

**CHALLENGES IN REGULATING FOREIGN NATIONALS IN INFORMAL
BUSINESSES: A CASE OF THE DIRECTORATE OF IMMIGRATION
SERVICES, KENYA**

BY

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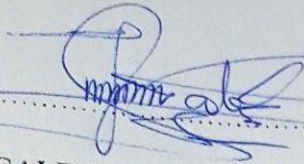
2020

DECLARATION

DECLARATION

This project is my original work and has not been presented for a degree or any other award in any other University.

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DEDICATION

Dedicated to my beloved family; Wambui, Lemayian and Leshan. The abounding grace of God will always keep us steadfast on the path to success. Keep moving.

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ABBREVIATIONS AND ACRONYMS

COMESA	Common Market for Eastern and Southern Africa
Covid 19	Coronavirus Disease of 2019
DIS	Directorate of Immigration Services
EAC	East African Community
EACOMP	EAC Common Market Protocol
GCM	Global Compact for Migration
GoK	Government of Kenya
I&P	Investigation and Prosecution
ICLS	International Conference on Labour and Statistics
ICT	Information and Communication Technology
ILO	International Labour Organisation
IOM	International Organisation for Migration
KCIA	Kenya Citizenship and Immigration Act
KCIR	Kenya Citizens and Immigration Regulations Act
KNMP	Kenya National Migration Policy (Draft)
MPFA	Migration Policy Framework for Africa
NIIMS	National Integrated Identity Management System (Huduma Number)
PISCES	Personal Identification Secure Comparison and Evaluation System
SARS	Severe Acute Respiratory Syndrome
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

ABSTRACT

The aim of the study was to assess the overall challenges faced by the investigation and prosecution division at the Directorate of Immigration Services (DIS) Kenya, in regulation of foreign nationals in informal businesses. The study objectives were to assess challenges associated with institutional and legal capacities at the investigation and Prosecution (I&P) division of the directorate. The research employed a case study design. The target population was all the 15 immigration officers in the division where twelve were male and three were female. Both primary and secondary data were captured. Primary data were collected using questionnaires and interview guides. Both open and closed ended questionnaires were administered to the respondents. Key informants were also interviewed using semi structured interview guides. Secondary data were collected from records in the DIS and internet sources. The response rate was 100%. Challenges noted in regulating foreign nationals in the informal business sector in Nairobi were both institutional and legal. Institutional challenges were found to be understaffing, inadequate training, poor ICT and surveillance systems and lack of sufficient vehicles for conducting patrols. Inter-agency coordination was found to be adequate which contradicts the directorate's draft policy which allude to challenges in coordination with other agencies such as the Police Service and the Judiciary. Legal challenges were mainly found in general enforcement of immigration laws, knowledge and skill deficiency among staff in operational laws and abuse of bilateral and multilateral laws by foreigners in informal businesses. The study recommends that the directorate recruits more officials to address staffing challenges and enhance capacity building on legal knowledge at investigation and prosecution division to improve overall enforcement capacity. The study also recommends enhancement of ICT infrastructure for foreign national surveillance. Effective inter-agency coordination is also recommended for effective and efficient delivery of the core objectives of the Directorate of Immigration Services. This study was limited to investigators and prosecutors at the DIS. Further studies are therefore recommended to capture the views of other agencies such as officers of the Kenya Police Service and the Judiciary. A study on foreign nationals in informal businesses would also give crucial insights to this area of research.

CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

The last decade has seen increased movement of people, products, jobs, information and technology across national borders and cultures thanks to globalization and regional integration (Zubiashvili, 2017). In the same period, economies of the Global South have evolved to acquire a largely informal character with little regulation on participation (Osei-Boateng and Ampratwum, 2011; ILO, 2018). This dual proliferation of migration on one hand and informal economies on the other creates new challenges in the enforcement of national and international migration codes by states (Collocott, 2019; Setumo, 2019; Omarjee, 2019). The current study considers the challenges faced by the Directorate of Immigration Services (DIS) in regulating the participation of foreign nationals in informal business activities in Nairobi, Kenya.

The study is based on the routine activity theory and the institutional theory. The routine activity theory avers that crime occurs when a motivated offender identifies a suitable target with the absence of a capable guardian (Cohen & Felson, 1979). The institutional theory proposes that human behaviour is chaotic and unpredictable in absence of regulations. The theory finds institutions as the antidote to chaos inherent in human behaviour (North, 1991). The confluence of these two theories is important for analysing the challenges faced by a regulatory institutions such as the DIS in its mandate on a chaotic societal environment such as the informal business sector in a country.

The Directorate of Immigration and Citizen Services (DIS) in Kenya is a government of Kenya department tasked with managing national security and enhancing social economic development of the country by carrying out comprehensive migration management (IOM,

2017). This entails border entry and exit clearances, issuance of secure documents such as passports, visas and permits, permanent residence certificates, citizenship and enforcement of immigration laws through investigation and prosecution of immigration related offences (GoK, 2011). Investigation & Prosecution (I&P) Division of the DIS is charged with enforcement of immigration rules, regulations and laws. The division under study is responsible for Nairobi city and its environs.

1.1.1 Concept of Immigration Regulations

Selznick (1985, p. 363) defines regulation as sustained and focused control exercised by a public agency over activities that are valued by the community. According to Levi-Faur (2010), regulation is a contested concept as it means different things to different people. Levi-Faur argues that regulation is an interdisciplinary subject touching on areas such as law, sociology and economics. He opines that regulation is best viewed as a combination of state and civil perspectives under the theme of regulatory capitalism which goes beyond state borders, markets and societies. Levi-Faur (2010) lists issues that are regulated as follows; entry, exit, costs, behaviour, content, performance, preferences and technologies. Regulation is central to governance as it involves rule making, monitoring and enforcement (Levi-Faur, 2010). Regulations beyond agencies and states are referred to as regulatory regimes which encompasses norms, institutional scope and international actor's interactions (Drezner, 2007).

As Levi-Faur (2010) study found out, immigrations regulations can be said to be state-centric as well as influenced by international regulatory regimes. This is explained by his list of regulated issues where entry and exit are captured. Entry and exit is the forte of immigration regulations including managing residency of foreigners. US Statutes under

Immigration and Nationality Act (INA, 1952) and Immigration and Refugee Protection Regulations Act of Canada (IRPA, 2002) cite immigration regulations on admissions of visitors, issuance of work permits, processing of permanent residence certificates and handling of refugees. According to Smith (2019), US enforcement of immigration regulations involves removal, detention and deportation of illegal aliens. Immigration regulations are also a tool for enhancing national interests. US immigration policy (2009) focuses on attracting skilled migrants, temporary worker programs for low skilled labour migrants and promoting family based immigration. Enforcement of legal employment is highly recommended by the US immigration policy (2009).

Immigration regulations' theme of control of entry, stay and exit of foreigners in a country is replicated in almost all other countries' jurisdictions (Tuvalu Immigration Regulations, 2014; Nigeria Immigration Act, 1963; Trinidad & Tobago Immigration Act, 1969; GoK, 2012). Regulation's documentation issued by immigration authorities for entry and residence into a foreign country for duration of time include visas, passes and permits (INA, 1952; IRPA, 2002; GoK, 2011). It is an offence to enter and reside in Kenya without a valid immigration documentation (GoK, 2011; GoK, 2012). Immigration regulations ensure that the right and beneficial foreigners are accommodated by the state while denying entry and stay to those viewed on the contrary, such as criminals, diseased and the immoral (GoK, 2011). These are known as prohibited and inadmissible immigrants who are liable for removal, detention and deportation (GoK, 2011).

According to Papademetriou and others (1998), immigration regulations are meant to; deter unlawful entry, facilitate lawful and beneficial entry and residence, citizenship registration and termination of unlawful residence. In essence, the aim is to protect jobs for locals as

well as attract scarce skills and capital for economic development. Those foreigners who do not fit in the immigration strategic importance of a country are ultimately excluded (Papademetriou, 1998).

Migration regulation is also a theme of the Global Compact for Safe, Orderly and Regular Migration, a non-binding resolution of the United Nations General Assembly adopted in 2018. Recognizing migration as a key feature of the globalized world, the compact demands that governments minimize irregular migration among their nationals by democratizing the issuance of identification and travel documents (objective 4) and to ensure that migrants respect the law of the destination country, so long as such law conforms to international laws (Article 15 (d)). The compact envisages that migration management will be managed in a multi-sectoral approach not only involving other government agencies but also international organizations involved in migration matters such as the United Nations High Commissioner for Refugees (UNHCR), International Organisation for Migration (IOM) and the International Labour Organization (ILO). Governments are also obliged to inform migrants of their rights, obligations and options for safe, orderly and regular migration. Detention is meant to be used as a last resort and nations are obliged to work towards full inclusion and social cohesion (The United Nations, 2019).

Migration regulation in Kenya is a function of the DIS (IOM, 2017). The mandate of the Directorate includes border entry and exit clearances, issuance of secure documents such as passports, visa and permits, permanent residence and citizenship processing and enforcement through investigation and prosecution of immigration related offences (GoK, 2011). This study aims to delve into challenges pertaining to immigration regulations of foreign nationals in informal businesses.

1.1.2 Concept of Informal Business

Stephenson (2008) defines business as the regular production or purchase and sale of goods undertaken with an objective of earning profit and acquiring wealth through the satisfaction of human wants. Informal business involves units of production of goods and services with primary objective of securing employment and income to the persons involved (ILO, 2013). The term informal sector was coined by the International Labour Organization (ILO) in 1972 as a more suitable term for what was initially called traditional sector. It characterised informal sector as employment and production that takes place in unincorporated, small or unregistered enterprises; also as informal employment without social protection whether in or out of the informal sector. This includes wage employment in the formal sector. The informal economy encompasses all these units, activities, workers as defined and their production. World Bank classification of these informal businesses would be equivalent to micro enterprises which have the size of less than ten employees (Tewari et al, 2013). This study uses the term informal business to refer to the informal sectors' units of production (ICLS, 2003; ILO, 2003; ILO, 2013). That informal businesses are in existence is a well-known fact, what policy makers fail to capture and agree on is the size, nature and operation standards of the sector (Tewari et al, 2013).

Informal business labour relations are based on casual employment, kinship, personal or social relations rather than contractual and structured relations found in formal establishments (ILO, 2013). Characteristics of informal business are; ease of entry, high unemployment, underemployment, reliance on indigenous resources, gender inequality, labour intensive, precarious work, unregulated and competitive markets, lack of social protection and labour representation (Agarwala, 2009; Suhaimi et al, 2016, ILO, 2013).

Contrary to the expectation of the economists in the 1970's that the informal economy was a transitional phase before countries in the Global South attained formal economy, the situation has persisted into the 21st Century and has even grown into some developed economies (Carr and Chen, 2001). In Kenya, the informal business sector is referred to as *Juakali*, Swahili for 'hot sun', a title reflecting open air informal businesses. Equally, informal sector businesses in Kenya are unregulated, semi-organized and use simple technologies (Githinji, 2018). The invisibility of the sector in ordinary accounting provides a powerful appeal to immigrants wishing to blend-in in the Kenyan society out of reach of the DIS regulations. In Nairobi, foreign nationals are most likely to get involved in these informal businesses; operating kiosks, trade in used clothes, hawking merchandise, operating barber and salon businesses, music, dancing, motor cycle taxis commonly referred to as *boda boda* and disabled street-begging which is driven by the criminal element of human trafficking and smuggling. The anarchic nature of the informal economy presents an allure for irregular migrants due to the lack of accountability that characterises such economies in weak states. This presents a unique set of challenges for migration regulators in developing nations. Studies across regions show that governance of regulatory and legal frameworks in informal commerce and business is critical yet scarce. Institutions and organisations such as governments and banks among others, lack data to base on regulations and credit management respectively. Cross-border informal businesses that involves immigration are prevalent in West and North Africa (Benjamin et al, 2014). This has been identified as a new area of migration studies. This study sheds light onto challenges faced by DIS in regulating foreign nationals in informal businesses in Nairobi.

1.1.3 Concept of Foreign Nationals

A foreign national is sometimes referred to as an alien, though the term alien's usage is diminishing as it is seen to be contentious, inappropriate and dehumanizing (Canadian Council for Refugees, 2019). IOM (2018) defines a foreign national as a person in a State where he is not considered as a citizen or a national. US immigration laws refers to foreign nationals as aliens (Smith, 2019). They define an alien as any person who is not a national or citizen of the United States and excludes lawful permanent residents (INA, 1952). Republic of Serbia defines a foreigner as a person who does not have the citizenship of that country (Serbia Gazette, 2009). In Canada, a foreign national is referred to as a person who is not a Canadian citizen or a permanent resident, and includes a stateless person (IRPA, 1976). Most countries today refer to those who are not their citizens as foreign nationals.

Kenyan immigration laws have undergone transformation, the main one being through the enactment of a new constitution in 2010. Alien Restriction Act Cap (1973) Laws of Kenya, section 2 defined an alien as any person who is not a citizen of Kenya. In the 2010 constitution, the Kenya Citizenship and Immigration Act (GoK, 2011) equally defines a foreign national as any person who is not a citizen of Kenya, the departure here being the change from alien to foreign national. There may be curtailment of rights and obligations of foreign nationals as compared to those of the citizens. These includes right to vote and contest for certain political seats (Cole, 2003; Brysk, 2005). In Kenya, the Immigration regulations (GoK, 2012) require all foreign nationals who are residents within Kenya for a period exceeding 90 days to register and obtain a Foreign Nationals Certificate.

Irregular foreign national, commonly referred to as an irregular migrant is defined as a “person who, owing to unauthorized entry, breach of a condition of entry, or the expiry of

his or her visa, lacks legal status in a transit or host country.” Persons who have entered a transit or host country lawfully but have stayed for a longer period than authorized or subsequently taken up unauthorized employment, also known as undocumented, are also covered by this definition (IOM, 2011). Most of the foreign nationals in the informal business sector in Kenya are thought to lack proper documented authorization for their participation in business.

1.1.4 Directorate of Immigration and Citizens Service, Kenya

The Directorate of Immigration and Citizen Services (DIS) in Kenya is a Government of Kenya (GoK) department in the Ministry of Interior and Coordination of National Government tasked with managing national security and enhancing social economic development of the country by carrying out comprehensive migration management (IOM, 2017). This entails border entry and exit clearances, issuance of secure documents such as passports, visa and permits, permanent residence and citizenship processing and enforcement through investigation and prosecution of immigration related offences (GoK, 2011). The Department of Immigration was legally established in 1906 under colonial government. After Kenya adopted a new constitution in 2010, relatively progressive provisions on immigration and citizenship are provided in immigration laws (IOM, 2017).

The DIS is mandated to promote the national interests of Kenya and protect residents and citizens from the adverse effects of migration. It does this by issuing secure travel and identification documents, managing foreign nationals in the country, provision of consular services at Kenya’s missions abroad and enforcing the relevant legislations related to immigration. The department is also the focal point for all government agencies on all matters of immigration. It also advises the government on migration law and policy.

According to KCI Act (GoK, 2011), foreign nationals intending to reside in Kenya beyond 3 months visitors pass are required to obtain a pass or a permit indicating the reasons of their extended residency. In addition, they are expected to register as foreign nationals and obtain Foreign Nationals Registration Certificate valid within the life of the permit or pass under regulation number 46. Failure to register is an offence (GoK, 2011). All foreign nationals conducting any form of business in Kenya are expected to report and register with the DIS (IOM, 2017).

The directorate (DIS) is headed by the Director General of Immigration Services who reports to the Principal Secretary in the Ministry. Functionally, the department is separated into 8 divisions namely: Missions abroad, Administration, Travel documents, Border Management office, Investigations & Prosecution, Foreign nationals' management office, Regions, and National Coordination Mechanism on Migration (IOM, 2017). The functional organization structure of the department of immigration services is provided in Appendix 1.

As at June 2016, the Department had employed 900 immigration officers and 400 support staff. Immigration officers perform the core duties of the Directorate at the ministry and are required, upon entry to have attained a minimum of graduate education. They also undergo continuous specialized training to prepare them for emerging trends and concerns in migration matters. Support staff includes administrators, human resource officers, ICT support officers among others. Immigration officers are located in all 34 ports of entry into Kenya, (15 land, 8 airports and 11 sea ports). They are also posted to the headquarters office in Nairobi as well as in the regional offices at Eldoret, Nakuru, Kisumu, Embu and Garrissa (IOM, 2017). Other officers are posted to Kenya's missions abroad. The department works

closely with the Kenya Police Service and other agencies in charge of security in Kenya. The Nairobi office in charge of investigation and prosecution has 15 immigration officers who are the primary respondents in this study.

Section 41 of the Kenya Citizenship and Immigrations Act (GoK, 2011) specifies that even when an immigrant has been granted a work or resident permit in Kenya and the applicant engages in employment, occupation, trade, business or profession other than the one specified on the permit, such a permit shall remain invalid. Schedule 8 of the Kenya Subsidiary Legislation (GoK, 2012) outlines the professions for which a work permit may be issued in the country. In a regulation that is meant to outlaw the participation of foreign nationals in informal business, regulation 20 (2) stipulates that the director can only issue a residence or work permit to a person satisfying requirements under the Seventh Schedule of the regulations. They include; Class A for Prospecting and Mining, Class B for Agriculture and Animal Husbandry, Class C for prescribed profession, Class D for employment, Class F for specific manufacturing, Class G for specific trade, business or consultancy, Class I for approved religious or charitable activities, Class K for ordinary residents and Class M for refugees. Foreign investors would attract Class G permit where the initial capital requirement is 100,000 dollars, way beyond capability of most foreigners in informal businesses. In addition, Schedule eight has prescribed professions which favour skilled migrants. Section 31 (7) of the regulations addresses the possibility of the use of a special pass by migrants to engage in any form of employment for a period not exceeding three (3) months. A visitor's pass cannot be used for such cases, and should stand nullified in case of abuse (GoK, 2012).

1.2 Problem Statement

Different countries appeal to foreign nationals for different reasons. Migration for labour has however become a common feature of the globalized world. Traditionally, migration policies in many countries are meant to attract high-skilled migrants to fill into positions where the local economies face shortages (Broeders and Engbersen, 2007; Okkerse, 2008; Thalhammer et al, 2001). Since positions in the formal economy are few, most migrants targeting the informal economy of most countries are low skilled and irregular in immigration documentation. Immigration authorities face various challenges in the regulation of these migrants.

It has been estimated that 80% of employment in Africa is in informal business sector (Osei-Boateng and Ampratwum, 2011; ILO, 2018). Due to the large number of players in the sector, migration authorities face the challenge of investigating immigrants who wish to camouflage their business activities among the local people. The presence of foreign nationals may appeal to local consumers due to availability of cheap labour and merchandise that the foreigners may import to the countries of destination (Low and Mokhtar, 2017). Equally, conflicts arise from local businessmen in the sector due to perceived unfair competition wrought by foreigners (Setumo, August 12, 2019). The informal nature of economies of the Global South presents unique institutional and legal challenges in the regulation of migrants who intend to benefit from these informal economies.

Left unchecked, these movements deny governments of revenue due to lack of business registration and trade in counterfeit goods. Informal businesses can also be a conduit for proliferation of transnational crime such as human trafficking, human smuggling and money laundering. In South Africa, inflows of immigrants have been known to cause xenophobic

attacks from the local people whose businesses are threatened by stiff competition of the foreign nationals in the sector (Setumo, August 12, 2019). This is as a result of the nature of developing economies where there is substantial unemployment and underemployment. In some circumstances, these migrant flows might lead to diplomatic misunderstanding between countries as the case between South Africa and Nigeria has illustrated (Ogunnoiki & Adefisayo, 2019). A recent problem associated with unchecked movement across borders is the spread of infectious diseases such as Covid-19 caused by the highly infectious coronavirus (Munda, May 2020). Studies on irregular migrants in Europe, North America and Middle East were found to focus on migrants seeking employment mostly as low skilled migrants. Studies in South Africa regulations have been found to focus on how to limit engagement of foreign nationals in informal businesses (Setumo, August 12, 2019; Gastrow, 2018). African Union Migration Policy Framework (MPFA, 2018) has extensive coverage on African migration, yet lacks the actual roadmap to migration regulation and management capacities within individual states and in Africa as a whole. It emphasizes more on the economic benefits accrued by the connectedness of the African people and the spirit of Pan Africanism. It also capture the sources of migration as conflicts and lack of job opportunities especially for the youthful population. Kenya on its part, with an immigration agency spanning over 100 years, lacks an immigration policy that can articulate migration matters. Hopefully, a draft policy recently formulated is expected to streamline migration matters in the country while offering a road map to other countries in Africa.

There is no known literature on the challenges of regulating foreign nationals in informal businesses. The current study seeks to investigate the challenges faced by the DIS in Kenya

in regulating foreign nationals in the informal business sector of the country. What are these challenges faced by the DIS in regulating foreign nationals in informal businesses?

1.3 Research questions

- i. What institutional challenges does I&P Division of the DIS face in regulating foreign nationals in informal businesses in Nairobi?
- ii. What legal challenges does I&P Division of the DIS face in regulating foreign nationals in informal businesses in Nairobi?

1.4. Research Objectives

1.4.1. General Objective

The main objective of the study was to examine the challenges faced by the DIS in regulating foreign nationals in informal businesses.

1.4.2. Specific Objectives

- i. To assess the nature of institutional challenges faced by the DIS in regulating foreign nationals in informal businesses.
- ii. To ascertain the nature of legal challenges faced by the DIS in regulating foreign nationals in informal businesses.

1.5. Justification of the Study

Developing countries grapple with the problem of unemployment which drive many to the informal business sector (Bocquier, 2005). This is exacerbated by the influx of foreign nationals into the same informal sector leading to conflicts emanating from business competition (Charman, 2012; Okoth, 2019). In Kenya, such incidences of business conflicts have been reported in the city of Nairobi casting the causes as lack of regulation of

foreigners in the informal businesses. There are reported cases of presence of irregular migrants who operate informal businesses in major urban centres of Kenya. Literature shows majority of them are not regulated (Anyanzwa and Magubira, 2019; Wako, 2019; Kejitan, 2019). Again, available literature does not explain challenges faced by authorities in regulating foreign nationals in the informal businesses. It was therefore the intention of this study to unravel the challenges that DIS faces in regulating foreigners engaged in informal businesses in Kenya.

1.6 Value of the study

This study is an investigation on the effectiveness of I&P Division of the DIS in Nairobi in controlling the participation of undocumented foreign nationals in business activities in the informal sector. The knowledge generated from the study will contribute to the existing body of knowledge on immigration regulations of undocumented migrants in the informal business sector in Nairobi. It will also open up new approaches on the study of foreign nationals in the informal business sector. It is expected to enrich the immigration enforcement practice by providing new view points on how to approach and regulate foreigners outside the known work permit regime. It is also the intention of the researcher that the study will offer basis for policy makers to better regulations in the informal businesses patronized by foreigners.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This chapter discusses the theoretical foundation and review of literature. The theories discussed are the institutional theory and the routine activity theory. In the empirical review, challenges associated with institutional capacity and legal framework of a migration management institution in regulating foreign nationals are discussed.

2.2 Theoretical Foundation

2.2.1. Institutional theory

The institutional theory was founded by Douglass North in his 1991 paper, *Institutions*. He posits that human behaviour is chaotic and unpredictable in absence of regulations. According to Scott (2001), institutions are social structures that are multifaceted and durable which are made of social activities, symbols and material resources. Institutions are the antidote to natural state of chaos inherent in human behaviour (North, 1991). Examples of institutions are; family, religion, economic and legal systems, ethnic and racial groups, businesses, mass media and nation-states (Scott, 2001). The institutional framework determines the nature of knowledge that provides the maximum pay-off (North, 1991). An institution is a social structure that guides actions and orientation on individuals and organisations, yet spells out constrains and control on the same. These guides and constrains include values, beliefs, norms and laws. Groups of individuals are bound by a common purpose to achieve certain objectives. Institutions provide structure to human behaviour through both formal and informal rules. Formal rules include common law, regulations and statutes while informal rules comprise of conventions, norms of behaviour, and self-imposed codes of conducts. Institutional growth can be either pragmatic or organic.

Pragmatic growth is that which is designed by authorised actors such as governments, parliaments, and spiritual leaders while organic growth arises spontaneously out of human interaction but not intentional. Institutions are regulative, normative and culturally cognitive. (Scott, 2001).

This theory is suitable for a study that aims at determining the effectiveness of an institution. The DIS is charged with the mandate of determining who is eligible to enter and stay in Kenya. Stay includes authority to work and invest in the country as a foreign national. DIS issues various types of work permits and plays regulatory role in the enforcement. As per the theory, DIS keeps updating its body-fabric of knowledge to achieve its mandate as an institution.

2.2.2 Routine Activity Theory

Routine Activity Theory was explained by Lawrence Cohen and Marcus Felson in 1979 following their examination of crime trends in the United States from 1947 to 1974. They found that crime occurs when a motivated offender identifies a desirable target which is vulnerable for exploitation due to poor guardianship. The period under study was marked by a spike in crime despite various social changes such as increased college enrollment, female labour participation, and urbanization. These changes had been expected to reverse trends of crime because they contributed to reducing poverty levels. In their explanation, Cohen and Felson averred that the spike in crime was caused by the changes in economic growth and lack of corresponding protection to property. This created more appealing and exposed targets for motivated offenders to commit crime (Cohen, and Felson, 1979).

In the context of the current study, Kenya's informal economy is considered a desirable target for motivated migration offenders from various parts of the world. In Eastern Africa region, Kenya has been relatively peaceful amidst the political conflicts characteristic of the horn of Africa and the Great Lakes region (IOM, 2018). Kenya attracts huge flows of mixed migration in the region. They include refugees and asylum seekers, smuggled and trafficked persons and irregular migrants. It acts as a destination as well as transit country (RMMS, 2013). Secondly, Kenya's economy is the most developed in the region and third most developed in Sub Sahara Africa after South Africa and Nigeria (Mohajan, 2013). Kenya's growing middle class is also an attractive market for traders from developing Asian, Middle East and North African countries such as China, India, and Egypt respectively (Okoth, 2019). This study seeks to examine whether the institutional and legal establishment of Kenya's DIS provides sufficient deterrence for such migration offenders.

2.3 Institutional challenges in enforcing immigration laws in the informal sector

Institutional challenges faced by enforcers of immigration laws may be divided into two categories: inadequate resources and poor inter-agency coordination. Kobach (2008) found that a migration regulatory institution will face tough challenges if it is not facilitated with enough financial outlay to conduct its work. He avers that increased painful penalties on immigration offenders and reduced access to employment would help tame illegal immigration. Surveillance of foreign nationals is an expensive task given the expansive and porous borders of some countries and the enhanced real time communication between people of different nationalities due to internet connectivity (McAuliffe, 2018). Investigation capabilities of an institution need to be supported with necessary equipment that could help to detect migration related fraud (Düvell, 2018). A crucial tool for any

modern regulatory institution is a reliable and integrated database system that tracks compliance to the terms and conditions of stay in the country. Despite the advanced technology of the United States' National Security Entry-Exit Registration System ("NSEERS") program, it was found to still be unable to track fully migrants in the informal economy (Kalhan, 2014). Adequate surveillance of undocumented migrants therefore require provision of sufficient information and communication technologies (ICT) infrastructure and other relevant equipments such as versatile motor vehicles.

Efficiency of an immigration regulatory institution will be hampered if it lacks adequate personnel to conduct investigation and prosecution of offenders (Opon, 2015; Düvell, 2018). The quality of training offered to enforcement officers determines the effectiveness of a regulatory institution in netting immigration offenders in any country (Wasem et al., 2004).

The capacity of an institution is greatly enhanced when there is proper coordination between government agencies such as the police and the criminal investigative authorities. In US, the concept of 'one face of the border' saw amalgamation of key border functions into the Department of Home Security (DHS) to enhance national security despite their individual social and economic national contribution (Wasem et al., 2004). This concept has been replicated in Africa through state cooperation. The East African Community Partner States enacted a law establishing One Stop Border Posts (OSBP) in 2010 (IOM, 2017). This was to enhance and coordinate border operations between government agencies as well as between neighbouring states. Kenya has undertaken a radical policy formulation anchored in law to enhance interagency coordination. The amendment to Kenya Citizenship and Immigration Act section 5A-5D in 2014 created Border Control Operations Coordination

Committee (BCOCC) whose main aim was to create border interagency committees. Border Management Secretariat (BMS) and Border Management Committees (BMCs) were formed as a result. This was meant to ensure effective and efficient border security management both on regular and irregular migration to enhance national security (IOM, 2017). The expansion of security concerns is founded on the concept of Security Sector Reform Policy (Ejdus, 2009). While BCOCC has concentrated its efforts at the borders, irregular foreign migrants use porous borders to illegally access entry into Kenyan urban centres where they engage in informal business activities. As unemployment is a threat to the national security, entry of unregulated foreign nationals in the informal sector exacerbates the problem which may lead to serious national and international repercussions.

The AU Migration Policy Framework for Africa (MPFA, 2018) cites challenges faced by immigration department's regulations as stemming from fragile states, poor remuneration and porous borders. According to Opon, Okoth and Onkware (2015), challenges of human resource in the department of immigration in Kenya arises due to inadequate staffing levels, poor remuneration, poor working environment, bureaucratic intelligence sharing among agencies, integrity issues, and existence of long porous borders. While this may be the case, studies on the challenges of regulating foreign nationals in informal businesses have not been explored. As earlier stated, most policies in developed countries aim at attracting scarce skills in their economies while discouraging locally available skills to avoid unfair competition for labour (Broeders and Engbersen, 2007; Okkerse, 2008; Thalhammer et al, 2001). Developing countries especially those in Africa lack sufficient policy frameworks to regulate foreign nationals in informal businesses.

2.4 Legal challenges in enforcing immigration laws in the informal sector

The right of the state to enact legislation to regulate the conduct of foreign nationals in their territory was mooted in the 1928 Havana Convention on the Status of Aliens. According to the convention, migration regulation is an aspect of sovereignty (Organization of American States, 1928, Article 1). The obligations, responsibilities and rights of foreign nationals and states are buttressed in the United Nations Declaration on the Rights of Individuals (United Nations General Assembly, 1985).

Migration regulation is also a theme of the Global Compact for Safe, Orderly and Regular Migration, a non-binding resolution of the United Nations General Assembly adopted in 2018. Recognizing migration as a key feature of the globalized world, the compact demands that governments minimize irregular migration among their nationals by democratizing the issuance of identification and travel documents (objective 4) and to ensure that migrants respect the law of the destination country, so long as such law conforms to international law.(Article 15 (d)). The compact envisages that migration management will be managed in a multi-sectoral approach not only involving other government agencies as well as international organizations involved in migration matters such as the United Nations High Commissioner for Refugees (UNHCR) and the International Labour Organization (ILO). Governments are also obliged to inform migrants of their rights, obligations and options for safe, orderly and regular migration. Detention is meant to be used as a last resort and nations are obliged to work towards full inclusion and social cohesion (The United Nations, 2019). According to Broeders and Engbersen (2007), States in the North of European Union mooted policies on surveillance of irregular migrant aimed at identifying and controlling, with severe deterrent measures aimed at exclusion and expulsion as the end game. One of

the most prominent challenges that enforcers of immigration law face is that the legislation of many jurisdictions does not recognize the existence of the sector or possibly, the informal sector does not feed to the strategic goal of an immigration policy. Where labour migration is envisaged in law, it is designed for highly specialized skilled workers who are expected to join the formal sector of the destination country. Foreign nationals in such jurisdictions without requisite skills find themselves irregularly in the informal sector (Newland and Riester, 2018). The root cause of these challenges could possibly be when the informal business sector was thought to be transitory, just for it to become endemic in the newly independent countries of the Global South and some pockets of the Global North (Osei-Boateng and Ampratwum, 2011; ILO, 2018). In 2013, the ILO estimated that 150 million out of 206.6 migrants of working age are in the labour force of the destination countries, most of them illegally due to the non-recognition of the informal sector by legislations in many jurisdictions in the world. (ILO, 2015)

Newland and Riester (2018) have suggested solutions to fill this legal gap in legislations of most polities in the world. They suggest that countries can create temporary employment programs in which low-skilled migrants are allowed to work for short periods of time when the demand for their skills abound. Such a programme could be applicable, for example in the agricultural sector where more manual labour is needed during harvest time. Such a programme could be suitable for a country that would not be willing to accommodate large migrant population in fear of disrupting the local demographics. Such a programme has been implemented in the agricultural sector of New Zealand. In view of the current study, such an innovations have been implemented in countries of the Global North where migrant labour is needed for manual jobs that cannot be automated such as child and elderly care,

and harvesting. In developing countries such as Kenya, most of the workers earn their living in the informal sector (Carr and Chen, 2001; Githinji, 2018), such that allowing the immigration of workers in the informal sector is likely to result in friction with the local population. However, scarce talents found in foreign nationals could be tapped through temporary and affordable work permits regimes.

Turkey has tried to solve this problem in view of the huge inflow of migrant labour from neighbouring Syria which has been in conflict since 2011. It has legislated for a points-based system approach called the Turquoise Card where the recommendation of the employer is taken into consideration when vetting the immigrant temporary status in the country. Applicants of these cards and members of their families are accorded residence status in the country. This system however has been criticized for being selective against the less educated and those lacking specialized skills. The policy therefore cannot be a solution to the problem of participation in the informal sector by foreign nationals (Akcapar, 2017). In view of developing countries, this innovation would fail to address the challenges of regulating foreign nationals in informal businesses because these countries have surplus of low-skilled labour of which the Turquoise Card program has been found to discriminate against.

The second challenge faced by immigration law enforcers is diplomatic in nature: the problem of 'soft borders'. Diplomatic tools are applied to provide migrants from a neighbouring country favorable treatment while accessing the labour market of the destination country. These agreements considers that 80% of migration in the global South occurs between neighbouring countries (Ratha and Shaw, 2007). Huge migration flows have been found occurring between India and Bangladesh; Mozambique and South Africa;

Ghana and Cote d'Ivoire; as well as Thailand and Myanmar (Horwood et al, 2018). Soft border agreements are in existence, for example between Romania and Moldova where residents of Moldova are accorded preferential access to the Romanian labour market (Pop et al, 2005). Similarly, Canada has a soft border agreement with Mauritius (Newland and Riester, 2018). According to Akcapar (2017), diplomacy is a new area of study in relation to immigration as it touches on political and social institutions particularly in regard to rising issues on xenophobia, Islamophobia and racism.

The concept of Simplified Trade Regime (STR) adopted by COMESA for reduction of procedures, processes and costs restrictive to small scale cross-border traders is essential for replicating to inland residential traders (Lesser and Mois-Leeman, 2009). In a regional integrated community such as EAC, having specific, easy to obtain work permits would be a great assistance to small scale traders. Adopting STR model for small scale traders would boost trade in the community.

East African Common Market Protocol (EACOMP, 2009), a multilateral agreement for EAC nations could be considered to be a kind of 'soft border' agreement where citizens of East Africa are allowed considerable freedom of movement within member countries. However, CMP (2009) does not create open borders as far as movement of labour and establishment in businesses is concerned except for specialised skills as provided for in the laws of member countries (CMP, 2009).

Kenya's relationship with Ethiopia may also be scrutinized under the same lenses. Kenya maintains a relatively 'soft' border with Ethiopia out of bilateral agreements entered into in the early days of independence. With regard to current trends in migration and the labour

market, these agreement pose challenges in the enforcement of migration law in Kenya as many Ethiopians get arrested while travelling clandestinely to South Africa (Alemneh, 2017). Many more Ethiopians have been arrested in recent years in both Kenya and Tanzania making the same trip to South Africa (Associated Press, 2020).

One more legal challenge that enforcers of migration laws face is the lenience or the perceived lenience of migration management laws when applied to the informal sector. Migrant labour in the informal business sector is usually cheaper than local labour especially in circumstances where the migrant stays in the country irregularly (Newland and Riester, 2018). This motivates traders to employ foreign nationals at the expense of local labour. Other beneficiaries of the presence of informal migrants in a country include house owners who charge premium rental prices to foreign nationals (Gastrow, 2018). Business competition that exists in the informal businesses where foreigners are players and competition for labour are a recipe for xenophobic conflicts.

United Kingdom's immigration Act (2014) holds employers, landlords and institutions culpable of criminality for illegally hosting immigrants. For instance, a fine of one thousand pounds is fined to traders who are found to have employed foreign nationals irregularly (UK Immigration Act, 2014). Similar penalties are extended to landlords and institutions offering services to such immigrants (Yuval-Davis, Wemyers and Cassidy, 2018). Kenyan immigration laws outline punishments for nationals colluding with foreign national offenders but are rarely enforced due to the intricacies of intelligence gatherings (GOK, 2011).

Access to legal documentation, fair labour treatment, observing rights and freedoms for migrants are enshrined in standards for access to productive and decent work (ILO, 2019; GCM, 2018). This is specifically so for the low skilled migrants who are vulnerable and liable to exploitation. Low skilled migrants are mostly found in informal businesses. Immigration laws on the other hand discourage low skilled migrants. Interestingly, migrants performing the 3Ds work – dangerous, dirty and demeaning, are usually tolerated in irregular statuses in many jurisdictions as long they provide services and labour that locals are unwilling to offer (GMG, 2013). This irregularity is most of times implicit.

2.5 Research gaps

Most of the studies that have been done to assess the institutional and legal capacities of migration management are in developed nations and concentrate on employment labour. One such study is Amada Armenta's *Protect, Serve and Deport: The Rise of Policing as Immigration Enforcement* (Armenta, 2017). Armenta's study took place in Nashville, USA. America has been referred to as a "nation of immigrants". Due to this heritage, the country has developed resilience to cope with community stresses that occur with immigrant's integration. Further studies are required for countries in the global south where cases of xenophobia have been reported based on much less demographic changes than has happened in America. Secondly the level of unemployment in such developing countries is much higher. The structure of the economy is such that most people work in the informal sector increasing the sensitivity of local communities towards the immigrants who seem to be taking employment opportunities that should be reserved for local people.

Armenta's advocates for opening of country borders to facilitate greater movement of people, goods, services and capital. In nations in the global south whose statehood is still in

transition, this proposal presents challenges in having to deal with huge inflows of migrants. This is especially so for a country located in a politically volatile region like East Africa, where Kenya is. Moreover, Kenya's economy is more developed than that of the neighbors, exposing the country to an uncontrolled flow of migrants seeking for better economic fortunes than they can get in their countries.

The study by the United Nations office of counter-terrorism, 2016 addressed migration management as related to border management. The concerns of the current study are different because they address the management of foreign nationals in a city such as Nairobi. Managing foreign nationals in such a city presents a different set of challenges including possibility of collusion with local people. The study examined the challenges faced by enforcement officers in regulating established foreign nationals in informal businesses. Studies on migration within and from without Africa are scanty. Most studies focus on African migration to developed nations in the West and Europe where the main objective is stem irregular migration (Broeders and Engbersen, 2007; Okkerse, 2008; Thalhammer et al, 2001). Studies have shown that 80% of Africa labour is in informal sector (Osei-Boateng and Ampratwum, 2011). In this regard, entry of foreign nationals into the sector is bound to cause ripples leading to conflicts such xenophobia witnessed in South Africa (Thalhammer et al, 2001).

2.6 Conceptual Framework

A conceptual framework is a tool in research which explains the connection between the dependent variable and the independent variables. It highlights the agenda to be examined, tried and reviewed in a study. (VanderStoep and Johnston, 2009:106) The conceptual framework for the current study is illustrated in Fig.1 below.

The Conceptual Framework

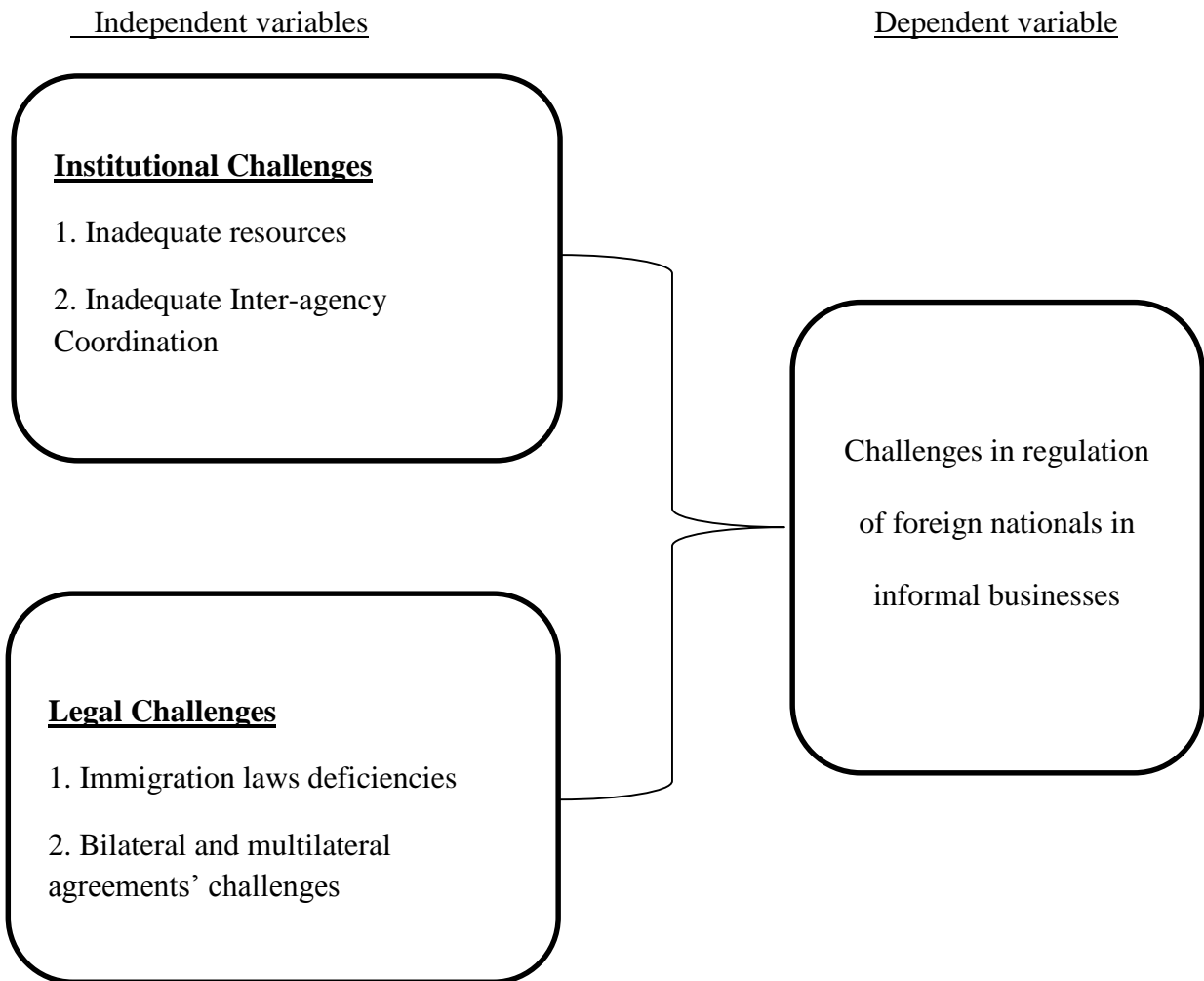


Figure 1: The conceptual framework

Source: Researcher

CHAPTER THREE: RESEARCH METHODOLOGY

3.1 Introduction

This chapter highlights the procedures and techniques that were used in conducting the study. It presents the research design used, target population, data collection methods, data analysis and presentation and ethical considerations.

3.2. Research Design

The research adopted a case study design. According to VanderStoep and Johnston (2009) a case study research design is most suitable for in depth study of a particular organization. Hence, the case study research design was the most appropriate for the study.

3.3. Target population

Target population entails the whole group of characters from which the research focuses to generalize its finding. The target population for the current study was the entire staff of the investigations & prosecution division at the DIS headquarters in Nairobi. This group was targeted for study because they possess some unique knowledge on the working at the investigations and prosecution office of the directorate. The staff comprised of 15 members; 12 male and 3 female. Since the target population was small in size, the researcher opted for a census and no sampling was done.

3.4 Data collection

The researcher collected both primary and secondary data. Primary data were collected using questionnaires and interview guides. Both open and close ended questionnaires were administered to the respondents. Key informants were also interviewed using semi structured interview guides. Secondary data were collected from records in the DIS and

internet sources. Secondary data from DIS included information stored in registers and court files which involved arrests, removals, repatriations and deportations in the last two years of 2018 and 2019.

3.5 Data analysis and presentation

Data were analysed by use of Microsoft Excel application package. The analysed data were presented in forms of frequency tables and figures.

3.6 Ethical considerations

Prior to the research, respondents were informed on their right of participation. Respondents were assured that the information sought was for academic purposes only and their identities were to remain anonymous. This study was carried at a time when restrictions on movement had been placed due to Covid-19. This made it important that questionnaires be sent by email and interviews be conducted through internet video platforms such as Zoom. Respondents were assured that the integrity of the source and modes of delivery of information were secure.

CHAPTER FOUR: DATA ANALYSIS AND PRESENTATION OF RESULTS

4.1 Introduction

This chapter presents data analysis and presentation of results. The study sought to find out the challenges faced by the DIS in regulating foreign nationals in informal businesses. The study involved an inquiry through questionnaires issued to staff in the Investigations and Prosecution division at the DISs, Nairobi. Two key informants from the same division were interviewed. The researcher did a census of all of the officials in I&P Division at the DIS. The response rate was 100%.

4.2 Background Information

This section illustrates the socio-demographic information of the respondents in this study with regard to gender and age in years of the respondents.

4.2.1 Distribution of the Respondents by Gender

The information is presented in table 4.1 below shows distribution of the respondents by gender.

Table 4.1: Distribution of respondents according to gender

Category	Frequency	Percent
Male	12	80
Female	3	20
Total	15	100

Table 4.1 above shows percentages of the respondents by gender. 80 % were male and 20% were female.

4.2.2 Distribution of the Respondents by Age

The information presented in figure 2 below shows distribution of the respondents by age.

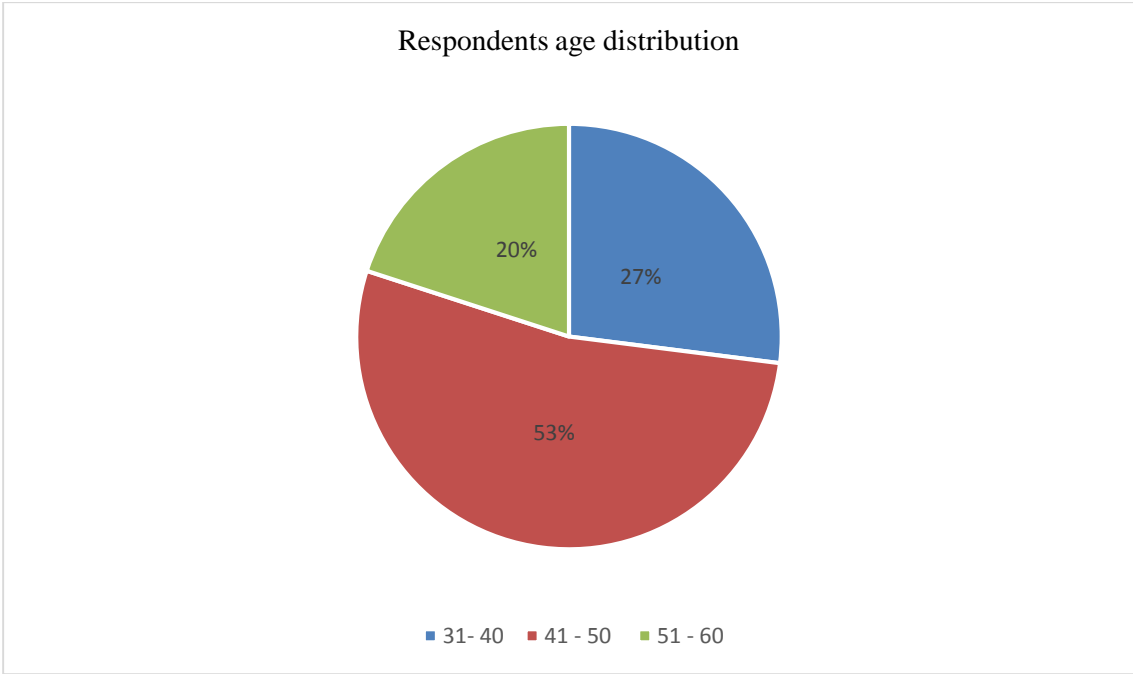


Figure 2: Age Profile of the respondents

Source: Researcher

Figure 2 above shows majority (53%) of the respondents were in the age bracket of between 41-50 years. 27% of the age of the respondents was in the age bracket of 31-40 years. The least were in the age bracket of 51-60 at 20%.

4.2.3 Experience in years

The researcher wanted to find out the work experience of the respondents in terms of the number of the years worked in I&P Division at the DIS. Figure 3 below presents the response.

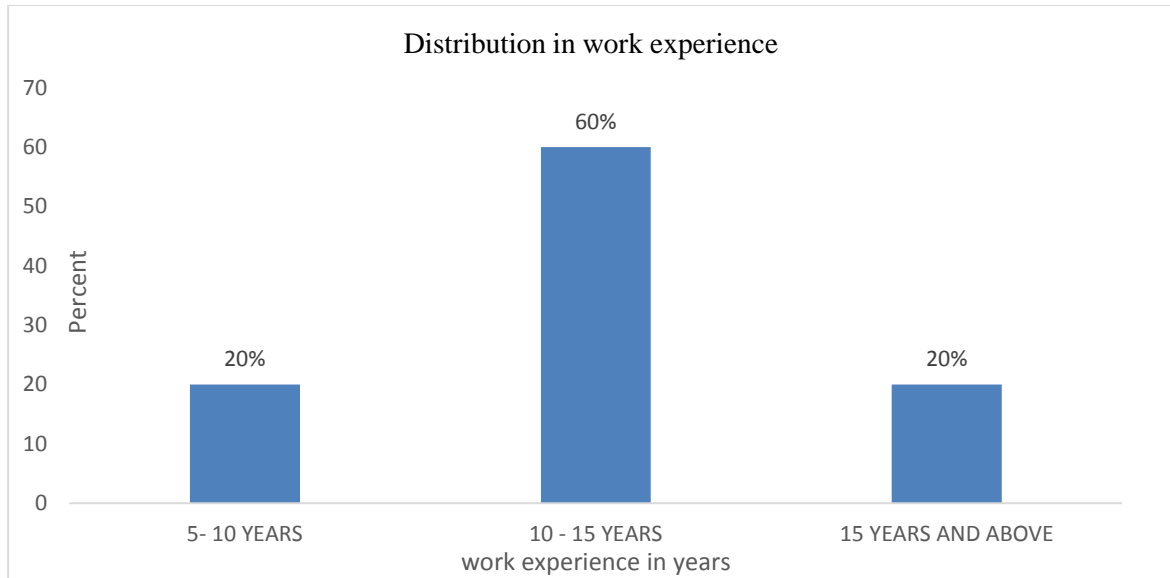


Figure 3: Profile of the respondents according to work experience.
Source: Researcher

As shown by figure 3 above, majority (60%) of the respondents had work experience of between 10-15 years. Respondents with 5-10 years and over 15 years of service had equal percentage at 20%.

4.2.4 Participation of foreign nationals in informal businesses

The researcher asked how often respondents did come across irregular foreign nationals operating informal businesses. The responses are presented in figure 4 below.

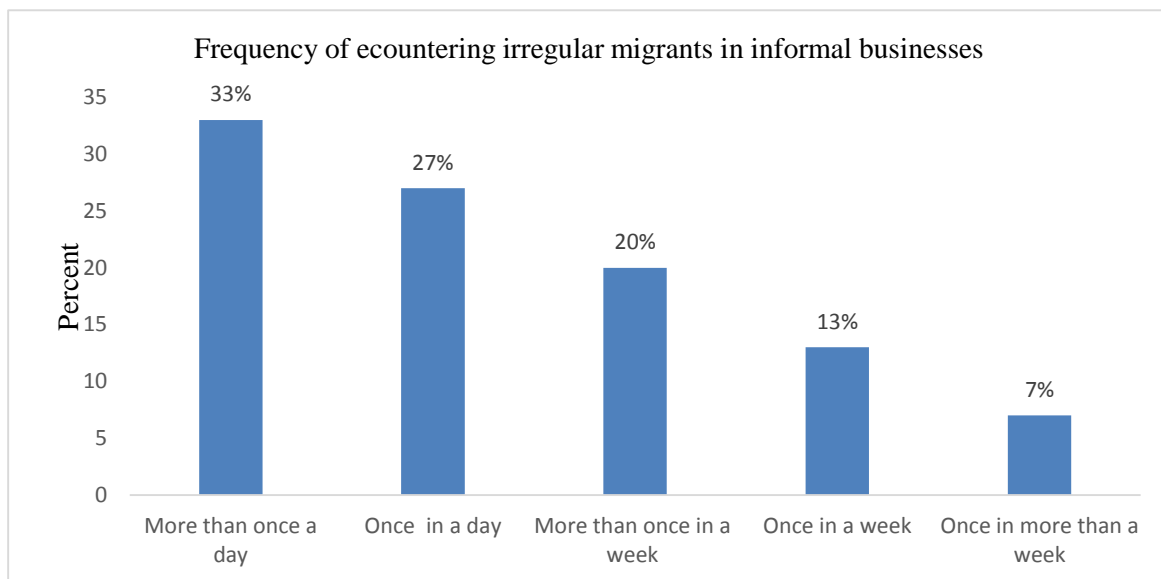


Figure 4: Frequency of encountering foreign nationals in informal businesses.

Source: Researcher

Figure 4 above shows that the frequency of encountering irregular foreign nationals in informal businesses as given by the respondents. Majority (33%) said more than once a day, 27% said once a day, 20% said more than once per week, 13% said once in a week and the least (7%) said once in more than a week.

4.2.5 Types of Businesses Foreign Nationals Engage in in Informal Sector

The respondents were asked to state the type of businesses that foreign nationals participate in in Nairobi. A variety of businesses were mentioned including kiosks, barber shops, music, selling second hand clothes and shoes, construction, selling electronics, hawking imported clothes and household goods, online businesses, motor cycle (*boda boda*) taxi and begging by disabled foreign nationals.

4.3 Institutional Challenges in Regulating Foreign Nationals in Informal Businesses

On a 5-point likert scale, the researcher asked the respondents on their levels of agreements concerning selected institutional challenges they might have faced in regulating foreign

nationals in informal businesses in Nairobi. They included challenges on resources, challenges on interagency coordination and integrity challenges. The 5 point likert scale ranged from strongly disagree, disagree, neutral, agree and strongly agree.

4.3.1 Challenges on Resources

The researcher asked the respondents to indicate the levels at which they faced the following resource-based challenges in regulating foreign nationals in informal businesses in Nairobi: inadequate staffing levels, inadequate training, insufficient vehicles for patrol and surveillance and inadequate ICT infrastructure. The responses are presented in Figure 4, 5, 6 and 7 respectively as illustrated below.

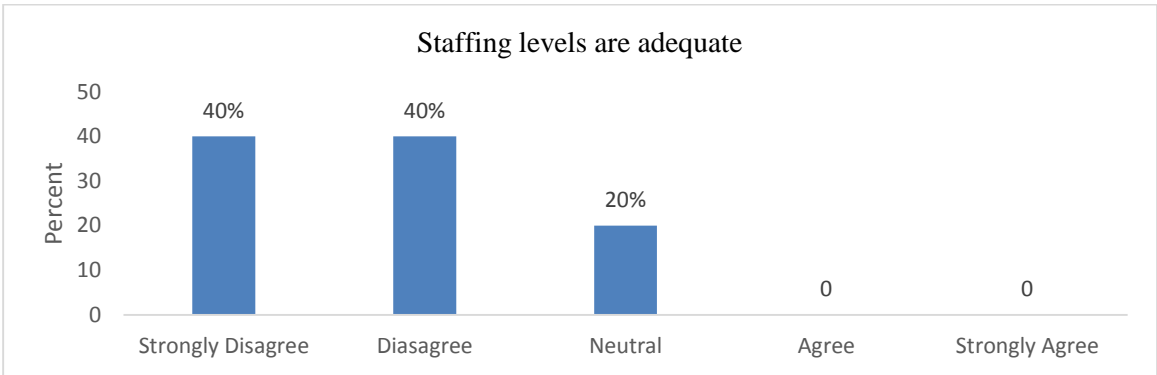


Figure 5. Adequate staffing levels **Source: Researcher**

As shown in figure 4 above, 40% strongly disagreed, while another 40% agreed on the statement that staffing levels at I&P Division at the DIS are adequate. 20% were neutral.

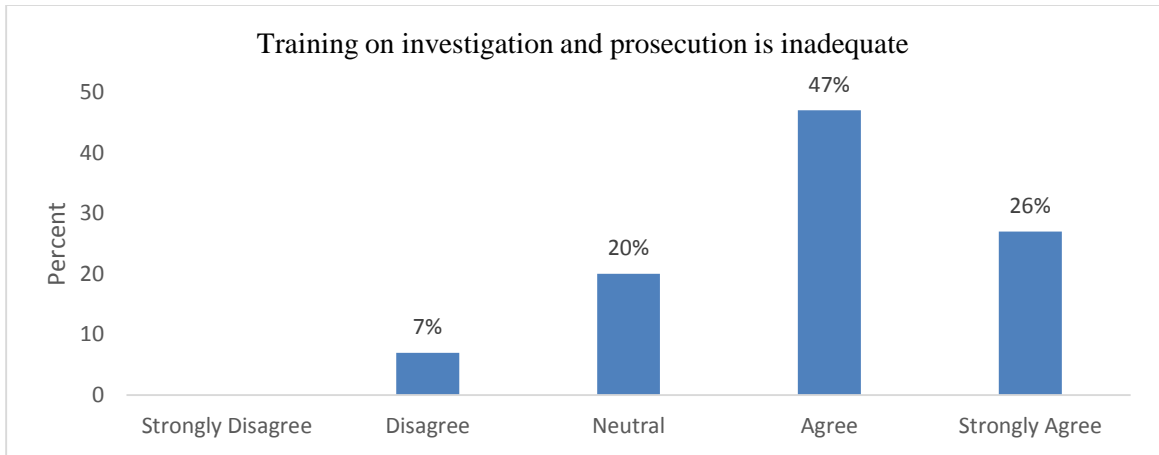


Figure 6: Inadequate Training

Source: Researcher

As shown in figure 5 above, majority (47%) agreed there is need for training in I&P division of DIS. 26% strongly agreed with the statement. 20% were neutral while 7% disagreed.

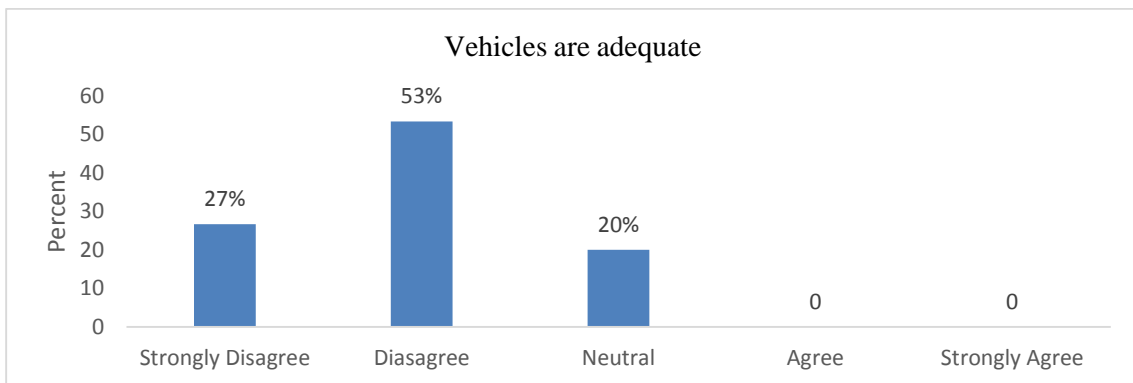


Figure 7: Vehicle Availability

Source: Researcher

Figure 5 above shows that majority (53%) disagreed, while 27% strongly disagreed with the statement that vehicles assigned to I&P Division at the DIS are adequate to regulate foreign nationals in informal businesses.

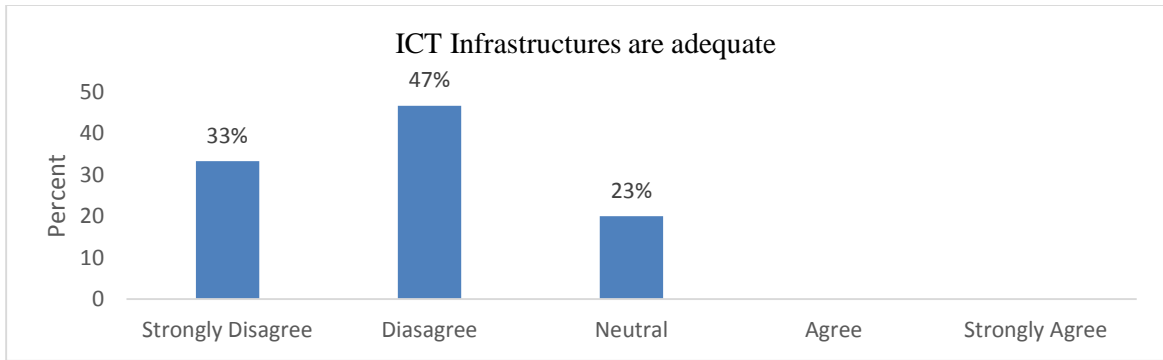


Figure 8: ICT Infrastructure Adequacy

Source: Researcher

As figure 6 above shows, majority (47%) disagreed with the statement that ICT infrastructures are adequate to regulate foreign nationals in informal businesses. 33% strongly disagreed and 23% were neutral.

4.3.2 Inter-agency coordination Challenges

Using a 5-point likert scale, ranging from strongly disagree to strongly agree, the researcher asked the respondents in I&P Division at the DIS to indicate how they agreed with the statement that interagency coordination between DIS and other security agencies such as police and judiciary was adequate. The responses are in figure 9 below.

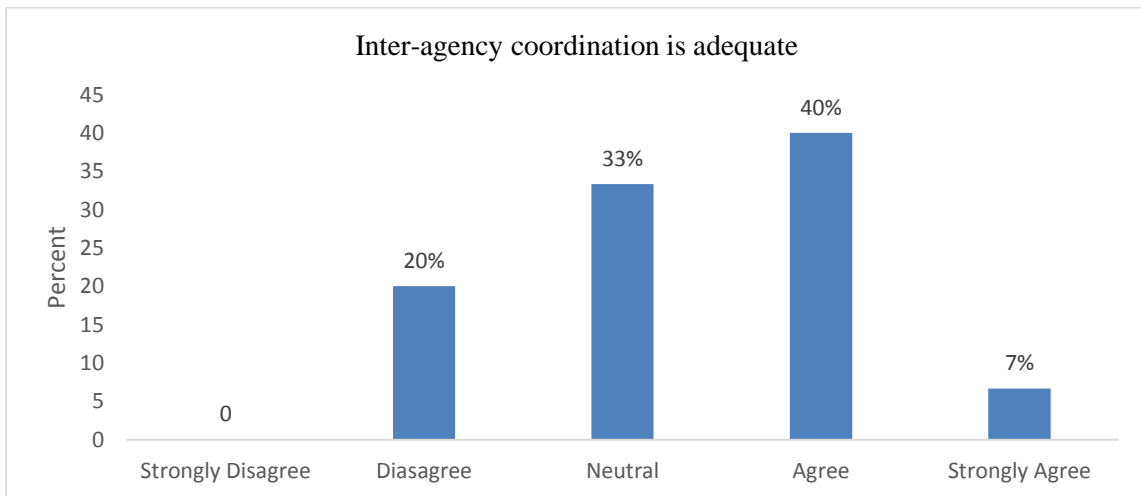


Figure 9: Inter-agency coordination.

Source: Researcher

As shown in figure 9 above, majority of the respondents (40%) were in agreement that inter-agency coordination was adequate between DIS and other agencies as indicated above. 33% were neutral, 20% disagreed and 7% strongly agreed that it was adequate.

4.4 Legal Challenges

The researcher sought to find out the challenges emanating from the legal framework in the DIS as well as related international laws of bilateral and multilateral treaties with Kenya. They include: whether immigration laws are deficient in regulating foreign nationals in informal businesses and whether bilateral and multilateral agreements provide room for foreign national in informal businesses to work without necessary permits.

4.4.1 Kenyan Immigration Laws

The researcher asked the respondents to indicate whether Kenya immigration laws do not envisage presence of foreign nationals in informal businesses. A 5-point likert scale of strongly disagree, disagree, neutral, agree and strongly agree was used. See figure 9 below for the responses.

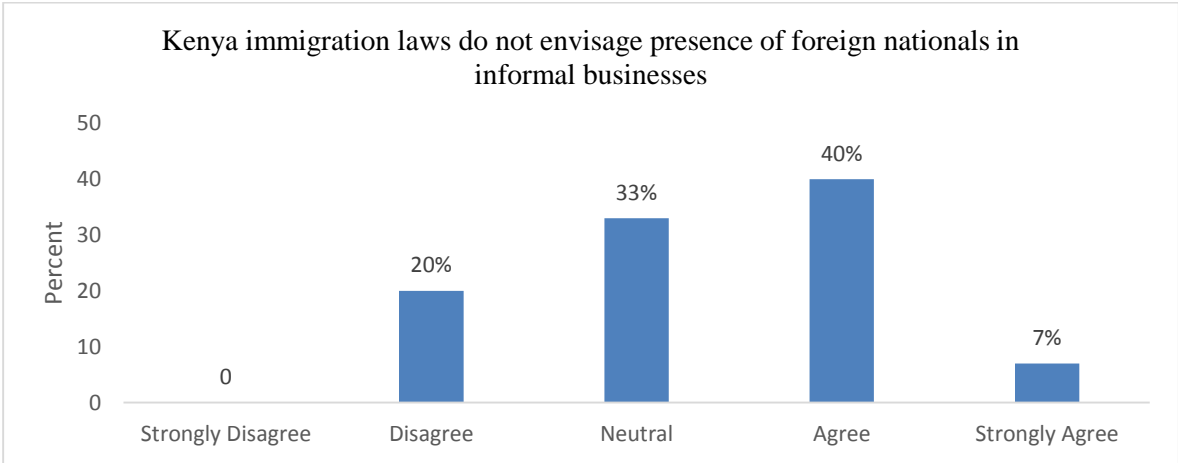


Figure 10: Deficiencies of Kenyan immigration laws

Source: Researcher

Figure 10 above shows that majority (40%) agreed and 7% strongly agreed that Kenyan immigration laws do not address cases of foreign nationals in informal businesses. 33% were neutral on whether foreign nationals in informal businesses are recognized by Kenyan immigration laws or not and 20% disagreed.

4.4.2 Bilateral and Multilateral Agreements

Respondents were asked whether bilateral and multilateral agreements open room for foreign nationals to enter and engage in informal businesses in Kenya without valid work permits. Figure 11 below presents the results.

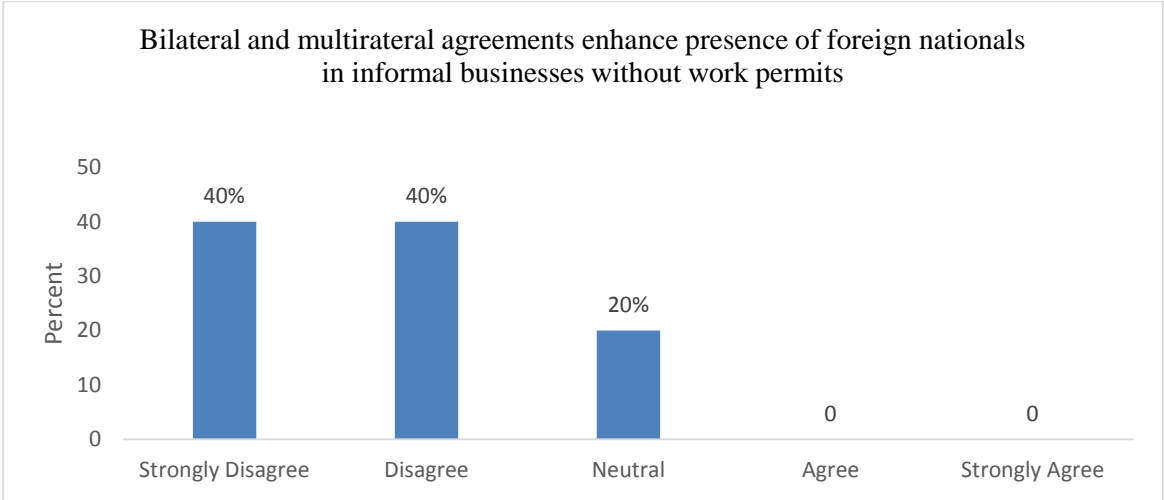


Figure 11: Multilateral and bilateral laws **Source: Researcher**

As shown in figure 11 above, 40% strongly disagreed and 40% disagreed that bilateral and multilateral agreements enhance presence of foreign nationals in informal businesses. 20% were neutral.

4.5 Interview Responses

According to interview respondent, most of the foreigners engaging irregularly in informal businesses have refugee certificates and passports. Some of the documents are expired while others have expired endorsements or use visitor’s passes for work. Some, especially Somalia

nationals have over time, fraudulently acquired Kenyan IDs and passports. These people are undocumented as far as working without permit is concerned. Refugees and citizens of EAC partner states have access to gratis work permits but they rarely do make the applications possibly because of the process or other requirements such as minimum capital requirements and skills. Among the challenges faced by the investigators is that local traders colluded with foreign nationals to enable the latter take part in informal trade as they provide cheaper labour than locals. This is common with many Tanzanians in motor cycle (*boda boda*) taxis. These foreign nationals are also assimilated such that it becomes harder for the DIS to arrest them. There is also a possibility of these foreigners to engage in criminal activities such as stealing and robbery. Due to shortage of staff in I&P Division at the DIS, most of the immigration enforcement is carried out by police where collusion with foreigners may take place. “Recruitment and deployment of more immigration officers in the Investigations and Prosecution division will enhance its investigative and general enforcement capacities.” (Interviewee I).

Due to shortage of staff in I&P Division at the DIS, a respondent informed the researcher that most arrests of foreign nationals irregularly involved in informal businesses is done by the police. The respondent suggested that hiring and training of more staff is necessary. Investment in superior ICT connectivity can be used to trace the movements of foreign nationals in the country. Real time linkage of essential border data with I&P Division would enhance enforcement of overstay cases. The respondents expressed hope that the Huduma Portal run by National Integrated Identity Management System (NIIMS) that is being developed by the government will improve the accountability process of foreign nationals in the country. “Identifying genuine refugees in the country is difficult considering that

Kenya is a major refugee-receiving nation in the world. This calls for better coordination between the UNHCR and the DIS.” (Interviewee II).

Investigating and enforcing some cases had proven difficult because the foreign nationals were being protected by senior persons in the security agencies. Although such cases were odd, they nevertheless hampered the working of the officials in I&P Division. “In this regard, we recommend that the unit be headed by a director accountable to the director general of immigration to enhance accountability in the management of foreign nationals.” (Interviewee II).

Multilateral and bilateral agreements in diplomatic relations considerations sometimes affect immigration decisions. For example, it would not be prudent to repatriate huge numbers at ago, despite the offences committed. This would lead to diplomatic tiff. A case of Anthony Chinedu, a Nigerian suspected drug baron who was deported from Kenya was strongly referred in this study. The Kenyan jet and the immigration officers deporting him were detained in Nigeria in June 2013 (Daily Nation, 2013). There is a growing number of Tanzanian disabled beggars in the country’s urban streets allegedly run by a ring of their compatriots and relatives (Daily Nation, March 18, 2020; Interviewee I).

4.6 Discussion of the Findings

The main aim of the study was to examine the challenges faced by DIS in regulating foreign nationals in informal businesses. The objectives were to assess the nature of institutional and legal challenges faced by DIS in regulating foreign nationals in informal businesses. The researcher opted for a census of all the 15 immigration officers in I&P division at the DIS. The response rate was 100%.

I&P Division at the DIS was noted to lack sufficient diversity. There are no employees in the range of 20 – 30 years and gender of the respondents is skewed where women account for only 20% of the employees. This may affect the performance of the DIS. Greater diversity of workers brings different perspectives and increases productivity especially in investigative duties. All immigration officers in the department were found to have a minimum of a basic university degree as entrance requirement meaning there is academic excellence. Findings also reveal the wealth of experience in the division shown by the number of years served.

Majority of respondents showed that the frequency of encountering irregular foreign nationals in informal businesses was high. 33% of the respondents met irregular foreign nationals in informal businesses for more than once a day, 27% said once a day, 20% said more than once per week, 13% said once in a week and the least (7%) said once in more than a week. This shows that irregular participation of foreign nationals in informal business activities is a common in Nairobi. Respondents said that the frequency of their presence might even be higher as investigators face the challenges discussed below. This explains why most of the arrests of foreign nationals in informal businesses were carried out by the Kenya Police Service as immigration staff were not adequate as indicated by the interviews indicated above.

Institutional challenges were divided into 2: capacity building resources which were staff strength and levels of training, and challenges of capital resources specifically motor vehicles and ICT infrastructure availability, and inter-agency coordination challenges.

On staffing capacity the researcher wanted to find out whether there were adequate members of staff in I&P in the DIS. 40% strongly disagreed, while another 40% disagreed on the statement that staffing levels in I&P Division at the DIS were adequate. 20% were neutral. This shows that inadequate staff levels affect regulation of foreign nationals in informal business in the country. On training challenges, majority (47%) agreed there is need for training in I&P division of the DIS. 26% strongly agreed with the statement. 20% were neutral while 7% disagreed. The findings are that there is need for further training in the operational laws, investigation and prosecution processes.

On capital challenges, the researcher wanted to find out whether patrol vehicles were adequate. Majority (53%) of the respondents disagreed, while 27% strongly disagreed with the statement that vehicles assigned to I&P Division at the DIS are adequate to regulate foreign nationals in informal businesses. This shows service delivery in surveillance and patrols of areas with foreign nationals in informal businesses is greatly hampered. On ICT infrastructure resources, the researcher also wanted to find out whether they were adequate to facilitate effective and efficient investigations and prosecution of foreigners in informal businesses. Majority (47%) disagreed with the statement that ICT infrastructures are adequate to regulate foreign nationals in informal businesses. 33% strongly disagreed and 23% were neutral. ICT challenges include system linkage such as border PISCES system linkage with I&P where they would track and monitor overstays, irregular work and location of foreigners in real time. Good ICT system would also enhance foreign nationals register

maintenance. Capital challenges regarding vehicles and ICT infrastructure were found to be a concern for I&P Division in the DIS.

The other institutional challenges findings were in inter-agency coordination. The researcher wanted to find out whether inter-agency coordination was adequate in regulating foreign nationals in informal businesses. Majority of the respondents (40%) were in agreement that inter-agency coordination was adequate between DIS and other agencies as indicated above. 33% were neutral, 20% disagreed and 7% strongly agreed. These shows that even though majority were in agreement that there was inter-agency coordination, 33% possibly didn't understand what inter-agency coordination was. This could be true since Border Control Operations Coordination Committee (BCOCC) whose main aim was to create border interagency coordination committees' concentrates its activities on border management. The idea should be strongly replicated for inland security where it would benefit investigators in enforcing immigration regulations.

Legal Challenges were broken into two, deficiencies in national immigration laws as well as challenges in bilateral and multilateral treaties between Kenya and other nations in relation to challenges in regulating foreign nationals in informal businesses. The researcher wanted to find out whether national immigration laws envisaged presence of foreign nationals in informal businesses. Majority (33%) agreed and 27% strongly agreed that Kenyan immigration laws do not envisage presence of foreign nationals in informal businesses in Kenya. 33% were neutral on whether foreign nationals in informal businesses are recognized by Kenyan immigration laws and 7% disagreed. The study found that Kenya's current immigration legislation does not envisage participation of foreign nationals in informal businesses. This is possibly because the reality of such participation was not

envisaged at the time when the law was being drafted or more succinct and clear reason being the strategic legal requirement of attracting scarce skills and discouraging labour that would subject citizens in informal businesses to unfair competition. Investor's capital requirement for permit are pegged at \$100,000. This findings illustrate that Kenya laws did not envisage foreign nationals in informal businesses neither were they accommodated. There is also a possibility that officers are not conversant with immigration laws given the neutral score of 33% tying this score to inadequate staff training in the division.

On bilateral and multilateral agreements, the researcher wanted to find out whether bilateral and multilateral agreements enhance irregular presence of foreign nationals in informal businesses. 40% strongly disagreed and 40% disagreed that bilateral and multilateral agreements enhance presence of foreign nationals in informal businesses in Kenya without work permit. Respondents felt that Kenya faced the 'soft-border' challenge as far as the implementation of the bilateral and multilateral treaties. EAC treaty was found to be the most abused as mostly citizens of Tanzania and Uganda work in Kenya using visitor's passes. While the East African Common Market Protocol aims at facilitating free movement of people, goods and services within the community, foreigners are required to apply gratis for work permits and residency. Diplomatic protocols, which are the purview of foreign affairs ministry, sometimes affect immigration operations. Literature however found out that foreigners in informal businesses, one caught, feigned ignorance and defended themselves by quoting EAC protocols.

4.7 Comparison to theory

The findings of this study are consistent with the tenet of the institutions theory. The theory avers that without institutions, human behaviour is chaotic and unpredictable. Institutions

are meant to create and enforce order on this natural state of chaos inherent in human behaviour. Migration is one such aspect of human behaviour that is usually accompanied by chaos if immigrants were to be allowed to move and act without control and order. This study has found that through various institutional interventions such as employment of sufficient enforcement staff and effective and efficient surveillance systems, the DIS has capacity and mandate to regulate the participation of foreign nationals in informal business in Kenya. The findings also confirm the suitability of the routine activity theory as a tool for analysis. In the context of the theory, Kenya's informal economy is a desirable target for motivated immigration laws' offenders from various parts of the world. From the Eastern African region, Kenya has been relatively peaceful amidst the political conflicts characteristic of the horn of Africa and the Great Lakes region (Khadiagala, 2009). The resulting refugee-dominated migration provides the required camouflage for motivated immigration laws' offenders to exploit the Kenyan market. Secondly, Kenya's economy is the most developed in the region and third most developed in Africa (Mohajan, 2013). This makes the country attractive for motivated migration offenders as a market for goods and services from neighbouring countries as well as a trade establishment haven without necessary immigration documentation. Kenya's growing middle class is also an attraction as a market for traders from developing North African, Asian and Middle East countries such as China, India, and Egypt. The weakness of the DIS exposes an unguarded target as the theory suggests. The remedy to control these crimes is to strengthen the institutional and legal capacities of the DIS so that it is seen as a strong deterrent to the immigration offenders.

4.8 Comparison to empirical studies

Two aspects of institutional capacity challenges in regulating foreign nationals in informal business were evaluated in this study namely resources and inter-agency coordination. Two of the questions inquired about the challenges emanating from lack of adequate capacity building and capital resources. It was found that the DIS faced serious challenges in staff numbers and training as well as lack of vehicles and ICT infrastructure. The Global Compact on safe, regular and orderly Migration (GCM) recognizes that migration management is a cost intensive activity. It encourages the formation of active civil registry systems in member countries well equipped with systems to issue identification and travel documents and to maintain the privacy and data protection of nationals as well as migrants. (The United Nations, 2019). In this regard, there is no other way other than availing resources for effective and efficient service delivery.

On Interagency coordination, the study found that the DISs enjoyed a cordial working relationship with other cooperating agencies. This finding however contrasts the opinion of the DIS in the draft Kenya National Migration Policy (KNMP). The DIS is of the view that the coordination between itself and agencies such as the Kenya Police Service, the National Intelligence Services (NSIS), the customs office of the Kenya Revenue Authority (KRA) and with international organizations such as the International Labour Organization (ILO), the International Organization for Migration Organization (IOM) among others is not sufficiently streamlined (GoK, 2019).

Regarding the use of ICT for migration management, the current study reinforces the views of Mc Auliffe (2018) who says that immigration enforcement agencies may make use of advances in ICT to improve their surveillance capacities. She gives the example of

algorithms and block-chain as some of the technologies that may be employed for surveillance purposes.

On challenges related to the legal framework of the institution, the respondents considered the current legislation as being silent in regulating foreign nationals in informal businesses, alternatively, it was seen as a strategy to protect locals in informal businesses against unfair competition. The EAC citizens were seen to hide under EACCMP to work in Kenya illegally. These findings are consistent with the DIS' own assessment that Kenya has not had a migration policy since independence, an indication that migration matters have been placed in the periphery of the state matters. The Global Compact for Safe, Orderly and Regular Migration advocates for greater awareness among judicial officials on matters on migration so that cases involving migrants will have a healthy balance considering the needs of the state and the rights of migrants (The United Nations, 2019).

This study agrees to other research findings (Kobach, 2008, Opon et al, 2015, Duvell et al, 2018) that the capabilities of an immigration regulatory organization are enhanced when the organization is properly resourced. The studies of Mc Auliffea (2018) and Duvell et al (2018) have emphasized the significance of reliable ICT systems and integrated databases for migration management. The findings of this study resonate well to those findings. Equally, the findings of Wasem and others, (2004) on the importance of inter-agency coordination reflect favourably with the findings of this study.

Newland and Riester (2018) found that the legislations of many polities do not recognize the informal sector, less so foreign nationals in the informal economy. This study finds the same result with regard to Kenya. While the intention of the EACCMP was not to create

'soft borders' with Kenya's neighbours, it is perceived to have done that, according to the respondents. Newland and Riester (2018) have explained that where 'soft-border' policies exist, the inflow of workers in the informal economy is inevitable. Yuval-Davis, Wemyers and Cassidy (2018) have found that significant challenges in enforcement of migration law occur when there is collusion between foreign nationals and local business owners in the informal economy. This study confirms that Kenya's DIS faces significant challenges due to such collusions.

CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This chapter presents summary of study findings, conclusion and recommendations on challenges in regulating foreign nationals in informal businesses: A case Study of I&P Division of the DIS Kenya.

5.2. Summary of Findings

This study aimed at examining the challenges faced by DIS in regulating foreign nationals in informal businesses. The specific objectives were to ascertain institutional and legal challenges.

Among the challenges noted in regulating foreign nationals in the informal sector in Nairobi include insufficient resources for staff hiring and training capacity building, lack of sufficient vehicles for conducting surveillance and inadequate ICT surveillance systems to facilitate enforcement. Inter-agency coordination was found to be adequate. Regarding the human capital, the number of staff in the investigations and prosecutions division was found to be insufficient to regulate foreign nationals in informal businesses in Nairobi. Mostly, it is the Kenya Police Service that does step in in regulating of foreign nationals in informal businesses.

The division also faced legal challenges. Since the Kenya Citizenship and immigration Act (2011) does not envisage the participation of foreign nationals in the informal sector, the punishments meted to offenders are lenient. Probably because of their station in life, they cannot afford huge fines spelt out in the Act. More importantly there was found to be inadequacy of the staff in legal training and knowledge with a fair percentage of the staff

answering in neutral on legal questions in the survey. Inadequacy of immigration officials allow foreign nationals in informal businesses to camouflage with locals. EAC citizens also hide under the EACCMP to access Kenyan market. Indeed, the DIS admit to facing legal challenges some of them emanating from the lack of an immigration policy since independence and quickly evolving dynamics of migration. It must however be noted that the DIS is in the process of publishing a migration policy (GoK, 2019).

Interview respondents explained that collusion between foreign nationals and Kenyan citizens posed a crucial challenge in their enforcement duties. Kenyan business owners prefer foreign nationals to work in their businesses because foreign labour is cheaper compared to local labour market. Some migrants offer better prices for goods and services while others pay better rental prices. Migrants are assimilated such that it becomes harder for the DIS to identify and arrest them. In some cases, the police provide a cover such that they may extort undocumented migrants. The suggested recommendation for this is the recruitment of more officers in the unit to enhance its investigative capacity. Some services offered by these foreigners might be unique like Congolese music, competitive prices of goods and services and performance of jobs locals could be unwilling to engage in. In this regard, special seasonal work permits could be offered to these foreigners.

5.3 Conclusion

There exists a void in the maintenance of law and order among foreign nationals in the informal business sector in Nairobi (draft KNPM, 2019). Immigration department is an important security apparatus and economic development facilitator of the state. It is important therefore that the department is adequately resourced to respond to the challenges that it must confront every day. Adequate number of skilled immigration officials, capacity enablers such as good working surveillance vehicles and ICT infrastructure are a necessity to enable a well managed foreign national in the informal businesses sector.

Migration enforcement also gets complicated by poor coordination between different agencies handling immigration affairs and security. Such agencies include the police, judiciary, foreign affairs and labour ministries. Lack of proper and active database for migrants blurs their official statistics making it hard to incorporate them in development planning. Enhancing the legislative framework establishing the DIS is key in addressing the realities of the informal economy.

5.4 Practice Recommendations

To improve its institutional capacity, the DISs needs to improve its ICT infrastructure used for immigration matters. A better database that captures the details of registered citizens needs to be created. Such a database can be based on more reliable modern technologies such as the block-chain technology. This project may also be made to capture the physical and mobile addresses of migrants such that they can be contacted in real time in case they overstay.

There is need to improve border surveillance and patrols. There is also need to decentralize and revamp investigation units from national and regional headquarters to all border sub-counties as well as the sub-counties in Nairobi, Mombasa and other counties with a high immigrant population. This will enable investigators recognize foreign nationals easily who may attempt to assimilate to local communities.

To reinforce its legal capacity, the directorate should consider hosting a discussion by various stakeholders involved in migration matters to discuss the modernization and harmonization of legal provisions on migration in Kenya. The DIS should also be proactive in providing advice to the government on immigration matters whenever the government is engaging in multilateral and bilateral treaties and agreements, for example on remittances, integration and reintegration, whether within or without.

5.5 Policy Recommendations

For greater accountability and to avoid the possibility of political influence on the DIS, it is important that it is given an autonomous status. Such an autonomous body may be staffed with professionals with diverse skills in economics, sociology, law, investigation, prosecution and diplomacy. Improved interagency cooperation will allow for better coordination with international organizations involved in migration matters such as the International Labour Organization (ILO), the International Organization for Migration (IOM), and the United Nations Development Programme (UNDP) among others. The staff in this autonomous body should be remunerated commensurate to the challenges they face in execution of their duty as well as offering them superior professional training.

The law should consider the reality of immigrants participating in informal sector and make provisions to address the challenges involved such as provision of seasonal work permits.

Laws on collusion of natives with irregular immigrants should for example be reinforced to ensure accountability on citizens.

5.6 Limitations of the study

Because this study was informed by the views of investigators and prosecutors, it might have failed to consider important viewpoints that might be raised by other stakeholders. It is therefore recommended that studies be conducted with such viewpoints as from associate agencies such as the Kenya Police Service, Foreign Affairs, Trade and Labour ministries, diplomats, business people and host communities. More important are the views of foreign nationals in informal businesses. The respondents in this study were mainly male (80%) with 100% of the respondents being in the age bracket of 30 to 60 years of age. This demographic characteristic of the interviewed population could lead to a narrow outlook towards enforcement.

5.7 Suggestions for further research

Further research on foreign nationals engaged in informal businesses is highly recommended as it will bring out deep nuances regarding regulations and their role in economic development of the host and sending countries.

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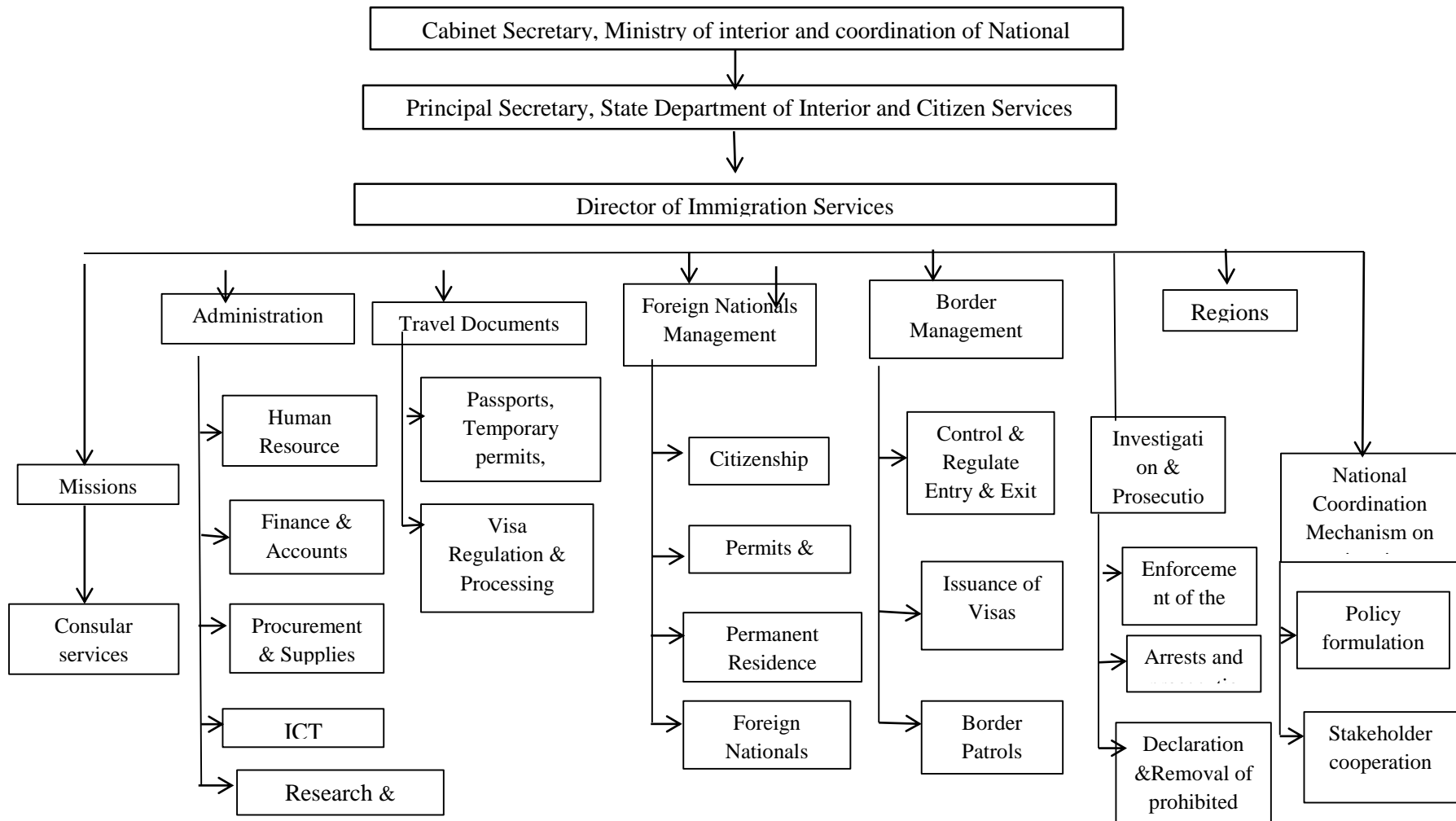
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APPENDICES

APPENDIX 1: FUNCTIONAL ORGANIZATIONAL STRUCTURE OF THE DEPARTMENT OF IMMIGRATION SERVICES



Source: IOM (2017). Immigration Border Procedures and Operations Manual.

APPENDIX II: QUESTIONNAIRE

My name is Mr. Sangale Nchololoi, a student at the Kenya Institute of Migration Studies at the University of Nairobi. I am carrying out a research on *Challenges in Regulating Foreign Nationals in Informal Businesses: A Case Study of the DIS Kenya*. The information provided will be used for academic purposes only in my postgraduate diploma in migration studies. Kindly give your responses to the questionnaire. All information will be confidential. Do not indicate your name on this questionnaire.

SECTION A: Background Information (Please tick (√) the appropriate answer)

- 1) Please indicate your gender: Female [] Male []
- 2) Please Indicate your age bracket 20-30 yrs. [] 31-40 yrs. []
41-50 yrs. [] 51 – 60 []
- 3) What is your highest level of education
Degree [] Masters [] PhD []
- 4) How long have you been working with the DISs?
a) Below 5 years [] b) 5 – 10 years []
c) 10 – 15 years [] d) Over 15 years []

SECTION B: Participation of irregular migrants in informal business activities in Nairobi.

1.) In your assessment, how would you rate the participation of foreign nationals in informal business activities in Nairobi?

- No participation at all []
- Slight participation []
- Average []
- Abundant []

Exceedingly abundant []

2.) How frequently do you encounter foreign nationals conducting informal business in Nairobi?

More than once a day []

Once each day []

More than once a week []

Once per week []

Once after every week []

3). What type of informal business activities do foreign nationals participate in in Nairobi? Tick as many as may apply.

Operating kiosks []

Barber shops []

Boda Boda (Motor bike) taxi []

Car washing []

Musicians []

Selling second hand clothes []

Hawking household goods []

Hawking imported clothes []

Matatu business []

Operating restaurants []

Online businesses []

Disabled beggars []

Any other business (give details)

.....

Section C: Challenges in regulating foreign nationals in informal businesses

1. Resources Challenges

In this section, the administrative capacity of Kenya's DIS (DIS) is assessed with regard to its contribution to the success in regulating participation in business of irregular migrants in Nairobi. Mark with a tick (✓) accordingly.		Rating				
		Strongly disagree	disagree	Undecided	Agree	Strongly agree
	Statement	1	2	3	4	5
1.	The department of investigations and prosecutions has a good working relationship with other agencies handling irregular migrants such as the police and the judiciary.					
2.	The ICT system managing the affairs of irregular migrants in Kenya is reliable.					
3.	The number of vehicles available for conducting surveillance and regulation enforcement are adequate and are in good working condition.					

2. Challenges related to human capital deficiencies

	In this section, the human capital of Kenya's DIS (DIS) is assessed with regard to its contribution to the success in regulating participation in business of irregular migrants in Nairobi. Mark with a tick (√) accordingly.	Rating				
		Strongly disagree	disagree	Undecided	Agree	Strongly agree
	Statement	1.	2.	3.	4.	5.
1.	There is sufficient number of officers to effectively investigate and prosecute cases of foreigners illegally engaged in informal businesses.					
2.	Officials in the investigations and prosecution office are properly trained to undertake their tasks, including investigation, prosecution, arrest and removal of foreign nationals in informal businesses.					

3. Challenges emanating from the legislative framework of the institution

	This section seeks to find out how Kenya's legislation on migration impacts on enforcement of regulations against participation of irregular migrants in informal business activities in Nairobi. Mark with a tick (√) accordingly.	Rating				
		Strongly disagree	disagree	Undecided	Agree	Strongly agree
	Statement	1.	2.	3.	4.	5.
1.	Kenya's current immigration legislation does not envisage participation of irregular foreign nationals in informal businesses.					
2.	Bilateral and Multilateral agreements open room for nationals of other states to compete with Kenyan citizens in informal business. (Eg. EAC Treaty)					

Thank you for your cooperation

APPENDIX III: INTERVIEW QUESTIONS

My name is Mr. Sangale Nchololoi, a student at the Kenya Institute of Migration Studies at the University of Nairobi. I am carrying a research on *Challenges in Regulating Foreign Nationals in Informal Businesses: A Case Study of DIS*. The information provided will be used for academic purposes only in my postgraduate diploma in migration studies. Kindly answer the questions below. This is just a guide; you may feel free to add more information as you may find appropriate. All information is confidential.

1. In your view, what pre-disposes Kenya as a destination for foreign nationals in informal businesses?

.....
.....
.....
.....
.....
.....

2. What challenges does your office face while executing its duties?

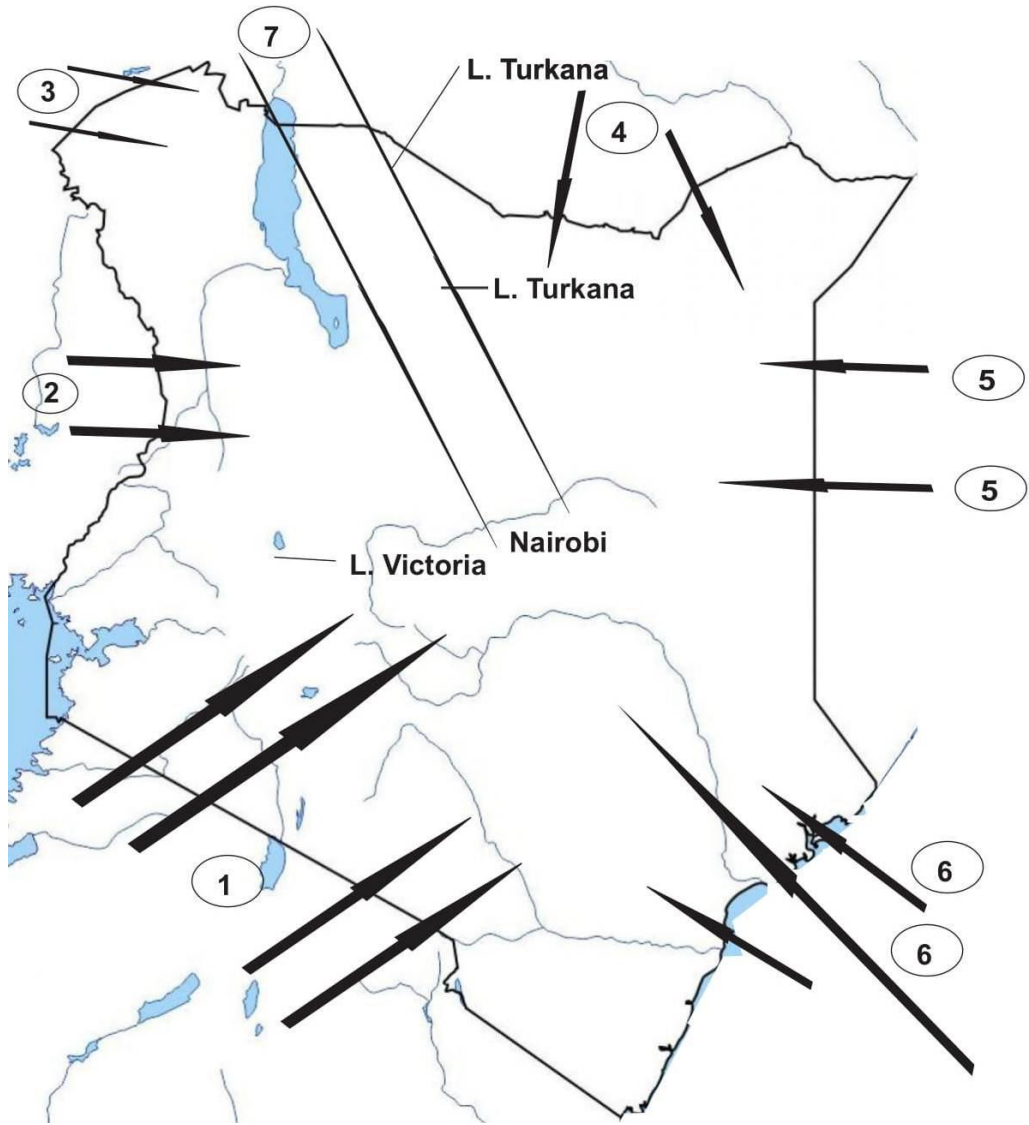
.....
.....
.....
.....

3. What measures can be put into place to make Kenya’s control of irregular migrants more effective?

.....
.....
.....

Thank you for your time

APPENDIX IV: KENYA AS A DESTINATION FOR IRREGULAR MIGRATION



KEY

- 1. Tanzania
- 2. Uganda, Burundi, Rwanda, D.R.C.
- 3. South Sudan
- 4. Ethiopia, Eritrea, Djibouti
- 5. Somalia
- 6. China, India, Asia
- 7. Nigeria, West Africa.

APPENDIX V: DATA COLLECTION LETTER



Kenya Institute of Migration Studies (KIMS)



Postgraduate Diploma in Migration Studies (PgDipMS)

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Fax: + 254-20-2220731
When replying please quote:

Office of KIMS Coordinator
Hyslop Building 2nd Floor Room H201
Population Studies & Research Institute
University of Nairobi
P.O Box 30197-00100
NAIROBI, KENYA

REF: IMM/3/10/vol.

15th May, 2020

TO WHOM IT MAY CONCERN

SUBJECT: JOHN WAMAE SANGALE NCHOLOLOI

RE: COLLECTION OF DATA

The above named is Postgraduate Diploma in Migration Studies student in this Institute. He is currently carrying out research on the Topic: **Managing foreign residency in Kenya: a Case of irregular migrant traders of East African Community.**

Kindly allow him into your Organization to collect relevant data that we believe will go a long way in helping him to achieve the academic objectives of his Research.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Gabriel Lubale'.

Dr. Gabriel Lubale
COORDINATOR

APPENDIX VI: TURNITIN REPORT

CHALLENGES IN REGULATING FOREIGN NATIONALS IN INFORMAL BUSINESSES: A CASE STUDY OF THE DIS, KENYA

ORIGINALITY TEST

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APPENDIX VII: CERTIFICATE OF CORRECTION



Kenya Institute of Migration Studies (KIMS)

in collaboration with



Maastricht University



Directorate of Immigration Services

Website: www.immigration.go.ke

Email: kims@immigration.go.ke

Tel. + 254-20-2222022 /2212760

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Population Studies & Research Institute

University of Nairobi

P.O Box 30197 – 00100

NAIROBI, KENYA

**Director, Graduate School
University of Nairobi
P.O. BOX 30197-00100
Nairobi**

Date: 02/11/2020

RE: CERTIFICATE OF CORRECTION: SANGALE NCHOLOLOI - Q68/31342/2019

This is to certify that Mr. Sangale Nchololoi has effected corrections from the board of examiners.

A handwritten signature in black ink, appearing to be 'Murimiri Mathai'.

Murimiri Mathai.

Supervisor.