision for refugees entering Kenya whether lawfully or otherwise. If they wish to remain in Kenya as refugees they are to make their intentions known by appearing before the Commissioner personally immediately upon entry into Kenya.⁴¹ The mere illegal entry shall not

³⁵ Ibid section 9

³⁶ Ibid section 9

³⁷ Ibid section 10

³⁸ Ibid section 10 (3)

³⁹ First schedule Rule 8

⁴⁰ Section 77 (9) of the Constitution of Kenya

⁴¹ Section 11

cause a person to be declared a prohibited immigrant, detained or penalised in any way⁴² (except in cases where he fails to report to the Commissioner as provided in section 11 (1). This section will in the writer's view save refugees from the ordeal they go through in the hands of Kenya police and the criminal justice system. We have situations where refugees are rounded up, locked up in police cells and arraigned in court for the offence of being in Kenya illegally. The provisions of section 11 should stem this inhuman trend.

Section 13 of the Act should be a welcome relief to those who have been charged under the Immigration Act (Cap 172) and the Aliens Restriction Act (Cap 173). It provides that:

13. Notwithstanding the provisions of the Immigration Act or the Aliens Restriction Act, no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya-

(a) if such a person has made a bona fide application under section for recognition as a refugee, until where appropriate, such a person has had an opportunity to exhaust his right of appeal under that section; or

(b) if such person has become a refugee.

The stay of proceedings will go a long way in alleviating the suffering of refugees who hitherto used to fall foul of the law immediately they stepped into Kenyan soil. There is a need to educate the provincial administration, local communities and the police with a view to making them aware of this provision. Compliance with the law by the police and the department of immigration is vital if refugee rights are to be fully realised and enjoyed.

Section 6 provides that every recognised refugee and every member of his family in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is a party. Kenya is a signatory to the Convention Relating to the Status of Refugees and other conventions described as International Refugee Instruments in this paper. The rights

⁴² Section 11 (3); Article 31 of the Refugee Convention provides that refugees should not be penalised for having entered the country illegally if they have come directly from a place where they were in danger and have made themselves known to the authorities.

enshrined in these conventions and the obligations spelt out therein are applicable in Kenya.

Under the Convention Relating to the status of Refugees (Refugees Convention), refugees rights are spelt out.⁴³ The UNHCR strives to ensure that refugees enjoy rights to which they are entitled once they have been recognised as “convention refugees”.⁴⁴ Under the Refugee Convention all refugees must be granted identity papers and travel documents that allow them to travel. Refugees must receive the same treatment as nationals of the receiving country with regard to the following rights:

- Free exercise of religion and religious education
- Free access to the courts, including legal assistance
- Access to elementary education
- Access to public relief and assistance
- Protection provided by public security
- Protection of intellectual property such as inventions and trade names
- Protection of literary artistic and scientific work
- Equal treatment by taxing authorities

Refugees must receive the most favourable treatment provided to nationals of a foreign Country with regard to the following rights:

- The right to belong to trade unions
- The right to belong to other non-political non profit organisations
- The right to engage in wage earning employment

Refugees must receive the most favourable treatment possible which must be at least favourable as that accorded to aliens generally in the same circumstances with regard to the following rights:

- The right to own property
- The right to practice a profession

⁴³ Articles 12-30 sets out refugee rights.

⁴⁴ Source Human Rights Education Associated HREA 2002 <www.HREA.org> accessed on 7/2/07

- The right to self employment
- Access to housing
- Access to higher education

Refugees must receive the same treatment as that accorded to aliens with regard to the following rights:

- The right to choose their place of residence
- The right to move freely within the country
- Free exercise of religion and religious education
- Free access to courts including legal assistance
- Access to elementary education
- Access to public relief and assistance
- Protection provided by social security
- Protection of intellectual property, such as inventions and trade names
- Protection of literary, artistic and scientific work.
- Equal treatment by taxing authorities⁴⁵

Refugees living in Kenya are deprived of most of these rights. We submit that they are entitled to those rights under the Refugees Act 2006. The government of Kenya pursues a policy (or lack of it) where refugees are encamped in remote areas. This practice of encampment is ostensibly under the Aliens Restriction Act, Chapter 173 of the Laws of Kenya. The Institutional framework set up by the Refugees Act 2006, it is hoped, will ease the burden of coordinating refugee assistance, a burden which is current borne by the UNHCR and the International Committee of the Red Cross.⁴⁶

⁴⁵ Articles 12-30 of the Convention Relating to the Status of Refugees 1951

⁴⁶ The International Committee of the Red Cross (ICRC) plays a large role in making sure some of the refugee rights in Kenya are realised. Internally displaced persons and refugees have benefited from ICRC protection and assistance. ICRC provides medical assistance in refugee camps and other areas; it also provides food aid and arranges for temporary shelter for refugees (source US Committee of the Red Cross website <www.USCR.org>accessed on 7/2/07)

Section 17 of the Refugees Act sets up the office of a Refugee Camp officer for every refugee camp. His duties include inter alia ensuring that the camps are managed in an environmentally and hygienically sound manner;⁴⁷ coordinate the provision of overall security, protection and assistance for refugees in the camp;⁴⁸ protect and assist vulnerable groups, women and children⁴⁹ and; ensure the treatment of all asylum seekers and refugees in compliance with national law.⁵⁰

The setting up of The Office of Refugee Camp Officer in the writer s view will ensure that the camps are well run and the rights of the refugees which include environmental rights) are respected. It is in the writer s view a positive development which, if well utilised can ensure the rights of refugees are respected. A lot will however depend on the attitude of the refugee camp officer and his or her commitment to refugee and human rights.

3.1 NON REFOULEMENT

The principle of non- refoulement is captured by section 18 of the Refugee Act 2006. The section provides:

18. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusing, expulsion, return or other measure, such person is compelled to return to or remain in a country where-

(a) the person may be subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion; or

(b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

Prohibition of forced return of a refugee is called non-refoulement and is one of the most

⁴⁷ Section 17 (d)

⁴⁸ Section 17 (e)

⁴⁹ Section 17 (g)

⁵⁰ Section 17 (h)

fundamental principles in international law. This principle is laid out in Article 33 of the Convention relating to the Status of Refugees (Refugee Convention). It is to the effect that no state shall expel or return (refouler in French) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or membership of a particular social group or political opinion.⁵¹ Article 31 of the refugee convention provides that refugees should not be penalised for having entered the country illegally or if they have come directly from a place where they were in danger and have made themselves known to the authorities. This is now reflected by section 11 of the Refugees Act.

Kenya seems to have finally complied with international law through the enactment of the Refugees Act 2006 and in particular section 11 and section 18, further buttressed by the passage of the Constitution of Kenya 2010.⁵² This means that the principles of international law regarding non refoulement and non penalization of asylum seekers are now part of the law of Kenya. Refugees should enjoy these rights that were previously unavailable to them.

4.0 DUTIES OF REFUGEES

The rights of refugees are balanced against their obligations. Refugees have a general obligation and a duty to conform to the laws and regulations as well as measures taken for the maintenance of public order in the host country.⁵³ The Refugee Act authorises the Commissioner of Refugee Affairs to withdraw refugee status of any person where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country.⁵⁴

Refugees thus have a duty to keep the peace and not be a threat to national security or a threat to

⁵¹ Convention Relating to the Status of Refugees 28th July 1951- entry into force 22nd April 1954

⁵² Article 2(5) and 2(6)

⁵³ Convention Relating to the status of Refugees, supra Article 2; section 16 (2) of the Refugees Act “Every recognised refugee...shall be subject to all laws in force in Kenya

⁵⁴ Section 19 Refugees Act

any community of that country. The Commissioner for Refugees has power to revoke recognition of a refugee in respect of any person who should not have been so recognised or has ceased to be a refugee for the purposes of the Act.⁵⁵ This power is in the writer's view appropriate so long as it not exercised arbitrarily and in breach of the rules of natural justice. The power to expel refugees on the grounds of national security and public order⁵⁶ shall only be exercised in accordance with the due process of law.⁵⁷ This is a useful safeguard. It remains to be seen if it will work in specific cases in the Kenyan context.

4.1 SAFETY OF REFUGEE WOMEN AND CHILDREN

Section 23 of the Refugee Act requires the Commissioner for Refugees to ensure that specific measures are taken to ensure the safety of refugee women and children in designated areas.⁵⁸ The Commissioner is also required to ensure that a child who is in need of refugee status or who is considered a refugee shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and assistance.⁵⁹

Section 23 (3) is to the effect that the Commissioner for Refugees shall as far as possible assist such a child to trace the parents or other members in order to obtain information necessary for re-unification with the child's family.⁶⁰ Where the parents of the child or other members of the child's family cannot be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family.⁶¹ This is in line with the Convention on the

⁵⁵ Refugees Act section 20 (1)

⁵⁶ Ibid section 21

⁵⁷ Ibid section 21 (2)

⁵⁸ Ibid section 23 (1)

⁵⁹ Ibid section 23 (2)

⁶⁰ Ibid section 23 (3)

⁶¹ Ibid section 23 (3)

Rights of the Child⁶² which upholds the rights of refugee children.

The Children Act (No.8 of 2001) should in the writer's view be further used to safeguard the rights of refugee children who are seeking refugee status or who are considered to be refugees. They are entitled to the full protection of the laws of Kenya to which they are subject. This would include the Penal Code (Cap 63), the Sexual Offences Act (2006) among many other laws. The Act entitles the minister to make regulations for the better carrying out of the provisions of the Act. He or she may make regulations relating to procedure to be followed in application for recognition of refugee status, expulsion of refugees and protection of women, children, unaccompanied minors, persons with disabilities and other disadvantaged groups *inter alia*.⁶³

It is hoped that the Minister will not water down the rights envisaged by the Refugee Act through regulations. The procedures for recognition of refugees should be transparent and should have regard for due process and the Constitutional rights of the refugees.

4.2 CONSTITUTIONAL RIGHTS OF REFUGEES IN KENYA

Kenya has taken the step of incorporating the bulk of international law on refugees by specifically adopting the conventions and principles in respect thereof and codifying them into law through the Refugee Act. The legal position in Kenya is that treaties and International Conventions that have been ratified now form part of Kenyan law.⁶⁴ Having been made part of the law of Kenya they still have to pass one more test. They must not be in conflict with the Constitution of Kenya.⁶⁵ Thus the Refugee Act as enacted should not be in conflict with the Constitution. Any provision that would

⁶² Article 22

⁶³ Section 26 (1) & (2) a-j

⁶⁴ *Supra* note 52

⁶⁵ See the case of *Okunda & Another-v-Republic 1970 EA 423* a constitutional reference before the High Court and *East African Community-v-Republic 1970 EA 457* at the Court of Appeal. This was an appeal arising from the judgment of the court in *Okunda & Another-v-Republic*.

be found to be in conflict with the Constitution would be void to the extent of the inconsistency. Similarly any convention or treaty or part thereof adopted by the Refugees Act which contravenes the Kenyan Constitution would be void to the extent of the inconsistency.⁶⁶

The rights envisaged in the Universal Declaration of Human Rights have already found expression in Chapter IV of the Kenyan Constitution. The said rights are expressed in the various International Refugee Instruments. Refugees are human beings. Refugee rights are, we submit, human rights. They are also Constitutional rights as expressed in the Bill of Rights. Every refugee in Kenya is thus entitled to enjoy both the rights envisaged in the international refugee instruments and are also the rights enshrined in the Constitution of Kenya.

Violation of refugee rights can thus in our view be the subject of a constitutional reference. The writer takes the further view that courts do not have to wait for a constitutional reference. They should ensure that the rights of an accused are upheld at all stages of a trial. The right to a fair hearing for example should be enforced and observed by all courts. The fact that there is now a Refugees Act should make it easier to protect refugee rights which are set out in international instruments and the Kenyan Constitution.

The writer suggests that the enactment of the Refugees Act should serve as a catalyst to the realisation of refugee rights in Kenya. The definition of a person in the Constitution of Kenya does not distinguish between a citizen, an alien or a refugee. Person includes a body of persons, corporate or incorporates.⁶⁷ The definition is wide enough to include refugees and groups of refugees. The rights enshrined in the Constitution of Kenya should thus be enjoyed by Kenyans and other persons including refugees. Refugees are thus entitled to personal liberty as envisaged in Article 29 of the Constitution. They shall not be held in slavery or servitude (Article 30); Refugees shall not be subject to torture or to inhuman or degrading punishment or other treatment (Article 29(d) and (f). Refugees are entitled to the protection of their

⁶⁶ The Constitution of Kenya 2010 Article 2(4)

⁶⁷ Article 260, Constitution of Kenya 2010.

property (Article 40); Refugees should not be subjected to the search of their persons other property except with their own consent (Article 31).

When refugees are charged in court with a criminal offence they are entitled to the protections enshrined in Article 49 of the Constitution of Kenya. The writer takes the view that they are entitled to a fair hearing and the presumption of innocence should operate in their favour. Refugees are entitled to freedom of conscience which freedom includes freedom of thought and of religion.⁶⁸ They are constitutionally entitled to manifest and propagate their religion or belief in worship, teaching, practise and observance. They are also entitled to establish and maintain at their expense places of education and manage the same.⁶⁹

To the extent that international refugee instruments uphold the rights enshrined in the Constitution of Kenya and that they have been domesticated in the Refugees Act then they are applicable in the Kenyan courts. If the rights enshrined in the Constitution of Kenya are to be strictly applied in relation to refugees then it is arguable that Kenya will in fact be enforcing the principles contained in international refugee instrument

5.0 CONCLUSION

Protecting refugee rights in Kenya through the utilisation of the International Refugee Instruments, the Refugees Act 2006 and the Constitution of Kenya as catalysts is now possible. All the players in the field of refugee protection should play their respective roles to the full. The UNHCR, ICRC, the Commissioner for Refugees, the Government of Kenya and other stakeholders should co-operate and seek to ensure that refugee rights are respected. Refugee rights are provided for by International law and municipal law.

There has to be the political will on the part of all parties concerned. A deep respect for human

⁶⁸ Article 32 of the Constitution of Kenya 2010

⁶⁹ Ibid

rights is necessary. A commitment to ensuring that the human rights of refugees are respected is a prerequisite.

Kenya hosts thousands of refugees and asylum seekers.⁷⁰ There is a need to accord them the rights envisaged by the International Refugee Instruments, the Kenyan laws and the Constitution of Kenya. The Refugee Act 2006 has given refugees legal status. What is needed is respect for their rights and proper planning and funding so as to ensure that their holistic needs are met. Kenyan courts need to acquaint themselves with the Refugee Act 2006 and its implications. There is certainly a need to change our approach to refugee issues. Courts should be protectors of refugees and not their persecutors.

Kenya has ratified the following treaties among others.

- The Refugee Convention (16th May 1966)
- The Geneva Convention (20th September 1966)
- The African Convention on Human and People's Rights (10th February 1992)
- Convention Against Torture (21st February 1977)
- Additional Protocols I & II to the Geneva Conventions (23rd February 1999)
- The OAU Convention Governing the Specific Aspect of Refugee Problems in Africa (1969)

Kenya has passed the Geneva Convention Act (Cap 198) and the Police Act (Cap 84). These Acts prohibit torture against any person (this would include refugees). The will to conform to the requirements of international human rights and humanitarian law seems to be present. The challenge that faces Kenya is how to make sure that refugee rights are realised by refugees

⁷⁰ Kenya hosted approximately 245,000 refugees by the end of 2001 including an estimated 160,000 from Somalia, some 70,000 from Sudan, nearly 5000 from Ethiopia, more than 5000 from Uganda and more than 3000 from other countries. Approximately 30,000 new refugees and asylum seekers fled to Kenya during 2001 primarily from Somalia, Sudan and Tanzania. Currently there is an influx of refugees and asylum seekers from Somalia into Kenya. (Source US Committee for Refugees (USCR) website <www.USCR.org> accessed on 7th February 2007)

currently in Kenya or those seeking asylum.

Kenya has an obligation under international law to uphold human rights. There is a need to define a constructive approach involving both refugees and nationals in the search for acceptable and durable solution to the refugee problem. The writer subscribes to the view that these durable solutions should address:

- the right to return
- integration
- participation by refugees in peace processes
- resettlement with the cooperation of countries of origin

The enactment of the Refugee Act 2006 is a first step in the right direction.