



The African Women's
Development and
Communication Network

End Violence and Harassment in the World of Work

ILO Convention 190 and Recommendation No.206

POLICY BRIEF



Hivos
people unlimited

Introduction

The right to work is a fundamental human right recognised in various international legal instruments. The Universal Declaration on Human Rights (UDHR)¹ stipulates that *“everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”* Likewise, article 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR)² recognises the right to the enjoyment of just and favourable conditions of work. Violence and harassment in the world of work greatly undermines the right to work through prohibiting people from accessing or keeping work. It is also an antithesis of decent work which is defined by the International Labour Organisation (ILO)³ as dignity, equality, fair income and fair working conditions.

This policy brief provides an overview of violence and harassment in the world of work in Kenya. It analyses the issues and legal framework, sets out the African Women’s Development and Communications Network’s (FEMNET) position on ILO Convention 190⁴ on Ending Violence and Harassment in the World of Work and provides policy recommendations.

This document draws on literature on violence and harassment in the world of work and key informant interviews, conducted in Kenya in July and August 2020, with workers representatives, the Central Organisation of Trade Unions (COTU), civil society organisations and relevant government departments and offices. It also builds on FEMNET’s advocacy work on ILO Convention 190 with a view to informing necessary actions in pursuit of ratification of this convention by the Government of Kenya.

Issues and Concerns

Violence and harassment in the world of work takes different forms, among them, psychological manipulation; insults; sexual harassment; physical abuse; subtle offensive language and gestures; stalking; bullying; condescending behaviour; and intimidation (CARE, 2018; Hainfurther 2009; Karega 2002; KHRC 2008). According to WIEGO (2018), violence and harassment in the world of work may also take the form of economic deprivation through low and irregular wage or prohibited access to valuable productive resources. As such, while everyone has the right to work, unfavourable working conditions can have negative implications related to physical and mental strain, harm, distress and even suffering.

Owing to the fact that work is a pre-requisite for survival and socio-economic progression of individuals, it has an undertone of an unpleasant duty in certain quarters and in particular, work settings in which violence and harassment is rife. In such contexts, workers may decide to turn a blind eye on the violations they suffer in a bid to keep their jobs as the risks of reporting cases of violence and harassment - including, losing a job, certain favours or privileges - may appear too high.

¹ Article 23, UDHR

² <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>

³ <https://www.ilo.org/integration/themes/mdw/lang--en/index.htm>

⁴ Cited as Violence and Harassment Convention, 2019 (No.190) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C190

Gender-based violence in the world of work remains not only the most rampant form of violence but also the most tolerated and normalised violation of workers' rights. Not only can it impact the mental and physical health of women but can also impede their career growth and advancement as well as economic wellbeing. This is because, to some women, the solution to this problem is resigning from work altogether. Women may also be unfairly targeted, victimised and even sacked as a result of declining the sexual advances of their tormentors.

Violence and harassment in the world of work is not homogenous; so are mechanisms for prevention, support, grievance handling and remedy. There are notable differences between formal and informal sectors in: (a) the manifestations of violence and harassment (b) levels of support and protection for workers; (c) availability of remedy mechanisms; (d) burden of proof; (e) and the ability of victims to report cases of violence and harassment. Further, unlike the formal sector, the informal sector is characterized by non-compliance to labour legislation and limited protections under the law. Further, it is typified by loosely organised associations and self-help groups as opposed to trade unions and thus lack capacity to engage in industrial relations and investigate and facilitate remediation of harms related to violence and harassment.

Domestic and social spheres can be impacted by violence and harassment in the world of work, for example, stalking and psychological abuse at work may impede relations at home causing a strain on the family as well as limiting one's ability to cope with the demands of life more broadly. It also impacts productivity at work which in turn may lead to the loss of a job.

Kenya's Policy and Legal Framework

In addition to Kenya being a signatory of various international instruments that relate to labour rights⁵, Kenya has a robust legal framework that protects workers against violence and harassment. Section 4.1 (2) of Constitution of Kenya provides for the right of every worker to reasonable working conditions. Further to this, Article 5 (3) of the Employment Act 2007 (hereinafter the Employment Act) prohibits an employer from "*directly or indirectly discriminating an employee or prospective employee or harassing an employee or prospective employee*" on whatever grounds. Moreover, Article 6 (1) of the Employment Act as well as Article 23 of the Sexual Offences Act 2006 define grounds, situations and conduct that would lead certain acts to be deemed as sexual harassment.

In addition to the foregoing, the Employment Act prohibits forced labour (Art 4, sub-article 1), which means "*any work or service which is extracted from any person under the threat of any penalty, including the threat of a loss of rights or privileges, which is not offered voluntarily by the person doing the work or performing the service*"⁶. From our analysis, forced labour could be a part of, or a consequence of, violence and harassment in the world of work.

⁵ Among them, ICESCR; over 50 ILO Conventions, 37 of which are in force; Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)

⁶ Employment Act 2007, Article 4, sub-article 2

On the question of prevention of harassment and violence as well as grievance handling, the Employment Act requires employers with 20 or more employees to have a policy on sexual harassment (Art 6, sub-article 2). Article 12 of the same Act further stipulates that an employer with 50 or more employees should have a grievance handling procedure. These two provisions are defective from a labour rights perspective owing to the fact that harassment and the right to effective remedy have nothing to do with the number of employees in an organisation. As such, these provisions limit the right to effective remedy. Further to this, the utility of operational level grievance mechanisms prescribed by Article 12 is questionable as more often than not, these mechanisms are merely put in place to satisfy the requirements of standards such as Fairtrade, Rainforest Alliance and others for purposes of enabling access to markets as opposed to providing mechanisms for addressing and remediating grievances. The Employment Act is also silent on grievance handling in the informal sector and in domestic services.

Evidently, Kenya's labour rights legal framework is too limited in scope to effectively address the full extent of violence and harassment in the world of work. Though it defines sexual harassment, it does not define harassment. Resultantly, it excludes numerous forms of harassment and violence as discussed in this policy brief. Further, by limiting itself to the workplace, it fails to protect a large group of people that suffer or might suffer violence and harassment in the world of work. In the same vein, it limits its scope of potential perpetrators of harassment and violence to an employer, a representative of an employer and a co-worker (Employment Act Art 6) which excludes other perpetrators present in the world of work as expounded by ILO Convention 190.

Further to the above, the legal framework fails to recognise the manifestations of violence and harassment in the informal sector and that at times, this can take the form of a brief single occurrence with a person that is unknown to the victim. It is therefore blind to the challenges that such a person might experience in holding the perpetrator accountable.

Enhanced Protection Under ILO Convention 190

Owing to the issues raised in the previous sections of this policy brief, FEMNET strongly supports ILO Convention 190. Not only does this convention provide the broadest definition of violence and harassment in the world of work, but also protects *"all workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer"* (Article 2). It also applies to all sectors; public and private, formal and informal, rural and urban. Further, ILO Convention 190 applies to *"violence and harassment in the world of work occurring in the course of, linked with or arising out of work"* (Article 3).

ILO Convention 190 provides a framework for all stakeholders to engage on issues of violence and harassment in the world of work as a national and global issue. It further provides a superior standard against which all stakeholders can assess the suitability of their national policy, legal and regulatory frameworks.

Recommendations

To comprehensively address the complexities of violence and harassment in the world of work, we recommend that the Government of Kenya:

- In line with its duty to respect, protect and fulfil human rights and fundamental freedoms, expeditiously ratifies ILO Convention 190 and adopts Recommendation 206.
- Analyses the regulatory capability of the Ministry of Labour in view of the technical and financial capacity required to effectively operationalise ILO Convention 190 and provides the requisite technical, financial and human resource support.
- Develops legal mechanisms for preventing, monitoring and remediating violence and harassment in the informal sector and provides requisite support to enable workers in the informal sector to organise and enjoy the right to collective bargaining. At the local level, the national government should work with county government to provide this support.
- Fast tracks the ratification of ILO Convention 189 on Domestic Workers⁷ to enhance the protection of the rights of domestic workers.
- Promptly concludes the development of the National Action Plan on Business and Human Rights in order to provide a suitable policy framework for enhancing accountability of businesses on matters related to violence and harassment in the world of work which they may directly cause, contribute to or be directly linked to.
- Enhances access to justice for victims of harassment and abuse through reducing practical, legal and other relevant barriers to remedy and strengthening judicial and non-judicial mechanisms to enable fair administrative action and provide effective remedy.
- Build the capacity of the police service to adequately understand violence and harassment in the world of work and have in place gender-responsive mechanisms for reporting, handling and investigating matters reported to it through gender desks at police stations.

In addition to the foregoing, we recommend that:

- Parliament initiates legislative review to address the legal gaps identified in this policy brief.
- Trade unions, under the auspices of COTU, and civil society organisations create awareness among workers and communities on the convention to enable them to effectively engage at all levels.

⁷ Cited as Domestic Workers Convention, 2011 (No.189)

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