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Kenyan Vulnerable Workers' Access to Justice: a case study

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ABSTRACT

This article aims to study access to justice for workers in the Kenyan floriculture industry. Through a case study – including interviews with fourteen experts in the field – the following justice institutions have been identified as relevant: the national human rights institution, the labour offices of the Ministry of Labour and Social Protection and courts. While keeping in mind that capacity constraints are a product of Kenya's position within the broader international political economy, this article studies related barriers to justice on the ground. It explains that the perceived interests of political and economic elites usurp sound remediation.

Keywords: remedies; conflict-resolution; courts; agriculture.

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1. Introduction

Kenya is the number one producer of cut flowers for European consumption. A few European colonisers started flower cultivation before Kenya gained independence from the United Kingdom. Kenya's first President Jomo Kenyatta (1964-1978) further stimulated the floriculture industry when prices for coffee and tea were falling(1). While domestic consumption of Kenyan flowers is negligible, it is estimated that Kenyan flowers contribute to one per cent of the country's Gross Domestic Product nowadays(2). 65 per cent of Kenyan flower exports go to the Dutch auction(3). From there, they are distributed to the other European Union Member States and Russia, Japan and the United States(4). Approximately 32 per cent of exported flowers are sent directly from Kenya to supermarkets in the United Kingdom, Germany and France(5). A minority of flowers is exported to Dubai. From there, they are distributed to various Middle-Eastern and Indian customers(6). New direct flights to other countries such as China are expected to open up more business

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(1) Horticultural Crops Directorate, *Welcome to Horticultural Crops Directorate*, https://horticulture.agricultureauthority.go.ke, accessed 20 February 2018.

(2) Kenya Flower Council, *Floriculture in Kenya*, 2018, http://kenyaflowercouncil.org/?page_id=92.

(3) W. Mitullah - P. Kamau - J. Kivuva, *Employment Creation in Agriculture & Agro–Processing Sector in Kenya in the Context of Inclusive Growth: Political Economy & Settlement Analysis*, *Partnership for African Social & Governance Research Working Paper*, 2017, 20, www.pasgr.org/wp–content/uploads/2017/08/Employment–creation–in–agriculture–and–agro–processing–sector–in–Kenya–in–the–context–of–inclusive–growth.pdf, 25.

(4) Ibid., 22; M. Nowakowska - A. Tubis, R*eliability of the Cut Flowers' Supply Chain,* in L. Podofillini - B. Sudret - B, Stojadinovic - E. Zio - W. Kröger (eds), *Safety and Reliability of Complex Engineered Systems,* CRC Press, 2015, 1757.

(5) EEAS, *Information on the EAC-EU Partnership Agreement'*, 2015, http://eeas.europa.eu/archives/delegations/kenya/documents/press_corner/trade_between_the_eu_and_kenya_2105.pdf, 12.

(6) M. Nowakowska - A. Tubis, (n 4), 1757.

opportunities to countries such as China. Despite the coronavirus disease pandemic, the value of the floriculture sector increased by 3.3 per cent in 2020([7]).

The Kenyan floriculture industry is labour-intensive. Workers are reportedly expected to work up to sixteen hours a day([8]). It is estimated that floriculture corporations currently directly employ around 90,000 people([9]). The number of floriculture jobs has doubled over the last decade, while the number of jobs in other industries has stagnated([10]). While many of the issues that floriculture workers face exist also for other agricultural workers in Kenya, they face particular challenges. They are exposed to extreme temperatures in the greenhouses and cold rooms, and to a plethora of toxic chemicals, including those that are illegally imported([11]). Exposure to those chemicals produces cancer, neurologic diseases, birth defects and other reproductive illnesses, sometimes long after workers have left their jobs([12]).

Since the mid-1990s, the literature has extensively discussed the role of Kenyan floriculture labour in the neoliberal world order. The literature has paid attention to gender and neo-colonial power dynamics. It has been considered that developmentalist mentalities have created their own truths while failing to take into account global and local forces([13]). Notably, Alex Hughes discusses that economic growth in the Kenyan floriculture industry under President Daniel arap Moi (1978-2002) was spurred by the controversial 'Structural Adjustment Policies' insisted upon by the World Bank, the International

([7]) *Study Reveals What Sustained Kenya's Economy in 2020,* 15 July 2021, https://furtherafrica.com/2021/07/15/study-reveals-what-sustained-kenyas-economy-in-2020/.

([8]) Kenya National Commission on Human Rights (KNCHR), *The National Action Plan on Business and Human Rights in Kenya. Report on Stakeholder Consultations held in Nakuru*, 2017, http://nap.knchr.org/Portals/0/Reports/Nakuru%20regional%20consultation%20report.pdf?ver=2017–09–04–174649–763, 7.

([9]) M. Styles, *Roses from Kenya: Labor, Environment, and the Global Trade in Cut Flowers*, *University of Washington Press*, 2019.

([10]) W. Mitullah - P. Kamau - J. Kivuva, (n 3), 29.0

([11]) Interview data – participant KE–O; A. Kargbo - J. Mao - C.Y. Wang, *The Progress and Issues in the Dutch, Chinese and Kenyan Floriculture Industries*, *African Journal of Biotechnology*, 2010, 9(44), 7406; P. Tsimbiri and others, *Health Impact of Pesticides on Residents and Horticultural Workers in the Lake Naivasha Region*, *Occupational Diseases and Environmental Medicine*, 2015, 3, 24-34.

([12]) CEDAW, '*Concluding Observations on the Eighth Periodic Report of Kenya*, 2017, UN Doc CEDAW/C/KEN/CO/8 para 36(b).

([13]) Cf E. Chowdhury, *Development* in L. Disch - J. Hawkesworth (eds), *The Oxford Handbook of Feminist Theory,* OUP, 2016, 145.

Monetary Fund and the United States([14]). Flower exports were highly compatible with their agenda to diversify exports of non-traditional goods and high-value commodities. Stephanie Barrientos explains that there are considerable barriers for smallholders to understand and reach consumers in Europe([15]). In large farms, women are segregated in more precarious wage labour jobs. Most recently, Megan Styles describes the attempts by various actors to use the global flows of people, information and money generated by floriculture to solve Kenyan social and environmental governance issues in a subtle ethnographic book-length analysis([16]). In my forthcoming Milan Law Review article, I discuss that it has become increasingly difficult for NGOs active in the Kenyan floriculture industry to manoeuvre([17]). This is highly unfortunate as public shaming of norm-violating behaviour is an essential factor to ensure respect for rights([18])

This article will focus on remediation, another factor that is considered to be important to ensure that public shaming follows when corporations violate rights by the constructivist and rationalist literature([19]). This article aims to study which domestic remedies are available for workers in the Kenyan floriculture industry.

According to the United Nations Guiding Principles on Business and Human Rights, a 'bouquet' of preventive, redressive and deterrent remedies should be available to rights holders who claim that their rights are violated by corporations([20]). While human rights and labour rights are separate categories,

([14]) A. Hughes, *Global Commodity Networks, Ethical Trade and Governmentality: Organising Business Responsibility in the Kenyan Cut Flower Industry*, *Transactions of the Institute of British Geographers*, 2001, 394.

([15]) S. Barrientos, *Gender and Work in Global Value Chains: Capturing the Gains?*, Cambridge University Press, 2019, 135-166.

([16]) M. Styles (n 9).

([17]) A. Nissen, *Trade with the EU, Variable Geometry and Human Rights in the EAC*, *Milan Law Review*, forthcoming.

([18]) Th. Risse - K. Sikkink, *Conclusions,* in Th. Risse - S. Ropp - K. Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance,* Cambridge University Press, 2013, 284.

([19]) See e.g. Th. Risse - S. Ropp, *Introduction and Stock-taking* in Th. Risse - S. Ropp - K. Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance,* Cambridge University Press, 2013, 17; E. Hafner-Burton, *Making Human Rights a Reality*, Princeton University Press, 2013, 11.

([20]) HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 2011, UN Doc A/HRC/17/31 Annex principles 25-31; UN General Assembly, '*Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 2017, UN Doc A/72/162 para 7.

labour rights complaints that are usually brought by floriculture workers are also human rights complaints. They relate to two fundamental labour rights (which are widely recognized to be human rights): the freedom of association and the elimination of discrimination in respect of employment and occupation([21]). Furthermore, most case law touches upon the right to health and safety at work, including the lack of safety gear and exposure to chemicals. This labour right is a human right included in article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)([22]). In 2019, eleven UN experts asked that the right to health and safety at work should also be recognized as a fundamental labour right([23]). This call echoes various older calls([24]).

This article is structured as follows. Part 2 describes the methodology. Part 3 briefly discusses the emergence and transformation of disputes. Part 4 explains that workers struggle to find trustworthy intermediaries. Part 5 discusses to which extent each of the relevant justice mechanisms provides remediation.

2. Methodology

Barriers to justice are often symptoms of broader patterns of exclusion([25]). Remediation mechanisms can also contribute to the marginalization of workers by reaffirming the expressions of power that are embedded in laws. The ICESCR and the International Covenant on Civil and Political Rights indicate that it is important to pay attention to such contextual background conditions([26]). The Preambles of these covenants set out that

([21]) E.g. J. Bellace - B. ter Haar, *Perspectives on Labour and Human Rights*, in J. Bellace - B. ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law*, Routledge, 2019, 3.

([22]) International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

([23]) UN OHCHR, '*UN Experts Urge ILO to Back Safe and Healthy Work Conditions as a 'Fundamental' Right*, 2019, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24695&LangID=E.

([24]) E.g. J. Takala, *Life and Health are Fundamental Rights for Workers*, *Health and Safety at Work: a Trade Union Priority*, ILO, 2002, 5; Ph. Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, *European Journal of International Law*, 2004, 15, 503.

([25]) A. Nissen, *Better Together: a Complementary Approach to Civil Judicial Remedies in Business and Human Rights, Penn State Law Review*, 2018, 122(48), 11.

([26]) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

conditions need to be created 'whereby everyone may enjoy his or her rights'([27]). Roderick MacDonald indicates that qualitative research provides the opportunity to shed a light on barriers and contextual background conditions which impede access to justice([28]).

The case study research methodology is particularly well suited to shed empirical light on contemporary phenomena within their real-world context, especially when the boundaries between the phenomena and context may be not evident([29]) This mode of inquiry allows studying the influence of social, economic and political factors on laws and institutions that can impede the enjoyment of rights in complex and relational contexts([30]) Evidence from the field also allows the identification, via inductive analysis, of issues and concepts that have not been considered or theorized in the literature([31]).

Semi-structured interviews with those concerned with law and policy-making form one of the most important sources for case study researchers([32]). Participants with the required expertise and experience of how remediation mechanisms deal with claims in the Kenyan floriculture industry were needed. The categories of participants were defined with the help of the 'access to justice assessment tool' of the American Bar Association([33]). It concerned lawyers, trade union and NGO representatives, labour officers, adjudicators and independent experts. A major drawback of this research is that affected right-holders could not be interviewed([34]). An Institutional Review Board indicated that interviewing them would be an ambitious endeavour because of the additional layers of protection that are necessary to protect their

([27]) H.J. Cho, *Horizons of Human Rights,* Humanitas, 2016.

([28]) R. Macdonald, *Access to Civil Justice*, in P. Cane - H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research*, Oxford University Press, 2010, 516.

([29]) I have used the case study research methodology in the realist tradition. See R. Yin, *Case Study Research and Applications. Design and Methods*, Sage, 2018, 15 and 38.

([30]) L. Webley, *Stumbling Blocks in Empirical Legal Research. Case Study Research*, *Law and Method*, 2016, 3, 12–14.

([31]) D. Choudhuri, *Conducting Culturally Sensitive Qualitative Research'*, in M. Constantine - Derald Sue (eds), *Strategies for Building Multicultural Competence in Mental Health and Educational Settings*, John Wiley & Sons, 2005, 277.

([32]) L. Webley (n 30), 9; A. Argyrou, *Making the Case for Case Studies in Empirical Legal Research*, *Utrecht Law Review*, 2017, 13*,* 102.

([33]) American Bar Association, *Access to Justice Assessment Tool,* 2012, www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_access_to_justice_assessment_manual_2012.authcheckdam.pdf, 34 and 51.

([34]) Cf A/72/162 (n 20) para 22.

vulnerabilities([35]). It was not possible to provide such protection due to resource constraints. Right-holders' views were therefore only indirectly included in this research, in as much as they are reflected in secondary sources.

The participants were recruited via a combination of emails, phone calls and direct approaches. They were sampled for range and identified through non-probability methods to recruit a diverse and specialised overall sample. The literature review indicated that data collection (and analysis) needed to be sufficiently differentiated along age and gender lines. Other 'subcategories' of participants that needed to be included were identified during the fieldwork after the first data were analysed. They were constructed using both reputational and purposive sampling techniques([36]). Subcategories of participants were redefined and revised until they did not need further modification. Using snowball sampling made it possible to get in touch with people that were hard to access. The interviewed participants should benefit from the research in exchange for the time and information that they provided.

It is required to discuss the steps that have been taken to ensure the internal validity or credibility (assessment of the causal relationship between theory and evidence), external validity (assessment as to whether the case study's findings can be subject to generalisation), and reliability or dependability (assessment as to whether the applied procedures provide stable and consistent results) of the research([37]).

Three data analysis tactics helped to increase the internal validity of the research findings. First, the semi-structured nature of the conducted interviews allowed participants to clarify responses or pursue ideas whenever they felt the need to. New themes and directions could unfold inductively. It is useful to note here that Lisa Webley has stated that immersion in the field might more easily result in confirmation bias by case study researchers([38]). However, Bent Flyvbjerg has argued that case study research would not be any more prone to confirmation bias than any other qualitative research method([39]). He explains

([35]) The research reported in this article has been approved by the Kenya National Commission for Science, Technology & Innovation (NACOSTI/P/18/59629/22158) and Cardiff University's School of Law and Politics Ethics Committee (SREC/051217/07).

([36]) Cf C. Hyde, *Multicultural Organization Development in Nonprofit Human Service Agencies: Views from the Field*, *Journal of Community Practice*, 2003, 11(1), 45 referring to M. Miles - M. Huberman, *Qualitative Data Analysis,* Sage, 1994.

([37]) F. Leeuw - H. Schmeets, *Empirical Legal Research,* Edward Elgar, 2016, 120–122 and 153.

([38]) L. Webley (n 30), 6.

([39]) B. Flyvbjerg, *Five Misunderstandings about Case–Study Research, Qualitative Inquiry*, 2006, 12(2), 19.

that the field itself is a powerful and unavoidable disciplinary force in case study research. Listening to participants in a context that is not part of the researcher's normal context can, in particular, sharpen the researcher's critical awareness. Second, the explanation-building process benefited from a series of iterations([40]). Data collection and data analysis were placed in a dialectical relationship. Data were colour-coded to identify emerging themes and the ways in which people talk about them([41]). To define, revise and extend theme categories, more data were added from additional participants. Theme categories were considered to be saturated when data could adequately account for the possible explanations of the identified theme([42]). The saturation point was reached after interviewing fourteen participants for (on average) 60 minutes([43]). Third, the interview data were triangulated by comparing them with data drawn from other sources. Various data analysis techniques, such as explanation building, pattern matching and cross-case analysis, were used.

Regardless of whether generalisations are derived from the desk research or uncovered at the conclusion of the case study research, they need to be supported by sufficient data and fair argumentative claims to guarantee external validity([44]). Two measures were taken to increase the external validity. First, extensive efforts were made to make a connection with research participants that were difficult to reach, in order to collect additional data. Second, the study design was augmented with 'how' and 'why' questions([45]).

Finally, accounting for the reliability of the conducted research requires demonstrating that the research approach was consistent and well documented. This is to some extent a consequence of the validity of a case study([46]). But, two specific efforts have been made to increase the reliability. First, the research protocol is discussed in detail here and the files with interview data and observations (which contain sensitive information) are stored privately([47]). Second, rather than glossing over my role in the field, I draw attention to how

([40]) Cf R. Yin (n 29), 180.

([41]) Cf C. Hyde (n 36), 48.

([42]) G. Bowen, *Naturalistic Inquiry and the Saturation concept: A Research Note*, *Qualitative Research*, 2008, 8, 140.

([43]) Interview participants KE–K and KE–L refused to be interviewed separately.

([44]) R. Yin (n 29), 38-40.

([45]) Furthermore, it is useful to note that I have carried out an additional case study in the South Korean semiconductor industry. Replicating findings of a first case study in a second case study makes the analytical implications more robust (ibid p 55).

([46]) M. Patton, *Qualitative Evaluation and Research Methods*, Sage, 2002, 14.

([47]) Cf R. Yin (n 29), 126–136.

my background, agenda and emotions have influenced my work in a reflexive account([48]).

3. Naming, blaming and claiming

William Felstiner and his co-authors theorized the transformation of unperceived injurious experiences into claims([49]). The three phases are naming, blaming and claiming. To begin, people identify a particular experience as injurious (naming). These named injuries can ripen into grievances (blaming). This means that the injury is attributed to the fault of a responsible actor. Third, people voice their grievance to the actor believed to be responsible and engage this actor to ask for a remedy (claiming). Attrition occurs in each phase. Gender is one of the social structural variables – alongside amongst others class, ethnicity, age – which affects such attrition([50]). People who suffer intersecting forms of oppression are particularly affected([51]).

Floriculture workers are not always aware that their rights are being violated([52]). Amongst those workers that can identify a particular experience as injurious and to attribute it to their employers, there is a reported general disbelief that complaining would change anything([53]). Like in various other contexts around the world, labour rights violations are seen as 'God's will'([54]). Justice institutions can only serve their purpose if the people they are intended to serve know about them, trust them and are able to use them([55]). Time, networks and money all help to get educated on rights violations and the justice institutions available. Women and other disadvantaged groups have unequal

([48]) A. Nissen, *Case Study Research in Kenya and South Korea: Reflexivity and Ethical Dilemmas* (working paper). See P.C. Hsiung, *Teaching Reflexivity in Qualitative Interviewing*, *Teaching Sociology*, 2008, 36, 212.

([49]) W. Felstiner - R. Abel - A. Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, *Law & Society Review*, 1980-1981, 16, 631.

([50]) Ibid., 636.

([51]) K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist politics*, *The University of Chicago Legal Forum*, 1989, 140.

([52]) Interview data – participants KE–B and KE–C.

([53]) Interview data – participants KE–D and KE–N.

([54]) Interview data – participants KE–D and KE–N; F. Afolabi - P. de Beer - J. Haafkens, *Can Occupational Safety and Health Problems Be Prevented or Not? Exploring the Perception of Informal Automobile Artisans in Nigeria*, *Safety Science*, 2021, 135, 2 and 7.

([55]) UN General Assembly, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 2013, UN Doc A/68/279 para 43; UN Women, UNDP, UN Office on Drugs and Crime and OHCHR, *A Practitioner's Toolkit on Women's Access to Justice Programming*, 2018, HR/PUB/18/2, 93.

access to such resources, due to, amongst others, gender pay gaps and a disproportional share is household work that is not sufficiently valued and rewarded.

For many floriculture workers, claiming their rights in company grievance mechanisms or transforming their claims into a dispute is not affordable. Getting food on the table is the main priority for workers in a country with so much unemployment and limited social security([56]). Women and other disadvantaged workers are especially not able to afford the costs that are associated with voicing their grievances([57]). Many workers are single mothers who have migrated from non-flower growing regions to the flower farms that are close to Jomo Kenyatta International Airport in Nairobi and Eldoret Airport([58]). The potential negative effects of claiming – most importantly dismissal – are worse for them, as they risk being sent out of the company-provided facilities or having to uproot their children([59]). This state of dependence is an effective disincentive to raise concerns about any violation of their rights taking place during or outside their working hours.

The interviews indicated that whether in-company proceedings provide an efficient opportunity to complain and continue the working relationship in a constructive manner depends, in practice, solely on the goodwill of the farm management. Floriculture workers are to some extent protected against dismissal and other disciplinary penalties by section 46(h) Employment Act (2007). According to this section, no disciplinary penalties can be imposed on an employee who has brought a complaint or legal proceeding against their employer. However, this section also provides that disciplinary proceedings might be taken 'where the complaint is shown to be irresponsible and without foundation'.

4. Intermediaries

([56]) M. Ole, *Protecting, Observing and Enforcing Human Rights for Labourers in the Cut Flower Industry in Kenya: a Critique,* 2012, www.researchkenya.or.ke/thesis/21716/protecting,–observing–and–enforcing–human–rights–for–labourers–in–the–cut–flower–industry–in–kenya–:–a–critique, 73.

([57]) OHCHR, *Survey for report on "Gender Lens to the UN Guiding Principles on Business and Human Rights. Legal Research Consortium*", 2018, https://www.ohchr.org/EN/Issues/Business/Pages/2018Survey2.aspx; C. Sachs - M. Alston, *Global Shifts, Sedimentations, and Imaginaries: An Introduction to the Special Issue on Women and Agriculture*, *Journal of Women in Culture and Society*, 2010, 35(2), 278

([58]) W. Mitullah - P. Kamau - J. Kivuva (n 3), 29 and 33.

([59]) Interview data – participants KE–C, KE–I and KE–N.

Intermediaries are important to empower workers to access justice institutions([60]). Floriculture workers who are aware, able and prepared to voice their grievances can, in principle, seek support from pro bono lawyers, Kenya Plantation and Agricultural Workers Union (KPAWU) branch officials and shop stewards and NGO representatives. There are, however, representation issues that might complicate floriculture workers' right to a remedy. The reported issues for the three categories of representatives are discussed in turn.

First, floriculture workers can seek support from lawyers who work on a pro bono basis. In some law firms, the interests of lawyers and workers are aligned. Bigger law firms often consider pro bono work as a 'social duty', which provides public relations opportunities([61]). One issue that has been reported is that they assign less-experienced staff to prepare such claims([62]). The interviews revealed that 'ambulance chasing' lawyers are another problem([63]). These lawyers are exclusively driven by money and often do a disservice to the workers they claim to represent. For example, such lawyers would accept a bribe from the floriculture corporation – in the form of an 'out-of-court settlement' – and leave the workers they are supposed to represent empty-handed([64]).

Second, those floriculture workers who are unionised – approximately 50 per cent – can try to seek support from KPAWU, which has a monopoly in the floriculture industry (and other agricultural industries)([65]). However, KPAWU's parent union, the Central Organization of Trade Unions Kenya (COTU-K), used law-making processes to strengthen its own position in 2007. Until a few days before Mwai Kibaki's first presidential term ended in that year, the Federation of Kenyan Employers had successfully opposed the introduction of new labour laws([66]). COTU-K changed the course of history by issuing an ultimatum to Kibaki, saying that it would mobilise its large membership base to vote against the ruling party unless the laws were passed before the election date([67]). Due to the time pressure, the laws were passed without much debate

([60]) B. van Rooij, *The People vs. Pollution: Understanding Citizen Action against Pollution in China*, *Journal of Contemporary China*, 2010, 19(63), 70.

([61]) Interview data – participant KE–J.

([62]) Interview data – participant KE–O.

([63]) Interview data – participants KE–C and KE–J.

([64]) Interview data – participant KE–C.

([65]) J. Kabiru, *Trade Unionism in the Cut Flower Industry in Kenya. 'A Case of Kenya Plantation and Agricultural Workers Union (KPAWU), European Scientific Journal*, 2018, 14(13), 221.

([66]) W. Maema, *Current Trends in Employment Disputes in Kenya – a Disturbing Trajectory,* 2016, www.ikm.co.ke/export/sites/ikm/news/articles/2016/downloads/IKM–Employment–update.pdf, 4.

([67]) W. Mitullah - P. Kamau - J. Kivuva (n 3), 29.

or scrutiny, almost in the same form in which they had been proposed by COTU-K. This allowed COTU-K to strengthen its monopoly position vis-à-vis other unions. It created rigid registration provisions that curb the freedom of association of workers([68]) In addition, as will be discussed below the position of NGOs was weakened([69]). This has a disproportionally negative impact on women. COTU-K has a strong masculinist culture that excludes women's voices and issues. It is useful to refer to the landmark case *KPAWU v Unilever Tea (K) Ltd* (2014). In this case, KPAWU contested the dismissal of five male workers on a Kenyan Unilever tea plantation who had been dismissed on the basis of disciplinary proceedings for sexual harassment([70]). KPAWU claimed that the dismissed workers – most of them in supervising jobs including one worker who admitted that he had attacked a female co-worker in her house – should have been allowed to cross-examine the alleged victims during the disciplinary proceedings, a request that is prohibited in relation to sexual harassment under section 6(3) Employment Act (2007). Unilever aptly observed that KPAWU has 'abdicated its duty of defending … women, who are also their members'.

In two independent studies, workers have furthermore reported that KPAWU branch officials do generally not inform them of their rights or represent them in cases of rights grievances([71]) KPAWU allegedly does not pursue rights claims as long as money is coming in([72]). While there is limited transparency in the organisation of KPAWU, this observation seems to be evidenced by the following two points. First, most court cases initiated by KPAWU against floriculture corporations that are included in the National Council for Law Reporting's database concern the failure by companies to

([68]) E.g. Section 14(1)(d)(i) Labour Relations Act (2007)

([69]) KNCHR, '*Report of the Stakeholders Forum on the Development of a National Action Plan on Business and Human Rights*, 2016), http://nap.knchr.org/Portals/0/Report%20of%20the%20Stakeholders%20Forum%20on%20the%20Development%20of%20a%20NAP%20on%20BHR.pdf, 10.

([70]) *KPAWU v Unilever Tea Kenya* (2014) 13/2014, Employment and Labour Relations Court (Kericho) para 17.

([71]) Interview data collected from 24 floriculture workers reported in J. Kabiru (n 65), 222; Interview data collected from 738 floriculture workers reported in Kenya Human Rights Commission, "*Wilting in Bloom" The Irony of Women Labour Rights in the Cut Flower Sector in Kenya*, 2012, www.khrc.or.ke/publications/63–wilting–in–bloom–the–irony–of–women–s–labour–rights–in–the–cut–flower–sector–in–kenya/file.html, 31.

([72]) Interview data – participant (anonymised). See also NTV, *Zena Roses Workers Demand Salaries Amounting to Ksh. 3M*, 15 October 2018, https://ntv.nation.co.ke/news/2720124–4807564–yxiobu/index.html.

deduct union fees, at 2 per cent of their gross wages, to KPAWU([73]) Second, while the contribution to COTU-K from flower workers alone is estimated to be over KES 200 million (EUR 1.72 million at EUR 1:KES 115.75) per year, KPAWU branch officials reportedly have to work with minimal resources([74]). Shop stewards on flower farms reportedly have to do much of their work alone, while not being sufficiently trained in handling complaints.

Third, floriculture workers can try to be supported by NGO representatives. Although NGO representatives face substantial difficulties in representing claimants in a labour office or court, they try to find ways to help workers([75]). One interview participant reported, for example, that she helps workers by setting up a mobile office out of sight of the management, where workers can get advice([76]). Sometimes, NGO representatives ask a fee for providing their services. While it was alleged by an interview participant that such a fee helps workers 'to see the value of the service provided', the fee can be as high as three months' wage for a floriculture worker([77]). To alleviate such problems, the NGO Kenya Human Rights Commission has encouraged the government to work with NGOs and the Law Society of Kenya to allocate more funding to legal aid([78]). While a National Legal Aid Service was established in 2016, the stringent conditions currently make access to aid practically unavailable([79]).

5. Remedies

5.1 KNCHR

The Kenya National Commission on Human Rights (KNCHR) – which has A-level UN status under the Paris Principles – can provide those whose rights have been violated with non-binding means of redress([80]). Section 8(d) KNCHR Act (2011) provides that this Commission can receive and investigate grievances about alleged abuses of human rights, and endeavour to resolve them by conciliation, negotiation or mediation. While the UN Working Group on

([73]) E.g. *KPAWU v Expressions Flora Limited* (2012) 11/2012, Industrial Court.
([74]) Kenya Human Rights Commission (n 71), XI.
([75]) Interview data – participant KE–J.
([76]) Ibid.
([77]) Interview data – participant (anonymised).
([78]) Section 29(2) (d) Legal Aid Act 2016 (KE).
([79]) Interview data – participants KE–A, KE–C and KE–J. See KNCHR, *National Baseline Assessment on Business and Human Rights*, 2017, http://nap.knchr.org/Portals/0/Reports/Kenya%20NBA%20Final.pdf, 49.
([80]) UN General Assembly, Res 48/134 (1993) UN Doc A/48/49.

Business and Human Rights stated that it heard only positive comments about the KNCHR's investigation of grievances([81]), it was perceived by some interview participants as a 'talking shop' that sees its adjudicating role as 'optional'([82]). The KNCHR's website explains that grievances that do not touch on discrimination issues are redirected to the Ministry of Labour and Social Protection's labour offices([83]). This practice can be considered unfortunate in light of the conclusions that are drawn in part 5.2 below. An additional problem is that the KNCHR Act provides that discrimination grievances that fall under the mandate of the Gender and Equality Commission are also outside the KNCHR's jurisdiction([84]). This further limitation to the scope of grievances that can be brought before the KNCHR is unfortunate as the Gender and Equality Commission does not host a justice institution([85]).

5.2 Labour offices

The Ministry of Labour and Social Protection's labour officers have jurisdiction over any dispute as to the rights of workers, including the right to occupational safety and health([86]). Major advantages compared to court proceedings are that labour officers' decisions are made promptly and informally([87]). There is little cost involved and workers can be helped in Swahili.[88] Labour officers can consider laws, policies, codes of conduct, collective bargaining agreements and findings of ex officio investigations in their non-binding decisions([89]).

There are, however, considerable practical and legal issues that impede the proceedings before labour officers. Practical issues include limited staffing,

([81]) UN Working Group on Business and Human Rights, *Statement at the End of Visit to Kenya,* 2018, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23356&LangID=E.

([82]) Interview data – participants KE–D and KE–E.

([83]) KNCHR, *About us*, www.knchr.org/Aboutus/FAQs.aspx, accessed 28 February 2018.

([84]) Section 8 (d) Kenya National Commission on Human Rights Act Nr 14 2011(KE).

([85]) CEDAW, *Concluding Observations on the Eighth Periodic Report of Kenya*', 2017, UN Doc CEDAW/C/KEN/CO/8 para 14.

([86]) Section 87(1)(b) Employment Act 2007 (KE). The Ministry of Labour and Social Protection's Directorate of Occupational Health and Safety has been recognised by the court as also having the power to adjudicate work injury claims. However, this has been disputed in court (see I. Kashindi - G. Kashindi - P. Munyao, *Employment and Labour Law in Kenya*, 2018, www.lexology.com/library/detail.aspx?g=3b9feea6–9be3–488f–8984–298724a9c797).

([87]) Interview data – participant (anonymised).

([88]) Interview data – participant (anonymised).

([89]) Interview data – participants KE–D, KE–H and KE–N.

limited training and bureaucratic procurement procedures. Interviewed labour officers themselves confirmed that they were open to corruption([90]). Arguably, the legal issues are even more concerning. These issues are connected to the finding that COTU-K prioritised its own perceived interests over those of workers during the 2007 legal reforms.

Most notably, section 48 Employment Act (2007) sets out that NGO representatives or pro bono lawyers cannot represent workers in a labour office. This is a privilege of trade union representatives([91]). Normally, shop stewards will represent workers in the labour office, and they report the results of the negotiations back to the KPAWU headquarters. Even if NGO representatives try to advise workers without formally representing them, this would, reportedly, have little impact. NGO representatives alleged that labour officers do not mediate with workers who are not represented by KPAWU but 'just ask workers to sign'([92]). One interviewed labour officer seemed to confirm such practices when he explained that NGO representatives are 'annoying' and 'not representative'([93]).

Section 40 Employment Act also serves the perceived interests of COTU-K. This section regulates terminations on account of redundancy. This section is reportedly often abused to dismiss, without payment of severance pay and compensation for the leave to which they are entitled, those workers that try to obtain an in-company or state-based remedy. Labour officers can play an important role in reviewing whether employers have accounted for the seniority, skills, abilities and reliability of employees when workers' services have become 'superfluous' through no fault of their own, for example, when employers face inefficiency gains or falling demand in low seasons. But, section 40 protects trade union representatives better than both non-unionised and unionised workers. Trade union representatives have a right to be informed about 'the reasons for, and the extent of, the intended redundancy' by the employer, alongside the labour officer. Non-unionised workers also have a right to be informed about their redundancy alongside the labour officer, but they do not have a right to be informed about the reasons or the extent of the redundancy([94]). Unionised workers do not even have a right to be informed

([90]) Interview data – participant (anonymised).
([91]) Interview data – participant (anonymised).
([92]) Interview data – participant (anonymised).
([93]) Interview data – participant (anonymised).
([94]) Section 40 (1)(b) and (f) Employment Act 2007 (KE).

directly by the employer about their redundancy([95]). This creates opportunities for bribery, as trade union representatives can wield undue influence on the labour officer without the knowledge of the worker.

5.3 Courts

The Kenyan judicial system is a three-instance system, which is composed of the High Courts and Employment and Labour Relations Courts as the courts of first instance, six Courts of Appeal, and the Supreme Court as the ultimate court of appeal([96]). The High Courts in the counties have powers to determine judicial proceedings and constitutional petitions. The Employment and Labour Relations Courts (or 'Industrial Courts') are of equal status to the High Courts and deal specifically with all matters relating to labour and employment. Decisions by the courts of first instance can be appealed to a Court of Appeal. Further appeals come before the Supreme Court, but only in limited circumstances.

The United Nations 2015 Universal Periodic Review indicated that the Kenyan judiciary was considered to lack independence. Interviewed participants agreed that corruption occurs in court cases([97]). Typically, files go 'missing' in such cases([98]). Nevertheless, corruption by the judiciary has decreased a lot in recent years([99]). The main reason for this improvement is the increased control over judges due to the increased computerisation of the court system([100]). Another reason is the active and activist role that the Industrial Courts have taken upon themselves([101]) Proactive judges in this court understand that they can provoke change, as much gravitas is attached to binding court proceedings in Kenyan society([102]).

Article 22 Constitution provides that every person has the right to institute court proceedings claiming that rights or fundamental freedoms in the Bill of Rights have been denied, violated, infringed or threatened([103]). Workers

([95]) Section 40 ibid; *Kenya National Private Security Workers Union v G4S Kenya Limited* (2017) 2326/2017, Employment and Labour Relations Court (Nairobi).

([96]) Art 48 Constitution 2010 (KE).

([97]) HRC, *Report of the Working Group on the Universal Periodic Review*, 2015, UN Doc A/HRC/29/10 para 142.

([98]) Interview data – participant KE–B.

([99]) Interview data – participants KE–C and KE–E.

([100]) Interview data – participants KE–B and KE–G.

([101]) Interview data – participants KE–A, KE–C, KE–D, KE–E, KE–F and KE–G; Maema (n 66) p 4.

([102]) Interview data – participants KE–A, KE–D, KE–F, KE–G and KE–O.

([103]) Art 22(1) ibid.

need to file their claims within a time frame of three years from the alleged breach([104]). Bringing claims in court often requires expert knowledge of the law and legal proceedings. Flower corporations are normally represented in court by their human resource manager and an external lawyer. KPAWU officials have represented floriculture workers in court. It used to be problematic for NGOs to represent workers in court, as they have no legal standing([105]). However, they have found a way around this issue([106]). They can file 'constitutional petitions' to secure and preserve rights guaranteed by the Constitution, including the Bill of Rights, under Articles 22(2) and 258(2)(c) Constitution([107]). Class actions are allowed([108]). This allows claimants to pool resources and add visibility to their case.

The formalities relating to initiating court proceedings should be kept to a minimum([109]). Courts entertain proceedings on the basis of informal documentation. It is relatively easy to get and use video or written proof([110]). Blood tests, soil reports and medical notes can also be used as evidence([111]). Witnesses can be brought to court, but witness protection is poor([112]).

Moreover, there are considerable barriers to bringing claims to court. Such barriers exist in particular for women working in the Kenyan floriculture industry. They are five times less likely to file proceedings in court (while they are more numerous and work in worse conditions than men). Costs, the long delays in proceedings and limited access to court documents pose considerable challenges to access to justice for floriculture workers([113]). Each concern is discussed in turn. First, Article 48 Constitution stipulates that a fee to file a claim may be required. Claimants reportedly have to pay to get copies of proceedings and judgments. There are various other costs, including the costs of transport to court and the price of medical evidence. For example, in *William Wagura Maigu v Elbur Flora* (2012), the claimant paid a doctor KES 10,000 (EUR 86),

([104]) Section 90 Labour Employment Act 2007 (KE).

([105]) Interview data – participants KE–E and KE–K/KE–L.

([106]) Interview data – participants KE–A and KE–F.

([107]) Interview data – participant KE–G; Katiba Institute, *What we Do*, www.katibainstitute.org/what–we–do/litigation/.

([108]) Art 22(2)(b) Constitution 2010 (KE).

([109]) Art 22(3)(b) ibid.

([110]) Interview data – participant KE–B.

([111]) *Bigot Flower v Julius Mwaniki Wachiri* (2016) 12/2015, Employment and Labour Relations Court (Nakuru) para 13.

([112]) Interview data – participants KE–B, KE–F and KE–K/KE–L.

([113]) R. Kibugi, *Development and the Balancing of Interests in Kenya*, in M. Faure - W. Du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa*, Pulp, 2011, 186.

which equals approximately a month's wage, to produce a medical report that stated that he became quadriplegic after falling off a greenhouse, even though health facilities are under an obligation to keep and maintain records([114]). Costs of court proceedings follow the events unless for good reason the judge rules otherwise, either awarding no costs or directing both parties to bear their own costs([115]). Second, the long delays in proceedings are another barrier that impedes access to courts. Proceedings can take more than a decade, but some courts, such as the Industrial Courts in Nyeri and Nakuru, work relatively fast([116]). The main reason for the existing lengthy delays is that Kenyan courts have limited human and material resources to fully carry out their functions([117]). Third, claimants sometimes face barriers in accessing court documents. For example, the High Court found, in *Moses Lubakwa v Bigot Flowers* (2012), that the claimant was 'not serious and not acting diligently' as he had not tried hard enough to get copies of proceedings – despite being able to prove that such copies had been requested – during the three years that his case was pending([118]).

Judges can directly rely upon the Constitution, which has supremacy over all laws([119]). Judges can also interpret international treaties or conventions that Kenya has ratified. Article 2(5)-(6) Constitution removed the need for 'domestication' of international law. Nevertheless, the status of ratified treaties and conventions in Kenya remains unclear for two reasons([120]). First, the relation between provisions in the Constitution and international law is uncertain. Second, Article 93(5) Constitution 'preserves the people's sovereignty and power to enact laws binding unto themselves through Parliament'. This preservation of the role of Parliament extends through the Treaty Making and Ratification Act (2012), which sets out that Parliament should play a decisive role in incorporating international law into Kenya. A related challenge is the limited expertise of judges about the Constitution and international law. For

([114]) *William Wagura Maigua v Elbur Flora* (2012) 248/2011, High Court (Nakuru).

([115]) Section 27 Civil Procedure Act 2007 (KE).

([116]) Interview data – participants KE–A and KE–F. See e.g. *Elgon Orchards v Doris Gerizo Agote* (2014) 25/2008, High Court (Kitale); *Esther Wavinya Mulwa v Redland Roses* (2017) 548/2009, High Court (Milimani).

([117]) A/HRC/29/10 (n 97) para 142.

([118]) *Moses Lubakwa v Bigot Flowers* (2012) 100/2008, High Court (Nakuru). See also *Daniel Karari v Bigot Flowers* (2012) 101/2008, High Court (Nakuru).

([119]) Article 2(1) Constitution 2010 (KE).

([120]) J. Ndirangu, *Do Articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a Monist State?*, 2014, www.ssrn.com/abstract=2516706. See also CEDAW, *List of Issues and Questions in Relation to the Eighth Periodic Report of Kenya*, 2017, UN Doc CEDAW/C/KEN/Q/8 para 1.

example, in a decision of 2020, the Supreme Court failed to call out the incompatibility of the single union requirements of section 14(1)(d)(i) Labour Relations Act (2007) with Article 24 of the Constitution and Kenya's international obligations, including article 8 ICESCR([121]).

It was explained in part 3 that grievances regarding labour rights are often only brought to court after the worker has been dismissed (or when no wages or union dues have been paid). On several occasions, the courts have set out that the employer must comply with procedural and substantive fairness when dismissing workers. This means that the reasons for dismissal must be valid and that a fair procedure must be followed. Fair procedure includes the right of the worker to be heard before being summarily dismissed. For example, in *KPAWU v Sirgoek Flowers Ltd*, the Industrial Court held that it was unfair to fire a worker for gross misconduct without sending a show-cause letter or hearing the worker([122]). The court, in determining a wrongful dismissal, may recommend to the employer to pay the wages that the worker would be entitled to or up to the equivalent of a maximum of one year's wages or salary (sections 49 and 50 Employment Act (2007))([123]). The court can also order the worker to reinstate the employee in the same or similar work in which they were employed prior to dismissal, at the same wage. Courts will, however, normally not grant the latter 'remedy' as the working relationship between employer and worker will have been damaged.

In health and safety cases, the court normally determines whether the alleged violation was caused by the corporation's negligence and/or breach of contractual duty and, if so, whether the respondent is entitled to any damages and to what extent. It is useful to give three examples. First, in *Mt. Elgon Orchards v Doris Gerizo Agote* (2014), the High Court held that the defendant had been 30 per cent responsible for chemical trauma to both eyes 'by failing to observe safety precautions'([124]). The claimant was 70 per cent responsible as the defendant should not have been asked to harvest flowers before the chemicals had dried up. Second, in *David Gaitho Ndungu v Timaflor Ltd* (2016), the Employment and Labour Relations Court considered that the defendant had

([121]) *KPAWU v KEFHAU and the Registrar of Trade Unions* (2020) 4/2018, Supreme Court. See Nissen (n 17).

([122]) *KPAWU v Sirgoek Flowers Limited* (2013) 34/2013, Industrial Court (Nakuru) interpreting section 44(4)(d) Employment Act 2007 (KE).

([123]) E.g. *David Gaitho Ndungu v Timaflor Limited* (2017) 132/2016, Employment and Labour Relations Court (Nyeri).

([124]) *Elgon Orchards v Doris Gerizo Agote* (n 116). See also *Esther Wavinya Mulwa v Redland Roses* (n 116).

unfairly dismissed the claimant after he had been hospitalised for organophosphate poisoning and refused to sign a declaration that he was 'fit to work'([125]). In both cases, the court considered that the employer failed to provide protective work gear (as required under section 101(1) Occupational Health and Safety Act (2007)). In more recent cases, however, the Employment and Labour Relations Court held that injured workers were considered 50 per cent responsible *because* they had been provided with protective gear([126]). Arguably, all the applied standards of shared liability fall below the standard set out in the UN Principles on Human Rights and the Protection of Workers from Exposure to Toxic Substances (2019)([127]). Principle 13 describes that remediation mechanisms need to take into account information about occupational diseases that are known to have occurred in a particular type of work or industry.

Corporations often allege that the worker was not employed or not 'on duty' at the time of an accident or unlawful dismissal([128]). Payslips with the name of the claimant and respondent are accepted as evidence to prove that the worker was in an employment relationship([129]). Some employers are, however, reluctant to provide payslips or allege that they provide them via email, even though most workers do not have access to the Internet([130]). In response, some Employment and Labour Relations courts have held that the burden of proof for holding that workers were not 'on duty' is on the corporation([131]). According to section 74 Employment Act (2007), employers have to keep written records of all employed workers, their rest days and sick leave. In practice, most employers fail to provide these records in court. An exception is *Bigot Flowers*

([125]) *David Gaitho Ndungu v Timaflor Limited* (n 123).

([126]) *Bigot Flowers (K) Limited v Livingstone Oramis Ekirapa* (2019) 3/2016, Employment and Labour Relations Court (Nakuru); *Bigot Flowers Limited v Zakiah Kairuthi Shaban* (2019) 61/2017, Employment and Labour Relations Court (Nakuru).

([127]) HRC, *Principles on Human Rights and the Protection of Workers from Exposure to Toxic Substances. Report of the Special Rapoporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, 2019, UN Doc A/HRC/42/41 para 88.

([128]) E.g. *Elgon Orchards v Doris Gerizo Agote* (n 116); Kashindi (n 86).

([129]) *Esther Wavinya Mulwa v Redland Roses* (n 116).

([130]) *KPAWU v Kongoni River Farm (Star Division)* (2017) 124/2017, Employment and Labour Relations Court (Nakuru); Antony Gitonga, *Another Flower Farm Sacks 500 Workers in Naivasha*, *Standard Digital* (Nairobi, 10 April 2017), www.standardmedia.co.ke/business/article/2001235717/another–flower–farm–sacks–500–workers–in–naivasha).

([131]) *Bigot Flower v Julius Mwaniki Wachiri* (n 111) para 20; *Elgon Orchards v Doris Gerizo Agote* (n 116).

Limited v Peter Jakoyo Anyago (2019)([132]). In this case, the judge decided that the defendant had not been at work because his name was not in the records.

6. Conclusion

This article assessed access to justice for Kenyan floriculture workers. Labour rights disputes – mostly touching on the right to health and safety at work – are often only brought in state-based justice institutions after the worker has been dismissed (or when wages or union dues have not been paid out). Floriculture workers can simply not afford to bring a remedy against their employer and risk losing their jobs. Such impacts are especially strong for women workers who face multiple forms of discrimination. Capacity constraints are in many respects a product of Kenya's position within the broader international political economy, where it is dependent on a labour-intensive export sector. Such constraints are likely to persist, as the bilateral Economic Partnership Agreement between the European Union – the most import market for the Kenyan floriculture industry – and the East African Community does not significantly alter the existing system([133]). Furthermore, the sound working of legal and institutional systems for the protection of Kenyan floriculture workers is subordinated to the perceived interests of political and economic elites. The integrity of administrative or judicial processes is sometimes undermined by the corruption of individual officials. This article has also determined that existing labour laws are functional for serving the needs of the trade union COTU-K at the expense of workers. Various deficits in the proceedings of the KNCHR and the labour offices have been identified. Some judges, especially in the Employment and Labour Relations Court are, however, oriented towards strengthening rights remediation. They have already found some ways to work around laws that favour those in power. Findings of case study research are fragmentary and cannot be transferred or generalised across contexts. Nevertheless, some of the results might be relevant to other contexts. The findings might be partly applicable in other export industries. I have, for example, been able to find similar patterns regarding fear of dismissal in an

([132]) *Bigot Flowers Limited v Peter Jakoyo Anyango* (2019) 60/2017, Employment and Labour Relations Court (Nakuru).

([133]) See A. Nissen (n 17).

additional case study on remediation for workers in the Korean semiconductor industry([134]).

([134]) Compare the titles of my two articles in popular media on these two case studies: A. Nissen, *In Kenia is de Ene Rozenplantage de Andere Niet: "Klagen is Ontslag Vragen*", 24 October 2020, Knack, https://www.knack.be/nieuws/wereld/in-kenia-is-de-ene-rozenplantage-de-andere-niet-klagen-is-ontslag-vragen/article-longread-1656597.html, and A. Nissen, *Meer dan 200 Samsung-arbeiders Ziek of Dood door Blootstelling aan Toxische Chemicaliën. Wie Klacht Indient Verliest haar Job*, January 2021, Eos Magazine.

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