IMPLEMENTATION OF THE RIGHT TO FREE MOVEMENT OF WORKERS IN THE EAST AFRICAN COMMUNITY: EXAMINATION OF THE LAW AND PRACTICE

IMPLEMENTATION OF THE RIGHT TO FREE MOVEMENT OF WORKERS IN THE EAST AFRICAN COMMUNITY: EXAMINATION OF THE LAW AND PRACTICE

BY

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CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a thesis entitled **“Implementation of the Right to Free Movement of Workers in the East African Community: Examination of the Law and Practice”** in fulfillment of the requirements for award of the Degree of Doctor of Philosophy of Mzumbe University.

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Date_____________________________

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LIST OF INTERNATIONAL INSTRUMENTS, CONSTITUTIONS AND STATUTES

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ABBREVIATIONS

ACFTA	African Continent Free Trade Area
CARICOM	Caribbean Community
CET	Common External Tariff
CM	Common Market
CMA	Commission of Mediation and Arbitration
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
EAC	East Africa Community
EAEC	European Atomic Energy Community
ECJ	European Court of Justice
ECOWAS	Economic Community of West Africa
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EIB	Employment Injury Benefit
EU	European Union
FG	Funeral Grant
ILO	International Labour Organization
MB	Maternity Benefit
NAFTA	North American Free Trade Agreement

NHIF	National Health Insurance Fund (NHIF)
NSSF	National Social Security Fund
NTBS	Non Tariff Barriers
PPP	Public Private Partnership
PTA	Preferential Trade Area
SADC	Southern African development community
SHIB	Social Health Insurance Benefit
SSRA	Social Security Regulatory Authority
TCU	Tanzania Commission for Universities
WTO	World Trade Organisation

ABSTRACT

This study examined the implementation of the right to free movement of workers in the East African Community guaranteed by the Protocol on the Establishment of the EAC common market. The study was prompted by the fact that although the protocol on the establishment of the EAC common market guarantees the right to free movement of workers in East Africa, literature seem to suggest that the municipal labour laws and policies of the EAC partner states are unfavorable to facilitate the implementation of the said right. The general introduction is provided under chapter one while chapter two presents conceptual framework of the study. Chapter three gives the legal framework for free movement of workers in East Africa. Free movement of workers in other economic communities is provided in chapter four. Research findings are covered under chapter five while chapter six gives summary, conclusion and recommendations.

The study involved the three EAC founding partner states: Kenya, Uganda and Tanzania. Data from all the three states was collected mainly through documentary review. However, face to face interviews were also conducted in order to get practical experiences to complement documentary data. Interviews involved a sample of 61 persons selected through purposive sampling. The data obtained from both documentary review and face to face interviews were analysed through qualitative methods. The study found that there is partial implementation of the right to free movement of workers in East Africa. The impediments to full implementation of the right to free movement of workers is caused by diversity in labour laws and policies, conflicting immigration laws and policies and lack of political will due desire to protect domestic labour markets by partner states. Best practices in this view point can be drawn from the European Union. The study recommends for fulfillment of partner states obligations in good faith, formulation of EAC harmonization policy and other policies, enforcement of the EAC Law, harmonisation of Annex II and Article 10 of the Protocol, maintenance of institutionalism approach by the EAC partner states and adherence to the EAC directives and recommendations.

TABLE OF CONTENTS

LIST OF TABLES

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Economic integration has been considered a harmonious development strategy between sovereign nations. Economists maintains that “integration of economics of foreign states has been one of the leading aspirations of social-economic policy in the second half of the twentieth century such that the period may be described as having been an era of economic integration (Kyablesa & Houngnikpo, (2016). Aspiration for economic integration has been demonstrated by the formation of various Regional Economic Communities (RECs) in the developed and developing countries (Grawford & Laird, (2014).

Economic integration is normally achieved through regional trade agreements (RTA’s) by conclusion of treaties and protocols which bind member states. Economic integrations vary significantly depending on the degree or depth in which they are aimed at. Nonetheless, the sole purpose is to eliminate or reduce barriers between member states (Kimbungwe et al, (2012). There is general consensus among economists that economic integrations basically take six forms namely Preferential Trade Agreements (PTA), Free Trade Area (FTA), Customs Union (CU), a Common Market (CM), Monetary Union (MU) and Political Federation (PF) as the apex stage (Harrison, (1996). However, Jovanovic (2011) has argued that the process of economic integration does not necessitate the integration to be gradual from lower stage to advanced stages. Partner states may agree depending on their goals, previous relationship and ambitions to begin at the particular desired state.

Cherunilam (2008) observed the fundamental goal for economic integration has been generation of economic growth and development between partner states regardless whether the agreement involves developing or developed countries.

Economists maintain that free mobility of factors of production facilitates optimal allocation of resources in the common market in economic integration (Benard, 2002) The rationale for a common market in economic integration is based on macro-economic theories and other philosophies which maintain that integration of national markets is easily achieved when products (goods and services) and production factors (labour and capital) move freely among partner states (Van der Mei, 2003). Economists also maintain that economic integration results into trade gains between partner states. This leads to increased returns and increased competition due to market enlargement, increase in investment between partner states and stimulation of Foreign Direct Investment (FDI) (Niekerk, 2010).

In developing countries specifically in Africa, economic integration has been advocated by many economists and experts as a means to accelerate economic development and strengthen their trading and bargaining powers vis-a-vis the developed economies. In the geographical view point, Cherunilam (2008) argued that "*Africa is the most fragmented in the world and therefore, economic integration will help to bring these developing countries together for mutual economic, political, cultural and social benefits*." The partition into small countries resulted from artificial borders put during colonialism.

The United Nations Conference on Trade and Development was of the view that regional economic groupings in Africa should be encouraged as a means of expanding their inter-regional and extra-regional trade and encouraging their economic growth (Mwansha, 2015). Most of the individual African countries are so small hence small markets and unstable economy. Vivid examples can be drawn from sub Saharan African countries in which as a result of such divisions, forty seven (47) states have small economies with small Gross Domestic Product (GDP). This results into small domestic markets with high cost of production (Van Niekerk, 2005). The ultimate purpose for economic integration is increased economic performances which results into increase in partner states welfare (Balasa, (2013). Thus, regional integration appears to be a feasible strategy for economic growth and poverty reduction in Africa. In this perspective, African states consider the regional integration approach as the best tool for their development (Balasa, *2013*).

In recognition and appreciation of regional integration approach in attaining economic development, the AU summit agreed in June, 2015 to create a continental free trade area (CFTA) trough trade liberalization in goods and services by 2017 (African Continental Free Trade Area, 2016).

The objective of the CFTA centers on creation of a single continental market for goods and services, expansion of intra trade through coordination and harmonization of trade liberalisation of all RECs across Africa and solve the challenges of multiple and overlapping membership hence consolidate the African Economic Community (AEC) (Continental Free Trade Area, 2018). The above commitment came to reality in March, 2018 when the CFTA treaty draft was signed creating the African continent free trade area establishing a single continental market for goods and services involving members of the African Union (AU) (The African Continental Free Trade Area Agreement, 2018). This was a crucial stage towards the consolidation of AEC.

Free mobility of workers in the common market calls for right for individuals or citizens to look for employment opportunities existing in other partner states without discrimination basing on nationality and other related aspects (Van der Mei, 2003). The right to free movement of workers in the community can be justified on the basis of economic gains to workers in individual basis and participating member countries at large. As hinted above, integration of member states markets can only be achieved when products and production factors move freely between borders within member states.

Free movement of workers in the community helps to avoid unemployment in one part of the community as workers freely move to places where their service is wanted. Thus, free movement of workers is a personal freedom with free choice as to where a person desires to work in the community, hence justified on the fact of rights and equality (United Nations Development Programme [UNDP], 2003).

Opening of partner states national labour markets in this basis result to efficient allocation of workers as a valuable resource in development. High unemployment in certain member states call for demand of workers in another partner states. Free movement of workers can be used as a strategy to address unemployment challenge in the EAC. This is simply because workers are free to move anywhere and work within the community. Unemployment is coupled with excess workers supply where the demand for the same is low (Abbott, 2013). This concept is supported by New Classical Economic Theory which presumes that, free movement of workers allow individuals to rationally pursue their economic interests, enabling them to move in response to wage differentials, hence maximizing their utility (Lindley, 2014). In this basis, migration for employment is always made at household level for economic gains. However, free movement of workers also result to economic development between member states.

Also, according to Traditional Trade Theory, free movement of workers like capital between states result in efficiency gains for both (Mathotra, (2012). Thus, free movement of workers is not justified for individual citizens of participating countries only but result to economic development of partner states. This is due to the fact that free movement of workers optimises resource allocation and ensures economic development in the community. Economic integration does not come in its own motion; it all depends on commitment and aspirations of partner states.

Economic integration is achieved through intergovernmental treaties in which "signatory countries agree to more advantageous conditions in the conduct of their mutual trade and investment relationships than those conditions applied to other non signatory partners" (Jovanovic, 2011). Thus, in economic integration measures are taken to abolish discrimination between economic units among partner states and a state of affairs which is revealed through non presence of various forms of discrimination between the national economies involved (Balasa, (2013). In order to achieve this conducive environment, the Treaty for the establishment of the East Africa Community[1] was signed on 30th November 1999 and entered into force on 7th July 2000 after its ratification by Kenya, Uganda and Tanzania as founding partner states in the same year. Rwanda and Burundi acceded to the treaty on 15th June 2007 and became full members of the community with effect from 1st July 2007, while Southern Sudan joined a bit later in April 2016.

The Treaty for the Establishment of the East Africa Community (herein after referred to as the EAC Treaty), paves the way for the establishment of a common market in East Africa.[2] This led to an enactment of the Protocol on the Establishment of the East African Community Common Market (herein after referred to as the EAC common market protocol).[3] This protocol was signed by partner states on 20th November 2009 and came into operation on 1st July 2010.

The EAC common market protocol [4] guarantee the right to free movement of workers who are citizens of the other partner states within their territories without any discrimination based on their nationalities, employment, remuneration and other conditions of work and employment. Free movement of workers in this context entitles a worker to apply for employment and accept offers of employment made at any partner state hence move freely within the community for employment purposes. Free movement of workers also entitles a worker to enjoy the right and benefits of social security protection as accorded to workers of the host member state.[5] In order to achieve the objective of attaining free movement of workers in the EAC, partner states agreed to "remove restrictions on movement of labour, harmonize labour policies, programs, legislation, social services, provide for social security benefits… and adopt a common employment

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[1] Treaty for the Establishment of the East African Community (as amended on 14th December 2006 and
August 2007).
[2] See Article 76 and 104. *Ibid*.
[3] Treaty for the Establishment of the East African Community. Article 2. *Ibid*.
[4] Treaty for the Establishment of the East African Community. Article 10 (1) and (2). *Ibid*.
[5] Treaty for the Establishment of the East African Community. Article 10 (3). *Ibid*.

policy."[6] The EAC partner states agreement in removing restrictions to free movement of workers in the EAC gives member states obligations to coordinate their employment, immigration and social security laws and policies in the community to enable implementation of free movement of workers accorded under the EAC common market protocol.[7]

Implementation of the right to free movement of workers is fundamental to the success of the EAC common market. Besides the existence of the EAC treaty and respective protocol commitment and obligations as stated above, literature presupposes that the EAC partner states have not attained a conducive environment for implementation of the right to free movement of workers in the community. This shows that there is a problem within the ambit of the laws and policies involving free movement of workers in the EAC hence there was a need to conduct a research on this aspect of the law.

This study was all about implementation of the right to free movement of workers in the EAC hence examining the laws and prevailing practices with focus to Tanzania, Kenya and Uganda as founders of the EAC. The EAC treaty and the EAC common market protocol were examined in relation to laws dealing with free movement of workers in the stated states partner states. These laws included mainly employment laws in relation to immigration and social security laws and policies. The target was to see how the said laws are coordinated and harmonized as required by the EAC Treaty and the Protocol on the Establishment of the East African Community Common Market, 2009 in order to allow for free movement of workers in the community. The category of workers involved in this study are employed persons who work for and under the supervision of another person for remuneration as envisaged under article 10 of the Protocol[8] and the free movement

[6] Protocol on the Establishment of the East African Community Common Market, November 2009. Article 2.

[7] This is provided for under Article 126 (2)[7] of the EAC Treaty and Articles 11, 12 and 47 of Protocol on the Establishment of the East African Community Common Market. *Ibid*.

[8] Protocol on the Establishment of the East African Community Common Market. *Op. cit*. See also Article 1 of the EAC Treaty which gives interpretation of the term "worker" and "labour."

of workers regulations.[9] The study did not include public servants and self employed persons as generally used in the common market context. The study was mainly doctrinal and partly non doctrinal research. Whereas doctrinal research involved review of legal texts and other relevant documents, non doctrinal research was conducted trough face to face interviews conducted in Dar es Salaam and Arusha in Mainland Tanzania.

1.2 Background to the Problem

The principle of free movement of workers is considered by economists to be a cornerstone in any successful common market in economic integration (Worley, 1994). This principle emerged after the Second World War in 1940's. The devastated and disjoined economies of European countries called for immediate solution. The idea on how to resolve and remedy the situation was initiated by Sir Winston Churchill.

In his words he once said, "recreate the European family…provide it with structure under which it can dwell in peace in safety and in freedom. We must build a kind of united states of European." (Taliashvili, 2008). The central idea was to create an economic integration without borders in which people move freely in order to achieve a better life hence wellbeing to the society. As a result of the above brief cornerstone, the idea of free movement of workers was first introduced with the Treaty of Paris of 1951 which established the European Coal and Steel Community (ECSC) limited to workers employed in coal and steel industries only (Yenilmez & Kilic, 2016). Thereafter, this right was thought successive to involve other categories of workers hence intensify the common market in the European countries.

[9] The East African Community Common Marker (Free Movement of Workers) Regulations, 2009. See also Article 1 of Protocol on the Establishment of the East African Community Common Market, *Op. cit*. The term labour involves a worker and a self employed person which was not the focus of this study.

Effective free movement of workers covering workers of all sectors was realised and extended by signing the Treaty of Rome in 1957[10] which created the European Economic Community (EEC). This Treaty recognized that it is crucial that certain matters should be free from regulation hence enshrined four principles notably the freedom of free movement of goods, capital and services, there after the right to free movement of workers in the community (Worley, 1994). In 1988 an effective analysis was made on the impact and potential of a common market in the EU countries. The Cecchini Report justified the relevance of a common market in various aspects including creation of employment opportunities among the participating countries (Yenilmez & Kilic, 2016). The principle of free movement of workers is anchored in the idea that "people know where their best interests lie and should be entitled to choose where to sell their labour or set up their business" (Grutters, Mantu, & Minderhoud, 2007).

Free movement of workers arrangement confers power to persons to move freely within the community while it is for the partner states governments to facilitate the desired aspiration. In a desire to create an effective common market where there is free movement of workers the Single European Act[11] stated necessary amendment which provided the deadline for completion of the common market within the European Union by 31st December 1992. Various Regulations and directives were enacted to ensure free movement of workers in the EU.

The idea of a common market was thereafter adopted in various parts of the world since the late 1940's. In America for example, the Organization of American States (OAS) was created in 1948 (Sanches, 2012). Besides OAS, there are also other RECs in the region. The Andean Community of National (CAN) was formed in 1971.[12] In another side, the Southern Common Market (MERCOSUR) was

[10] Treaty of Rome, March 1957.
[11] Single European Act, 1987 O. J L 169/1.
[12] *Ibid*. The community comprises the countries of Bolivia, Colombia, Educator, Peru and Chile. Other associated member states are Chile, Argentina, Paraguay, Uruguay and Brazil. The Community aimed at attaining economic, political, legal social and environment development in the region

formed in 1999 when the Treaty of Asunción was signed March 26, 1991.[13] Furthermore, the Union of South American Nations (UNASUR) was created in 2004.[14] Other blocs in the regional involve the Latin American Integration Association (LAILA) which was created in 1960[15], the Bolivia Alternative for Latin America (ALBA) and the Amazon Cooperation Treaty Organization [OTCA] (Sanches, 2011).

In an effort to coordinate and harmonize the RECs in America, the Community of Latin American and Caribbean States (CELAC) were created in 2010 (Sanches, 2011). Hence, this marks a remarkable step towards attaining effective integration in the respective region. Such achievement was attained by merging RECs through coordination harmonization of the existing RECs in America. In the African point of view, the establishment of a single continental market for goods and services in March 2018 is one of the strategies in coordination harmonization of African Recs.

The idea of a common market where there is free movement of workers was also thought appropriate for African countries development. Due to increase in welfare sought to be associated with creation of economic communities, the idea of economic integration was also adopted in Africa. It is worth to point out that African regional integration finds its roots in Pan-Africanism which targets for the unity of African independent states and people of African origin (in the continent and in the Diaspora) (Tamura, 2011). Such aspirations led to the creation of various economic communities thereafter in Africa.

It is estimated that Africa currently has at least 14 economic integrations with two or more in all sub regions (Ross – Lerson, 2004). In the Eastern Africa there's the

[13] Founders of the community involved Argentina, Brazil, Paraguay and Uruguay. The respective common market aimed at creating free movement of goods and services and other factors of production.

[14] The UNASUR Constitutive Treaty, May 2 2008. This Community comprises all countries in the South America. The Primary objective of the union is to attain political, economic and social integration in the region.

[15] The Treaty of Montevideo, August 1980.

East African Community (EAC)[16] and the Inter-Governmental Authority on Development (IGAD).[17] Other economic communities are also found in West Africa,[18] in central Africa[19] and in the southern Africa.[20] Nevertheless, the focus of the study is in East Africa which has demonstrated a desire for implementation of free movement of workers through establishment of an economic community at different times.

The relevance of economic integration has been discussed in the introduction. However, in addition, there are various factors which accounts as to why various independent African states tend to join more than one economic community. The following are main reasons: economic factors, strategic and political reasons, historical reason, and geographical proximity, thirst to seek additional external resources, economic, political pressure and cultural vision (Nantchchouang, 2014). Economic integrations have been established in all sub regions in Africa as discussed above.

[16] Treaty for the Establishment of the East African Community. *Op. cit*.

[17] *Ibid*.

[18] Various economic integrations exists notably the Economic Community of West African States (ECOWAS) which is governed by Revised Treaty of the Economic Community of West African States (ECOWAS), 2010. The West African Economic and Monetary Union (WAEMU) established by Treaty on the West African Economic and Monetary Union (WAEMU), January 1994. The Mano River Union (MRU) governed by The Declaration and the Consolidated Protocols to the Mano River Declaration, October 1973.

[19] In Central Africa there are three main economic integrations in the region. These are: The Economic and Monetary Community of Central Africa (CEMAC) by CEMAC Constitutional Treaty, March 1994, also The Economic Community of Central African states (ECCAS) by Treaty Establishing the Economic Community of Central African states (E.C.C.A.S), May 1975, and The Economic Community of the Great Lakes Countries (CEPGL) by Convention Establishing the Economic Community of the Great Lakes Countries (CEPGL), September, 1976.

[20] There are four prominent economic integrations. These are, the Southern African Development Community (SADC) by Treaty on the Establishment of the Southern African Development, August 1992, the Common Market for Eastern and Southern Africa (COMESA) by Treaty Establishing the Common Market for Eastern and Southern Africa, November 1993, the Southern African Customs Union (SACU) by Southern African Customs Union (SACU), Agreement, 2002 and the Indian Ocean Commission(IOC) by Agreement for the Establishment of the Indian Ocean Tuna Commission, October 1995.

The idea of economic integration in East Africa was first adopted through the establishment of the defunct East African Cooperation Treaty[21] in 1967 which comprised Tanzania, Kenya and Uganda. The main objective of the community was "to control and administer certain matters of common interest and to regulate the commercial and industrial relations and transactions between the respective countries and by means of a central legislature to enact on behalf of the said countries laws relevant to the purposes of the said join organizations.[22] It is thought that the defunct EAC had attained a splendid development of its own kind.

History unfolds that during this particular period, "The East African Community had attained a high level of economic integration. The defunct EAC had reached a level which had not been attained by any organization of its type on the continent" (OECD, 2002). The East African Community had managed to sustain a common market, a custom union, a joint income tax regime, a Monetary Union with a Common Currency (i.e. the East African Shilling) coordinated by the East African currency Board. Also the respective Community had a joint railway lines, air lines, posts, telecommunications, meteorology and the East African Development Bank. Higher education was also coordinated by the University sector of the East African Community. In general, almost the whole economic, social, legal and cultural life was coordinated by economic integration.[23] The defunct EAC also managed to establish the common market tribunal and the common market council.[24]

However, critical examination of the defunct treaty for East African Cooperation Act[25] shows that there were no specific provisions aiming at attaining free movement of workers in the region governed by common market principles as opposed to other freedoms notably free movement of goods, services and persons.

[21] The East African Cooperation Treaty, Act No 31 of 1967.The Cooperation took over the functions of the East African Common Services Organization to coordinate the social, economic and legal services. The Community was established by the newly independent countries for their own initiatives and benefits.
[22] Treaty for the Establishment of the East African Community. Preamble, *Op. cit*.
[23] *Ibid*.
[24] The East African Cooperation Treaty Act 1967, Article 11 (5) and Article 32. *Op. cit*.
[25] *Ibid*.

Free movement of workers was enshrined under the shadow of free movement of persons and not guided by specific provisions and regulation involving free movement of workers.

This problem has been addressed by the current EAC treaty in article 76[26] in which a common market is established with clear vision of attaining free movement of workers in East Africa with distinct common market principles.[27] This led to enactment of the EAC common market protocol[28] with specific regulations[29] to govern free movement of workers in the community. The defunct EAC could not survive long due to various factors which accounted for its disintegration. Despite achievements attained as discussed above, the defunct East African Community was dissolved in 1977, ten years after its establishment. The preamble to the current East African community accounts that, the main reasons which contributed to the collapse of the defunct East African corporation was lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the community among the partner states due to their differences in their levels of development and lack of adequate policies to address this situation (Ogbor, 2009).

Safeguards have been put by the current EAC in which partner states are "determined to strengthen their economic, social, cultural, political, technological and other ties for their fast balanced and sustainable development by the establishment of an East African community customs union and a common market as transitional stages to an integral parts thereof, subsequently a monetary union and ultimately a political federation."[30] This reveals an aspiration for development ushered by a political and economic will for the benefit of all partner states. Also,

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[26] Treaty for the Establishment of the East African Community. *Op. Cit*.

[27] Article 3 of the Protocol on the Establishment of the East African Community Common Market. Non discrimination and transparency principle and other principle are outlined. The fundamental and operational principles of the common market are enshrined in Articles 6 and 7 of the EAC Treaty. See also in chapter two part 2.2 in which these principles are discussed with other WTO common market principles.

[28] Article 2. *Ibid*. The respective article establishes a common market.

[29] The East African Community common market (Free Movement of workers) Regulations, 2009.

[30] See preamble to the Treaty for the Establishment of the East African Community. *Ibid*.

partner states agreed to adhere to fundamental and operational principles and WTO principles and the principles of international law governing relationships between sovereign states.[31] The dissolution of the defunct EAC could be regarded as a step towards re establishment of the current EAC.

Despite the disintegration of the defunct EAC, founding partner states reconsidered the economic, social, legal and cultural achievements and benefits which had been so far obtained. Pursuant to Article 14 (2) of the Mediation Agreement,[32] Tanzania, Kenya and Uganda consented to examine and discover areas for future co – operation and plan to re establish the common market and the full economic integration in East Africa.

As a result, the treaty for the establishment of the (new) East African Community was signed in November 1999 and came into force in July 2000 (Kaahwa, 1999).[33] The EAC integration is organized into four main stages: customs union as the entry point, common market, and monetary union and political federation of partner states as its ultimate stage. The EAC common market as a stage was entered following the adoption of the Protocol for the Establishment of the EAC Common Market of 2009.[34] The said protocol was signed by partner states on 20th November 2009 and came into operation on 1st July 2010.

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[31] Treaty for the Establishment of the East African Community. *Ibid*, see also chapter 25 of the EAC Treaty where the whole chapter address on how the private sector and the civil society are involved in order to avoid the problem of non involvement of the private sector and civil society which among others contributed to disintegration of the defunct EAC.

[32] Agreement for the Division of Assets and Liabilities of the Former East African Community, 1983. The founding partner states were Tanzania, Kenya and Uganda.

[33] This was the outcome of the six years of continuous efforts of founding members Tanzania, Kenya and Uganda to re establish the Community. This was a historical event where President Yoweri Museven of Uganda, the former president Benjamin Mkapa of Tanzania and Daniel Arap Moi of Keny played the central roll. The ceremony was held in the Tanzanian city of Arusha which is also the headquarters of the Community. This paved the way for clover economic and political Federation. See Article 2(2) and Article 5, Treaty for the Establishment of the East African Community (as amended on 14th December 2006 and August 2007). The Community came up with clear vision of establishing a Custom union, a Common Market, a Monetary Union and finally a Political Federation. This aims at widening and deepening economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa.

[34] Treaty for the Establishment of the East African Community. *Op. cit*. A protocol is made under the Treaty and integral part of the Treaty. See Article 151 of the Treaty. Some protocols like the

After ratification of the Treaty in 2000 by founder partner states, other legal procedures including enactment of enabling legislation had to be adhered to assume its bindingness within partner states which is a crucial step to implementation of free movement of workers in the community. The ratification gave effect to the EAC common market where free movement of workers is established. Without such legal procedures which enable bindingness in international relationship, there is no free movement of workers and the common market at large.

Hence, in order to assume the basis of binding nature and effective implementation of the EAC treaty, founding partner states were required within 12 months from the date of signing of the Treaty to ensure the enactment and effective implementation of legislation as is necessary to give effect to the Treaty.[35]

Pursuant to article 8 (2) (b) of the EAC treaty, Uganda enacted the East African Community Act.[36] This Act was assented on 4th May, 2002. The objective of the Act was to give the force of law in Uganda to the treaty for the establishment of the EAC and provide for the establishment of the EAC treaty and provide for other connected or incidental matters. In the same requirement, Tanzania enacted the Treaty for the Establishment of the East African Community Act[37] which was assented on 30th March, 2001 in order to give effect to the provisions of the EAC treaty and connected purposes. Kenya fulfilled this requirement by enacting the treaty for the establishment of the East African Community Act[38] with the same objective of giving effect to the provisions of the EAC treaty and other connected

EAC common market protocol have annexes in the form of binding regulations which describe how effectively the cooperation have to be implemented.

[35] Treaty for the Establishment of the East African Community. *Op. cit*. See also Article 153 (1) in order to ensure international recognition of the Community, the EAC Treaty provides for the registration of the Treaty with the African Union (AU) and the United Nations (UN).

[36] Act No 13 of 2002.

[37] Act No 4 of 2001.

[38] Act No 2 of 2000.

purposes. This Act was assented on11th July, 2000. Other EAC neighbor countries witnessed such development with aspirations to join the community.

The achievement recorded by the community to establish a customs union protocol[39] and a common market protocol[40] in force, attracted other countries to join the Community. It is accounted that the community has managed to increase both intra-regional trade and intra- EAC Foreign Direct Investments (EDI) and Foreign Direct Investments (FDI) from outside the region (Abdullah, 2012). Hence, Rwanda and Burundi acceded to the treaty in July 2007 while Southern Sudan joined the community in April 2016 (Mangachi, 2011). This was a favorable environment for establishment of a common market. However, this idea was pre conceived during the EAC treaty establishment.

In order to attain implementation of the right to free movement of workers in the EAC, partner states agreed to "remove restrictions on movement of labour, harmonize labour policies, programs, legislation, social security services, provide for social security benefits and establish common standards and measures for association of workers and employers, establish employment promotion centers and eventually adopt a common employment policy."[41] This is in line with the general objective of the EAC common market aiming at widening and deepening cooperation among the partner states in the economic and social fields for the benefit of the partner states.[42] In the light of this agreement, partner states are given specific obligations to coordinate and harmonize their employment, labour, immigration and social security laws, policies and programs to facilitate free movement of workers.[43]

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[39] Protocol on the Establishment of the East African Customs Unions Protocol, March, 2004.
[40] Protocol on the Establishment of the East African Community Common Market, November, *Op. cit*.
[41] Treaty for the Establishment of the East African Community, Article 5(2) (c). *Op. cit*.
[42] Protocol on the Establishment of the East African Community Common Market. Article 4. *Op. cit*.
[43] Treaty for the Establishment of the East African Community. Article 126(2) *Op. cit.* And, Protocol on the Establishment of the East African Community Common Market, Article 4, 11, 12 and 47, *Op. cit*.

Depending on schedules for the free movement of workers,[44] Kenya, Uganda, Rwanda and Burundi committed to implement free movement of workers in their countries by 2010 while Tanzania committed for implementation between 2010 and 2015. Though the implementation of the EAC common market was sought to be implemented progressively,[45] partner states agreed to have the common market implemented in a transition period of 5 years hence full implementation by 2015 (Heshmati, 2016).

Various achievements have been made towards the full implementation of free movement of workers in the EAC. These achievements include among others easing the movement of people through introduction of the east African passport, and adoption of designated immigration entry points. Yet, implementations of free movement of workers still face legal challenges (Yabara, 2012). Despite commitment reached by partner states to coordinate and harmonize their employment, immigration and social security laws and policies for effective implementation of the right to free movement of workers, literature presupposes that the dream of attaining free movement of workers in the EAC is far to be realized (Ogalo, 2012). Hence, this prompted a study of partner states employment, immigration and social security regimes in order to examine how effectively free movement of workers can be implemented in the EAC.

This study focused on examination of the implementation of the right to free movement of workers in the EAC with emphasis to Tanzania, Kenya and Uganda as founders of the EAC. The EAC treaty and the EAC Common Market Protocol were examined in relation to domestic partner states employment, immigration and social security laws and policies with a view to determining how they facilitate free movement of workers in the EAC common market.

[44] The East African Community Common Market (Free Movement of Workers) Regulations, 2009. Regulation 15.

[45] Protocol on the Establishment of the East African Community Common Market. Article 2 (5). *Op. cit.*

1.3 Statement of the Problem

The EAC common market has been in place since 2010 which over nine years. However, the citizens of the EAC have not yet fully enjoyed the benefits of the right to free movement of workers as envisaged in the EAC Common Market Protocol. Article 10 of the respective protocol[46] guarantees the right to free movement of workers amongst member states of the EAC without any discrimination. It is worth to pin point that the right to free movement of workers in a common market is premised in three fundamental aspects which require full implementation by the respective partner states. These aspects are removal by every partner state all immigration restrictions on entry for workers in their respective countries, ensuring non discrimination of workers on employment opportunities, housing and other related matters by member states; and protection of social security rights of workers through exportability of social security credits and aggregation of insurance periods in the course of free movement of workers within the community (Worley, 1994).

Due to diversity in employment laws and policies in relation to conflicting immigration laws and uncoordinated social security laws, the present legal set-up is problematic hence does not support effective implementation of the right to free movement of workers in the community. This causes difficult in enforcement of the said right as per EAC common market protocol requirement. For effective implementation of the right to free movement of workers within the EAC common market, EAC treaty and the EAC common market protocol impose on the governments of every partner state the obligation to coordinate and harmonize their domestic employment laws and policies, immigration laws and their social security laws and policies.[47] Notwithstanding such obligations, literature suggests that the employment, immigration and social security laws and policies of the EAC

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[46] *Ibid*.

[47] Treaty for the Establishment of the East African Community. *Op. cit.* Articles 126 (2) and the Protocol on the Establishment of the East African Community Common Market, *Op. cit*. Articles 11, 12, 39 and 47.

common market partner states are unfavorable to effective implementation of the right to free movement of workers in the EAC common market (AIMS Law Chamber Consortium, 2012).

This study was therefore thought imperative in order to examine the employment laws and policies, and how influenced by immigration and social security laws and policies of selected partner states of the EAC with a view to determine the manner the said laws and policies are compatible with and supportive of the right to free movement of workers in the EAC common market and find out the best practices that the EAC can learn from other selected economic communities on how to make the envisaged right to free movement of workers in the EAC common market a reality.

1.4 Objectives of the study

This study had one general objective and two specific objectives as explained hereunder.

1.4.1 General Objective

The general objective of this study was to examine the EAC partner states laws governing implementation of the right to free movement of workers under the Protocol on the Establishment of the EAC Common Market and find out the best practices that the EAC can learn from other economic communities in the implementation of the right to free movement of workers.

1.4.2 Specific objectives

This study was guided by the following specific objectives:

(a) To examine how the national employment, social security and immigration laws and policies of selected partner states of the EAC enhance the implementation of the right to free movement of workers under the Protocol on the Establishment of the EAC Common Market.

(b) To find out the best practices that the EAC can learn from other selected economic communities in the implementation of the right to free movement of workers.

1.5 Research questions

This study was guided by the following research questions:

(i) Do the employment, social security and immigration laws and policies of the EAC partner states enhance the implementation of the right to free movement of workers envisaged under the Protocol on the establishment of the EAC common market?

(ii) What are the best practices that the EAC can learn from other selected economic communities in the implementation of the right to free movement of workers?

1.6 Significance of the Study

Free movement of workers offered by the common market in economic integration is considered to be the cornerstone in any successive economic integration (Hall & Chuck-A Sang, 2007). With this consideration, EAC member states consented to guarantee the right to free movement of workers who are citizens of other partner states within any territory in the region without discrimination of workers of other partner states based on nationality with respect to employment, remuneration and other conditions employment.[48] The study on implementation of the right to free movement of workers in the EAC is crucial in order facilitate workers mobility in the region as envisaged by the EAC treaty and the EAC common market protocol.

This study is very significant to workers and potential workers in the community hence assurance for economic gain and economic development to partner states due to creation of employment opportunities. Unemployment in East Africa is considered to be the serious problem, thus member states governments employ

[48] Protocol on the Establishment of the East African Community Common Market, Article 10 (10) and (2). *Op. cit.*

various strategies to ensure sustainable employment opportunities for their citizens.[49] Free movement of workers is viewed as a joint strategy to address unemployment problem in the common market. Efficient allocation of workers in a common market demands opening of partner states national labour markets. Thus, high unemployment in certain parts of the region allows for demand of workers where appropriate in other places within the community. Free movement of workers in a common market in this case helps to avoid unemployment as workers move freely to places where their service is demanded without restriction (Abbolt, 2013).

This study will also guide the EAC organs and institutions like the Summit, the Council, the EAC Legislative Assembly, and Secretariat Committees on what exactly to do for the success of the free movement of workers and the common market at large. Basing on the research objectives and findings of the study, effective recommendations will be provided hence solution to challenges hindering implementation of the right to free movement of workers in the community. The study will guide the Council in giving effective directives, regulations and policies to give effect the free movement of workers in East Africa as planned by the community. The result will be establishment of effective common labour and migration law regimes backed up by appropriate respective policies in East Africa hence law and policy change.

Last if not the least, there is scanty of literature specifically dealing with the EAC law as compared to other economic integrations like the EU and CARICOM. The study will provide a complete and detailed description of the research topic in an exploratory nature coupled with effective recommendations basing on research

[49] Example, for Tanzania see the National Employment Policy, Ministry of Labour Employment and Youth Development, Dar es Salaam, p.2 see also, the Kenya Citizenship and Immigration Regulations, Legal Notice No. 64, 2012. Member countries use various strategies involving restricting employment opportunities for their citizens only without considering their agreement and obligations to the EAC common market.

questions and research findings. Basing on the above achievement, the study at hand will contribute greatly in the academic discipline.

1.7 Scope of the Study

The study was about implementation of the right to free movement of workers in the East Africa Community confined to EAC founding members namely Tanzania, Kenya, and Uganda only. However, the rest of the EAC member states notably Rwanda, Burundi and Southern Sudan were mentioned where necessary. Data collection through face to face and telephone interviews was performed in mainland Tanzania from November 2016 to October 2017. However, documentary review involved the whole period of study from 2013 to 2018. The study employed mainly doctrinal research and partly empirical research.[50] This being the case, interviews involved respondents from Arusha and Dar es Salaam in Tanzania officials only as justified in the limitations below.[51] Also, the research focused on free movement of labour[52] specifically on free movement of workers in East Africa as opposed to other economic freedoms and rights offered in the common market.[53] This enhanced focus and proper management of the research area. Lastly, the study covers the current and not the defunct EAC as discussed earlier in chapter one

1.8 Literature Review

There is scanty of literature specifically dealing with free movement of workers in the EAC as opposed to the EAC law generally. However, there are prominent

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[50] See part 1.9 for details.
[51] See part 1.10 below for clarification.
[52] See Article 1 of the Protocol on the Establishment of the East African Community Common Market, *Op. cit*. The term labour is meant to involve a worker and a self employed person(self employed person is defined to mean a person engaged in an economic activity not under any contract of employment or supervision and who earns a living through this activity). The term worker is defined to mean a person who performs services for and under the direction of another person for remuneration. This was the scope of my study.
[53] According to the EAC Common Market Protocol, the EAC common market involves free movement of labour, persons, capital, goods and services together with right of residence and establishment. See Article 2 (4) of the Protocol on the Establishment of the East African Community Common Market, *Op.cit*.

authors who have significant contribution on the EAC common market and the community at large.

Gathii (2011) wrote specifically about the EAC common market protocol. He shares a very wide knowledge on what the protocol provides about free movement of workers in East Africa. The author provides that, "under the common market protocol, workers are entitled to apply for employment and accept job offers in other states, move freely between member states for the purpose of employment, remain within a partner state for the purposes of employment, conclude contracts without discrimination, and enjoy the social security benefit that are awarded to nationals of that member state"[54] Such rights explained are stipulated under article 7 (3) of the protocol . These rights form the basis of free movement of workers in the common market.

Furthermore, the said author clarifies on family matters in which a worker employed in a partner state gets by being accompanied with a spouse and a child for the same privileges available to the respective worker. The Author enumerates that free movement of workers in the Protocol is limited to private sector. This limit can be waived by national laws and regulations if they provide otherwise. The same limitation is provided for under article 10 (10) of the protocol. Exceptions are provided in which a host country may make restrictions for the purpose of public policy, public security and health matters. This is in line with article 10 (11) of the protocol.

The author gives legal procedures on how to enter, travel within or exit member countries for employment purposes. All issues are dealt with by immigration offices in which one must deliver a valid travel document or national identity card supported by an employment contract (Gathii, 2011). Such procedures are well provided for under free movement of workers regulations.[55] The above formalities

[54] Protocol on the Establishment of the East African Community Common Market, Article 11. *Op. cit.*

[55] The East African Community Common Market (Free Movement of workers) Regulation. Regulation 5(2).

enable the respective worker to possess a pass valid for six months in a host country in order to finalize procedures of securing a work permit. This also applies to worker's spouse, children and other dependants if any. The author emphasizes that the respective passes should be issued free of charge.

The author enumerates that partner states are obliged to harmonize and mutually recognize academic and professional qualifications mainly of skilled ones and highly educated (Gathii, 2011). This is well provided for under Article 11.[56] The author reiterates that, "member states agreed to seek to harmonize their labour policies and national laws and programs to facilitate the free movement of workers within the region."[57]

This aspect is as provided for under the Protocol.[58] As stated under Article 12 (5), the author comments on the issue of harmonization of national social security policies such that self employed citizens of partner states are well covered in such schemes (Gathii, 2011). With regard to free movement of legal professions, the author notes that problems have been observed as Tanzania and Uganda lawyers are accepted in Kenya while those from Kenya are not permitted in Tanzania. This might also apply to other professions.

The author narrates on specific commitment shown by member states in facilitating free movement of workers to honor the implementation of the protocol. However, there are different opinions by member states on how to fulfill the same. In work permit issuance, Tanzania recommends to be issued within the respective national laws specifying nationality and the type of work desired.[59] Other member states share the same opinion but propose a work permit to be issued within three months a worker enters the respective country (Gathii, 2011). The author

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[56] Protocol on the Establishment of the East African Community Common Market. *Op. cit*.

[57] *Ibid.*

[58] Protocol on the Establishment of the East African Community Common Market, *Op*. *cit*. Article 12.

[59] *Ibid*.

recognizes the need for integrating the right of free movement of workers with the right of residence to workers and right of establishment.

This is very necessary in order to make the right to free movement of workers meaningful and attainable as discussed before. By using observation and discussion the author had comprehensive analysis of the legal framework of the Protocol on the establishment of the East African Community Common Market. The respective methodology will also form part in my research work.

Despite the author's valuable contribution in the subject matter as discussed above, the author seems to concentrate more on what the CMP provides and the procedures involved in free movement of workers as provided by the respective regulation and does not explore on legal challenges involved in the full implementation of free movement of workers. However, harmonization of laws in East Africa has encountered challenges which inhibit its success which contribute to ineffective free movement of workers in the community. This study examined legal challenges in implementation of the right to free movement of workers in order to bridge the stated gap.

Chauffour and Maur (2011) acknowledge that the right to free movement of workers is part and parcel of bundle rights offered by the EAC Common Market Protocol. The authors provide that free movement of workers in the bloc faces a lot of challenges. They point out that, "work permits are not harmonized across countries, they are relatively restrictive and remain difficult to obtain, they are subject to delays and administrative requirements and rejections are numerous." (Chauffour & Maur, 2011). The author observes that partner states seem to protect their domestic labour market. In most EAC partner states, work permit is issued upon provision of evidence that the company or firm has failed to employ residents of the respective country and even failed to employ residents of the respective country and even failed to train the desired skill.

The author's observation above demands specific solutions for effective free movement of workers in the community. This gap was covered through examination as to whether there is glimpse of domestic labour market protection in East Africa and how it affects free movement of workers with appropriate recommendations.

The authors are pessimistic that inclusion of social security in the free movement of workers in EAC is very limited." (Chauffour and Maur, 2011). However they do not explain the challenges faced by the EAC common market in addressing the issue of social security coverage in the course of free movement of workers within the community. This study will cover the stated gap.

The authors do acknowledge that free movement of workers in this bloc has been very slow. The issue of sovereignty of national states seems to be a great challenge. Dominant members try to dominate while young member states affirm the sovereignty in the community. However, the treaty for the establishment of the EAC is very clear that the community law is supreme over partner states laws as stated under article 8(4) of the treaty.[60]

Great achievements have been made in harmonization of passports and migration procedures. Authors not with concern that due to protection of domestic labour market there is a tendency of formal PTA's to involve only highly skilled labour in free movement of workers. Recent agreements have shown the need to cover the semi skilled workers. They propose Bilateral Labour Agreements (BLA) as alternative to the rigid procedures in PTA's (Chauffour & Maur, (2011). This promotes the inclusion of unskilled and semi skilled workers in the free movement of workers. Despite the author's great contribution in this gap, they couldn't discuss how semi skilled and unskilled workers can enjoy the right to free movement of workers in the common market. The study at hand will examine the

[60] Treaty for the Establishment of the East African Community. *Op. cit.* This stand was also reaffirmed in the case of *A.G of the Republic of Uganda v. Tom Kyahurwenda*, EACJ appeal Division, No 1 of 2014 on implementation of the EAC Treaty through national courts of the EAC Partner States.

same and give proper solutions for the success of the free movement of workers in East Africa.

The authors give experience from West Africa that would be of great help in the EAC. ECOWAS assumed a common approach in migration issues basing on the European Model. The first part of the approach involves preparation of legal framework and desired key principles and the second base on a regional migration and development plan (Chauffour & Maur, (2011). Common migration procedures are very important for free movement of workers in the common market.

Through exploration, the author collaborated with various distinguished individuals like lawyers, economists and policy makers. This professional insight enabled the author to write his comprehensive work. The outlined method was also utilized in this work.

Despite the author's appreciable contribution in the subject matter at hand, the authors do not elaborate further on how common migration policy can be achieved and how partner states can participate in achieving the same. Furthermore, they give little attention to EAC common market specifically on implementation of free movement of workers in the community and challenges involved in achieving the same. The research at hand focused on the same.

AIMS Law Chamber Consortium (2012) enumerates that all partner states ratified the protocol on the establishment of the EAC common market in which the free movement of workers is centered upon. The protocol was effective on 1st July, 2010, since then, partner states had the obligation to change their national policies, laws and regulations to allow full implementation of the protocol. The author views that the treaty for the establishment of the EAC is sufficiently instructive on the issues pertaining free movement of workers as well as right of establishment and residence.

The author gives an account, that article 10 (1) of the EAC Common Market Protocol guarantees the free movement of workers between partner states and obliges them to eliminate discrimination in employment, remuneration and other related issues. Also, partner states committed themselves to harmonize their labour and employment policies, national laws and programmes as per article 12 of the Protocol in order to facilitate free movement of labour in the bloc. As part and parcel of labour right, article 39 of the protocol also obliges partner states to coordinate and harmonize their social security policies in order to ensure fair and secured living standards. This entitles a worker to enjoy the rights and benefits of social security in the host state as stipulated under article 10 (e) of the protocol.

The author insists on accreditation of higher education institutions and standards of curriculum and training, this is in line with mutual recognition of professional qualifications and harmonization of social security benefits within the bloc as central to employment. The author observes that this commitment is far to be realized. Despite this contribution to the subject matter, the author does not examine more as to why the said commitment is far to be realized. This study will cover the same and other legal challenges which might be involved in the free movement of workers in the bloc.

Also, the author devoted his time in studying the crucial obligation given to partner states by the EAC treaty and the respective protocol in reforming national social security policies, laws and regulations in order to facilitate free movement of workers in East Africa. The author insists that, “workers mobility can only be significant and beneficial if it is backed up by labour laws that encourage movement of workers among member states. Work permits and immigration rules need to encourage rather than discourage movement and mobility of workers” (AIMS Law Chamber Consortium, 2012).

The author appreciates that there is a notable delay in the harmonisation of the required policies, laws and programmes by partner states. This weakens effective free movement of workers in the community. Despite this notable acknowledgement, the respective author does not give an account as to why there is such delay in the harmonisation of the respective laws, policies and programmes and legal challenges involved in the same. The study ventured to explore the relevance of harmonisation of laws involved in the implementation of the right to free movement of workers in the community and how the same can be achieved hence covering the noted gap.

The author too recognises that effective free movement of workers is subject to effective harmonisation of employment laws in relation to immigration laws, policies and programmes. The author further emphasizes that, "labour and social security laws applicable in the EAC countries are diverse, a diversity that potentially hinders movement of workers across the borders. At the same time, the employment policies and strategies inclusive of social security systems pursued by the member states are different, hence posing a further challenge to effective integration." (AIMS Law Chamber Consortium, 2012). In order to address stated gaps, this research devoted sufficient time and resource not only in addressing the issue of harmonisation of laws and how related to free movement of workers in the community but also legal challenges involved in the implementation of the right to free movement of workers in East Africa. Effective recommendations to eliminate the noted challenge are also provided.

Ogalo (1975) wrote his work based on the conference held by the East African partner states in November 2012. The said conference sought to assess the progress made in domestication in the sense of implementing the protocol in the partner states legal systems focusing the right to free movement of workers and residence. It also aimed at identifying and sharing experiences on technical and policy challenges of implementation of the CMP on free movement of workers in the community.

The author reminds and cements that article 10 of the respective protocol guarantees free movement of workers who are citizens of partner states. In this basis, workers are entitled to apply for employment and accept offers of employment opportunities and conclude contracts of employment which entitle them to move freely within the bloc.

In this perspective, the same article requires the EAC partner states to make sure that there is no discrimination in employment which involves remuneration and other related services between involved states in the community. The author also calls to attention articles 11, 12 and 39 of the Protocol as explained in other discussed works. His special emphasis is on article 5 of the protocol in which partner states committed themselves to ease cross-border movement of persons which involves workers and finally adopt an integrated border movement system.

The report explores benefits to be achieved when there is free movement of workers in East Africa. Apart from economic benefits to be obtained by workers themselves, he points out that the same allows for an efficient and economic allocation of skills between partner states which appears to be scarce in some member states.

The report provides that labour market integration in east Africa is likely to be faced by technical and administrative challenges notably in harmonisation of employment categories and mutual recognition of vocation certificates. However, it is my understanding that there is a need to address first the challenges involved in harmonisation of labour and immigration laws as core function, other technical and administrative challenges in the categories and vocation certificates will the automatically be dealt with. The study at hand addressed sufficiently the noted gap.

The author maintains that, “effective and beneficial integration is hinged on existence of timely and reliable labour market data in east Africa…the region lacks data on stock of skills, characteristics, distribution, and skill supply and demand.

This limits development of labour market search, jobs matching and employment." (Ogalo, 2012). The author is pessimistic that some member states are likely to show resistance to the aspired legal changes in their legal system due to labour market protection.

To bridge the stated gap above, the study researched more on the relevance of proper negotiations on details involved in particular aspects in the implementation of the right to free movement of workers. It also explored the dangers involved in labour market protection in the common market and economic integration.

Based on the report under discussion, the author recognises the urgent need do address restrictive labour and migration regulatory frameworks of partner states for effective free movement of workers in the region. He calls upon member states to review labour and migration laws in order to quicken the aspired goal of free movement of workers in East Africa. Despite this contribution, the author does not elaborate legal challenges which are likely to be involved in harmonisation of the respective laws to for efficient free movement of workers. The research at hand covered the stated gap by addressing challenges involved in harmonisation of laws and their appropriate solutions.

The **OECD (2012)** upholds that, "the degree to which workers migration is facilitated varies with the level of regional integration." This ranges from Preferential Trade Area, Free Trade Area, Customs Union, Common Market, and Economic Union to Political Federation. The author recognizes the importance of harmonising domestic laws and having common policies, regulations and standards.[61] The degree of integration determines how far mobility of workers is allowed in economic integration. Example, a lower degree of mobility of workers is found in the North American Free Trade Agreement (NAFTA) in which only a limited number of workers mainly to specific categories of workers who are highly skilled. The deeper degree of workers mobility is found in common markets and

[61] Treaty for the Establishment of the East African Community. *Op. cit.*

economic Union stage. At this level, there is "recognition of a right to free mobility to all member countries." (OECD, 2012).

The author puts it clear that in the common market where free movement of workers dominates, there is mutual recognition of academic qualifications, common social security rights and consideration of the workers families. An example of the most successful workers mobility is found in EU in which there is the European Economic Area (EEA). Not only does it represent the best example in the number of countries involved, but the extent of how workers mobility is facilitated.[62] Residents in the EEA in this case, have personal right to free mobility within member states to hunt for a job and get employed with same conditions of workers in respective partner states.

Furthermore, workers have the right to reside and make establishment after having secured employment. This also accrues to family member of a worker. All this is facilitated by the existence of a common market. Basing on the principle of equal treatment, EEA workers enjoy the same social, tax and other benefits offered to nationals of the respective country (OECD, 2012). This also is recognised to family members of a worker or third country nationals. The EAC has a lot to learn as far as the common market is concerned and the economic integration at large to the EU. The EU observes harmonisation of laws as an integral part in the success of not only the free movement of workers, but also in other freedoms and rights.

The author gives much weight to the use of directives in addressing specific areas in harmonisation process. This work gives a great contribution on the basis that free movement of workers can also be achieved Africa. Inspite of the fact that the author has contributed much in the aspect of how the common market was developed in the EU, he does not focus his attention to emerging economic integration blocs in Africa and how the same works especially the EAC notably on the success of free movement of workers. This research covered the noted gap

[62] *Ibid.*

through examination of implementation of the right to free movement of workers in the EAC and associated challenges involved.

Maletic (2003) builds his work on positive and negative harmonisation of law theory for the success of free movement of workers in the common market. He argues that common market establishment aims at removing barriers to free movement of workers between partner states. This is intended to merge national markets into a single market which assumes the conditions of a genuine domestic market. However, the author points out that the same is to be achieved when there is common labour and migration laws between partner states. This is to be achieved through effective harmonisation of laws between partner states. This has direct bearing to 'Positive harmonisation and Negative harmonization theory.' Positive harmonisation focuses on legislative intervention in the community in order to make harmonisation of laws between partner states successful. Certain standards believed to be reasonable and appropriate are introduced by the community for effective harmonisation of laws. Example, in the EU the European legislature have been introducing harmonisation norms for the absorption by member states in order to make the common market as effective as possible (Meletic, 2003).

Negative harmonisation relies on the direct approximation of national norms resulting from the deregulatory effects on member states laws. Partner states should remove national barriers to free movement of workers and other factors of production (Meletic, 2003). The establishment of the common market is aiming at removing barriers between member states in order to merge partner states markets into single market. In this case, it brings the desired market as close as possible to those of a genuine domestic market. Partner state members are able to move freely for employment opportunities.

The European legislative institutions for example, introduced harmonisation norms in order to approximate member states laws and policies. The two forms of harmonisation of laws can be used together in order to achieve the expected goal.

Despite the author’s contribution, he does not explore various challenges which might be involved resulting in the application of the said theory especially in developing blocs like the EAC. The study at hand covered this gap by exploring the kind of harmonisation which is appropriate in the African context specifically the EAC.

Kenner (2003) emphasises on the importance of having effective policies at the community level in order to coordinate labour and migration regimes. In the first place he highlights the contribution of the EU Social policy in the harmonisation of labour laws in the EU. In this case, “Member states agreed upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained” (Meletic, 2003). The author enumerates that previously there was no EU common social policy hence harmonisation proved difficult to be achieved. Establishment of the EU social policy involved social participation in all member states. Trade Unions, Employers and Employees were consulted. This is to eliminate national pressure in the partner states. The Social Action Program (SAP) was adopted by way of council resolution in January 1974. This led to the establishment of the EU social policy. The EU social policy involved issues like employment, labour law and collective bargaining between Employers and employees (Meletic, 2003).

The author appreciates the need for coordinating labour law regimes in order to facilitate harmonisation of labour laws between partner states. He testifies that, “variations in industrial relations and labour law systems and corresponding differences in the form and substance of national labour laws represent insuperable obstacles to full harmonisation” (Meletic, 2003). Common labour law regime breaks down labour law differences between partner states. Finally the author recognises the need for harmonisation policy. Effective harmonisation policy started with the identification of a problem common in European countries and the attempt to harmonise law and practice.

He views that, directives have been used as the major harmonisation strategy. In this perspective, the community was able to lay down standards acceptable to all member states. The approach was "to intervene in areas where national regulation either did not exist or was manifestly failing to improve the working environment" (Kenner, 2003). Example, the Collective Redundant Directive[63] provided for consultation of workers where the employer is contemplating collective redundancies. The insolvency directive [64] provided flexibility for choice of compensation payments. The amount awarded must be for period of at least three months before the end of employment contract but cover a period up to 18 months before the end of employment contract. The author's work focused mainly on the EU. This study will explore on the directives which have been given by the EAC Council for effective harmonisation of employment and immigration laws and policies in East Africa and legal challenges involved in the same and the free movement of workers at large.

Trough observation, the author traces the evolution of EU employment law and social policy in the Treaty of Rome. He also explores various national states laws and policies and examines how they conform to community requirement. This method was also useful to the research at hand.

The above author's contribution is relevant in the success of free movement of workers in a common market and the common market at large. Despite this remarkable contribution and appreciation of importance of coordinating labour law regime in the community, the author did not discuss on how partner state labour laws can be effectively coordinated in the presence of partner states sovereignty. This study bridged this gab by discussion on how best partner states labour law regimes can be coordinated through proper negotiation and agreement using various types of directives.

[63] Directive no 98/59.
[64] Directive no 80/987.

(The United Nations Development Programme [UNDP], 2003) using the 'Traditional Trade Theory' justifies for international migration of workers between states. The theory upholds that, "the free movement of workers, like capital between two countries results in efficiency gains for both. International workers migration also helps to optimise resource allocation and maximise economic welfare for the world as whole, just as free movement of capital is supposed to do." (UNDP, 2003). Also, the movement of workers between partner states is justified on the basis of rights and equality.

The author focuses on changing the national labour laws and migration laws in order to enable workers move freely across borders without discrimination practices. The legal system between partner states should also be transparent and objective for effective implementation of free movement of workers and the Common Market at large. However, the author does not elaborate more on issues and challenges involved in changing the national labour laws and migration laws in member states for effective harmonisation of laws. The study at hand will cover the noted gap.

For effective free movement of workers, the author examines the need to separate the normal immigration and permanent workers flow. Also, conditions for entry and stay should be less stringent than normal immigration. For efficiency of the free movement of workers, the strict time frame for acquisition of work permits within partner states is desirable (UNDP, 2003). The author advises on the presence of mechanisms for finding out the status of application, the causes of rejection and the requirements to be met for getting work permits.

Despite this notable contribution, the author did not discuss how and in particular which mechanisms should be used in work permits administration for effective implementation of the right to free movement of workers in the community. This gap was addressed in relation to the EAC and challenges which might be encountered in administration of the same were analysed.

Falker et al (2005 elaborate on the importance of having specific policies covering specific fields at the community and member states level. However, this proves difficult as member states maintain heterogeneous policy legacies and varied preference.[65] This demands flexibility in order to have common regimes hence common policies between member states. The EU approach has been minimum harmonization which sets a common floor of standards to be achieved by every member state and social dialogue between them (Falker, 2005).

The author gives emphasis to social partner participation not only in labour law migration regime and national policy formulation but involvement before a national government decides up on a draft directive in the Council. Nordic countries like Denmark, Finland and Sweden have established procedures enabling social partner participation in the upstream phase. This eliminates national pressures during implementation hence effective harmonisation of laws and desired policies.

The authors give special attention in coordination of national state policies and laws through directives and regulations. This involves binding legal acts like directives, regulations and decisions and non binding acts like recommendations, declaration and conclusions. Normally, the commission proposes a draft directive to the council. This is followed by negotiation at the European level at the council of ministers. Negotiation at the national level is very necessary. Domestic actors like parliament, trade unions, employers and employees should be consulted. Otherwise, "the actors which had been ignored in the upstream phase might obstruct implementation during the downstream phase" (Falker, (2005).

It is evidenced that a collective agreement reached in harmony with the main social partner organizations is a common legal instrument in the area of labour law (Falker, 2005). This facilitates effective harmonisation hence facilitates free movement of workers. Member states are obliged to incorporate provisions of directives into member states legal order. Every Directive has a decline of its

[65] *Ibid.*

implementation by partner states. The six labour law Directives had to be implemented by member states not later than 30 June 1993 (Falker, 2005). Directives are binding upon member states. If partner states fail to fulfill their obligation under treaties the commission fulfils its role as a guardian of treaties by initiating appropriate proceedings at the ECJ (Falker, 2005).

Despite the author's contribution in the law of the common market by discussing the relevance of adopting specific policies involving all relevant in the community, he did not focus on how this can be implemented in developing countries especially in the African context. This study provided vivid discussion on the relevance for adopting common policies in East Africa and resulting challenges in the aspect of implementation of the right to free movement of workers.

The author used face to face interviews with his research team. However, e-mails and phone calls were also used to bridge the physical gab between respondents in different places. It is my sincere hope that these techniques will also be useful in this study.

Condinanzi, Lang, and Nascimbene (2008) devote their time in researching on the need and importance of immigration policy at the community level. Previously before 1970, it was national law not community law which determined migration issues. This led to differentiated treatment and affected standard of leaving and working condition in the community.

The authors give an account on how the EU migration policy was achieved. The Commission utilized its power conferred by the treaty to lay down the beginning of a community immigration policy. The Commission gave member states a duty to communicate and consult their migration policies **(**Condinanzi, Lang, and Nascimbene, 2008). Article 1 demanded Partner states to surrender drafts of laws, administrative acts and international agreements to the Commission.[66] This aimed at achieving a step forward towards harmonisation of labour laws and immigration

[66] *Ibid.*

laws. Effective harmonisation of national laws is achieved through adoption of common rules in all relevant fields or aspects.

The author used observation and description method in which he analysed in detail the various provisions of community laws which conform upon individuals the right to reside and work in member states. He also examined the procedural safeguards which set those fundamentals. These methods are useful in research work and formed part in the methodology used in this study.

The author's contribution in the subject matter by giving link between labour and migration law regimes and other aspects discussed in the implementation of the right to free movement of workers is highly remarkable. However, he didn't give much attention to discussion on how common labour and migration regimes can be attained. This study discussed the same and shared views on various challenges likely to occur in achieving the same.

Andenaes et al (2012) maintain that, differences between national labour law regimes are capable of causing barriers to free movement of workers between partner states. They emphasize that, "differences between the labour law regimes are problematic and that member states are likely to encounter problems to justify aspects of national employment law and practice before courts." (Andenaes et al, 2012). This being the case, common labour regime between partner states is essential in the full implementation of the right to free movement of workers in the community.

The authors also insist on harmonisation as an important feature of the modern legal system. They hold that, harmonisation of the member states laws is a core instrument in the common market. Partner states are obliged to fulfill the same for effective integration. The authors uphold that there are various forms of harmonising instrument. The common ones are by use of regulations and directives. In the EU regulations have direct effect without any legislative transposition measures to have its effect in national laws **(**Andenaes et al, 2012).

The main types of directions are minimum standard directives, maximum standard directives and framework directive. Effective harmonisation affects the form of national legislation and the sources of law in member states.

Despite his contribution, the author does not clarify more on when and how to apply the types of directives mentioned above for effective harmonisation of the desired laws hence efficient free movement of workers. Also, the author could not appreciate that there might be different context between developed and developing countries and relevant approach in each case. This study covered the identified gap in relation to the EAC as one of the community in the developing country.

Mathotra (2012) provides justification for free movement of workers in the bloc for various ways. According to traditional trade theory, free movement of workers like capital result in efficient gains for partner states. It leads to proper allocation of workers as valuable resource and maximize economic development for both countries. Furthermore, there is cross country differences basing on income and quality of life between countries. This being the case, "there is disparity in income levels and employment opportunities between member countries. On the supply side, unemployment and poverty are the main explanations" (Mathotra, 2012). Workers in this case move freely to where there is employment with high income in the bloc. The author also points out the need for having common laws between states and eliminating barriers to free movement of workers between them.

By using the Traditional Trade Theory the author justifies the social and economic benefits to be obtained for effective economic integrations. Despite the authors emphasis on harmonisation of laws between partner states he does not clearly explain on how harmonisation is to be effected and how common labour can be attained between member states and legal challenges involved. The research at hand will cover the noted gap.

Dukes (2014) upholds that differences in employment standards between member states can give raise to restriction to free movement of workers. For effective implementation of free movement of workers, differences in employment standards should be removed. Thus, maintenance of common labour and migration laws regimes result to common employment standards between partner states. The author advocates on upward harmonization of laws which relies on partner states need to draft and agree on common standards to be maintained by all member states. He clarifies that the success in the negative harmonization of national labour and migration regimes depend on legislative responses of member state (Dukes, 2014). The author emphasizes that partner states should respect the treaty and various protocols and fulfill their commitments in good faith.

The author also insists that, it is very important to decide on the harmonisation regime to be applied in legal harmonization. This determines harmonisation dimension or scope and has “a bearing on the desirable content of the rules and standards” to be adopted by member states (Gomez & Ganuza, 2016). Harmonisation regime affects harmonisation process hence determines the scope. A maximum harmonisation regime eliminates all national rules and standards and establishes a new legal system. Thus, entirely displaces the national standards in member states. The minimum harmonisation regime sets a mandatory base line rules and standards to be applied by country members. Hence, member states are allowed to retain or create new rules and standards basing on the minimum parameters. Under minimum harmonization, standards that are lower than the harmonized ones are automatically eliminated and replaced by harmonised standards.

Countries with a higher standard are allowed not only to keep it, but essentially to ignore the harmonised standards. The optimal harmonisation legal regime co-exists side by side with the national existing rules and standards in member states. This being the case, optional legal regime allows full co- existence of national and harmonized rules and standards. What matters is to absorb the regulations and directives in national member states.

The author's contribution in the aspect of adopting harmonisation regime in the common market is highly appreciated. However, the author did not describe on what kind of harmonisation regime is relevant in the African context. This study covered this gap by giving informed discussion on appropriate harmonisation regime for developing countries and examined legal challenges which might occur in using the discussed legal harmonisation regimes.

The following part discusses the research methodology which was used in conducting this study.

1.9 Research Methodology

This part provides the research methodology employed in conducting this study. This study is mainly doctrinal and partly non-doctrinal research. It is mainly doctrinal research because the major part of it involved review of primary and secondary documents from the selected partner states of the EAC (Kenya Tanzania and Uganda). The primary sources reviewed includes legal texts (statutes, treaties and protocols), Secondary sources involved other scholarly documents obtained in hard and soft copies.[67] The study is partly non-doctrinal research because besides documentary review, the researcher conducted face to face and telephone interviews with a few field respondents in Mainland Tanzania only. The idea was to get some practical views to test and corroborate the information obtained from the reviewed documents. Interviews were not conducted in other EAC partner states because of limited time and funds. Since the study was mainly doctrinal, the information obtained from the few respondents from Mainland Tanzania sufficed to corroborate information obtained through documentary review.

1.9.1 Research Approach

This study employed qualitative approach. Qualitative approach enabled the researcher to make a complete and detailed description of the subject matter under

[67] Doctrinal research is sometimes referred to as traditional research. This type of research is not concerned with people but with documents thus differ from non doctrinal also called empirical research which focuses on people, See (Chakraborty, 2015).

research. It afforded the researcher high flexibility in the content analysis of the primary and secondary documents as well as interactions with the few field respondents through interviews. Qualitative approach further involved a descriptive process of the collected information and arrangement of data into themes and concepts to form theoretical explanatory patterns (Straus & Corbin, 1998).

1.9.2 Research Design

The research employed descriptive multiple case study designs. Descriptive multiple case study design involved three cases: Kenya, Tanzania and Uganda in the EAC Common Market. Through this design an in-depth analysis and comparison of the content of the employment laws, social security laws, immigration laws and policies was done in order to acquire deep understanding on how the said laws and policies enhance free movement of workers in the EAC as envisaged under the Protocol on the Establishment of the EAC. Besides content analyses of the primary and secondary sources reviewed in the three cases, interviews were also conducted with a few field respondents in the case of Tanzania with a view to test and corroborate documentary data. Furthermore, descriptive multiple case study design also involved analysis of secondary sources from the EU, CARICOM, ECOWAS, SADC and COMESA in order to explore the best practices that the EAC can learn from other selected economic communities in the implementation of the right to free movement of workers under a common market. Descriptive multiple case study design was chosen because the nature of the study required high flexibility and comparison of the contents of the relevant laws and policies related to free movement of workers in order to explore the phenomena under study through replication strategy (Zach, 2006).

1.9.3 Area of Research

The research was conducted in Tanzania whereby review of primary and secondary Documents (desk review) related to free movement of workers in the selected EAC members states, namely, Kenya and Uganda and Tanzania was done. Desk review also involved review of secondary sources related to free movement of workers from the EU, CARICOM, ECOWAS, SADC and COMESA. Nonetheless, face to face and telephone interviews were also conducted in Dar es Salaam and Arusha cities. Arusha was deliberately selected as it is the Headquarters of the East Africa Community, hence, easier to get information related to free movement of workers and the common market at large. Dar es Salaam is the commercial and political city in Tanzania where partner states embassies are also located. Also, the Ministry of Foreign affairs and East African Community, Ministry of Labour, Employment, Youth and persons with Disability, Home affairs, other related Ministries, institutions and other agents of the free movement of workers have their Head quarters in Dar es Salaam.

1.9.4 Study Population

The population of the study involved [68] various categories of people in the government sectors, government ministries notably the Ministry of Labour, Employment, Youth and Disability in Dar es Salaam, Ministry of Foreign Affairs and EAC, and the Ministry of Education, Science and Technology. Also, Immigration Department Services, The East African Community Headquarter in Arusha, Law Reform Commission of Tanzania, and the Tanzania Social Security Regulatory Authority (SSRA). In addition, EAC embassies officers in Dar es Salaam were consulted. People in these specific areas were selected because they are knowledgeable and stake holders of free movement of workers in East Africa.

1.9.5 Sample size

The research at hand involved various samples from different categories of respondents selected through stratified random sampling and purposive sampling

[68] The term population refers to “an entire group of persons or elements that have at least one thing in common. See Kombo & Tromp, (2006). *Op. cit.* p. 76.

from the area of study as described.[69] A sample size of sixty one (61) respondents (Directors, Commissioners and Principal Officers) was used in all units. The breakdown of this sample is as follows: Tanzania Immigration Service Department (9), The East African Community (13), The Ministry of Labour, Employment, Youth and persons with disability (14), Law Reform Commission of Tanzania (6), The Ministry of Foreign Affairs and EAC (6), The Ministry of Education, Science and technology (5), The Social Security Regulatory Authority (SSRA) (2), The Association of Tanzania Employers (ATE) (2), Kenya Embassy (2) and Uganda Embassy (2). An outline of specific kind of information expected to be obtained from each category of the sample is summarized under **Appendix 1**. The Sixty one (61) respondents were selected basing on stated research questions in order to address effectively the specific objectives of the study. Since as noted above the major part of this study was doctrinal, a sample of sixty one respondents were adequate in providing sufficient information for the purpose of testing and corroborating the data obtained through documentary review.

1.9.6 Sources of Data

This study involved both primary and secondary sources of data. The primary sources of data involved legal texts (i.e. statutes, subsidiary legislations, law reports and policies governing employment, labour, migration and social security in East African countries) and secondary sources of data involved various records of work permits granted and rejected in the selected cases, books, journals articles, government reports and other documents accessed in hard and soft copies from the EAC library at Arusha, Mzumbe university library, University of Dar es salaam library, the Open University of Tanzania, the High Court of Tanzania library in Dar es Salaam Registry and reliable internet search engines. Since as noted above this study was mainly doctrinal and the primary sources of data were legal texts, besides secondary documents, the other secondary source of data was interviews which involved field respondents from the Ministry of Labour, Employment,

[69] A sample is the group of people who take part in the intended research and which should be as representative as possible of the target population.

Youth and persons with Disability, the Ministry of Foreign Affairs EAC, the Ministry of Education, Science and Technology, the East African Community headquarters at Arusha, Immigration Department Services in Dar es Salaam, the Law Reform Commission of Tanzania, and the Tanzania Social Security Authority (SSRA).

1.9.7 Data Collection Methods

The primary method of data collection in this research was documentary review which was supplemented by face to face and telephone interviews. The detailed application of these methods is hereby discussed below:

1.9.7.1 Documentary Review

As noted above, the predominant method of data collection in this study was documentary review. Documentary review involved content analysis of Primary and secondary sources of data. The primary sources reviewed include the EAC Treaty and Protocols and partner states and subsidiary legislations, law reports and policies governing employment, labour, migration and social security in the East African countries.

The secondary sources reviewed involved work permits granted and rejected by the partner states, books, journals articles, various government reports and other documents of secondary nature obtained in hard or soft copies from Mzumbe University library, the EAC library at Arusha, University of Dare s salaam library, the Open University of Tanzania, the High Court of Tanzania library in Dare Es salaam Registry and Internet based libraries like Google books, Hein online and other reliable internet search engines.

1.9.7.2 Interviews

Face to face and telephone interviews were[70] conducted in Mainland Tanzania with various categories of respondents notably the EAC Management, Law Reform Commission of Tanzania and Kenya and Uganda embassies and the Tanzania Immigration Department Services. Directors, Commissioners and Principal Officers were interviewed in order to gain specific knowledge in relation to objectives of the research. Interviews were also conducted with Directors, Commissioners and Principal Officers in various selected Ministries, and SSRA as outlined above. Telephone interviews and e mails were also used for some respondents who could not be readily available for face to face and telephone interviews. The researcher was guided by pre-determined interview guide with open- ended questions.[71] Generally, the interview process involved asking questions through discussion with respondents. Responses of the interviews were recorded through note taking with consent from respondents. Upon completion of the interviews, recorded information was transcribed into word processed documents for analysis.

1.9.8 Instruments of Data Collection

This study involved mainly two instruments of data collection. The said instruments were a check list of reviewed primary and secondary documents and an interview guide which was used in conducting interviews. The instruments of data collection are appended to this thesis as **Appendix 2** and **Appendix 3.**

1.10 Methods of Data Analysis

Collected data was analysed basing on objectives and research questions through qualitative methods. Documentary information was analysed by using content analysis technique. Analysis of interviews information was carefully made after

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[70] Interview is an ancient and mostly applied method in data collection. It is a verbal mechanism of obtaining the desired information in human beings. Due to its interactive nature, interview can "access to what is inside a person's head. See (Cohen, Maioni & Marrison, 2007).

[71] See Appendix 2.

data processing which involved data classification, cording and tabulation.[72] The processed data was organized into categories, themes and patterns. The analysed data was thereby logically interpreted against every research questions and objectives by using inductive reasoning. Statutory provisions were interpreted by using cannons of statutory interpretation, that is, literal rule or plain meaning, the mischief rule or intentional rule and the golden rule. Logical inferences of the analysed data was coupled with descriptive method to examine the related EAC partner states policies, laws and regulations in relation to the EAC common market Protocol and the treaty at large.

1.11 Limitations of the Study

There were various impediments during the course of this study. The prominent constraint was availability of respondents for face to face and telephone interviews. The interviews involved directors, commissioners and principal officers. These respondents were always occupied hence difficult to locate for face to face telephone interviews. In such circumstances, flexibility was attained in which the researcher resorted to telephone interviews. Sixty one (61) respondents out of sixty six (66) respondents which is equivalent to 92.4% were interviewed.

It also proved difficult to access records which are secured in the private domain related to free movement of workers in the EAC headquarter and partner states. However, due to permission to conduct research obtained at Mzumbe University respondents agreed to provide copies of documents requested. Also the researcher made use of the EAC official website and partner states ministries official websites together with official websites of EAC partner states High Commissioners which are all located in Dar es Salaam. Additionally, the researcher utilised the index to the laws of the EAC partner states through official websites. This facilitated examination of member states constitutions, statutes, policies and other desired relevant information. Also, due to scarcity of fund and time limitations, the researcher could not be able to go to other partner states apart from Tanzania for

[72] Data processing is considered as part of data analysis. See (Kothari, 2002).

face to face and telephone interviews. In order to bridge the stated gap, documentary review was dominantly used. Furthermore, the East African partner states embassies respondents notably Uganda and Kenya were consulted.

1.12 Conclusion

This chapter has provided the general introduction and background information of the study. Various components were covered involving the statement of the problem, objectives of the study, research questions and literature review. The literature review has shown that there is scanty of literature specifically dealing with the aspect of free movement of workers in the East African Community and the EAC common market at large.

The significance and justification for the study has also been discussed. It has been pointed out that literature suggest that the employment, immigration and social security laws and policies of the EAC common market partner states are unfavorable for effective implementation of the right to free movement of workers in the EAC common market. This necessitated the need to examine the employment, immigration and social security laws and policies to determine their effectiveness to support the right to free movement of workers in the EAC common market. The methodology used in carrying out this study included documentary review and face to face and telephone interviews. The next chapter covers the conceptual and theoretical framework of free movement of workers in the EAC common market.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK OF THE STUDY

2.1 Introduction

This chapter presents the conceptual and theoretical framework of the study which includes analysis of key themes and concepts that constitute this study. The important themes and concepts informing this study include free movement of workers, the concept of workers, the concept of common market, the concept of economic integration; partner states; international law, international treaties; protocol, state sovereignty, ratification of international treaties and the concept of implementation of the right to free movement of worker in the common market. The theories which are relevant to this study include the economic integration theory, comparative advantage theory and labour theory of value and economies of scale. The relevant principles which are examined in this chapter are World Trade Organisation (WTO) common market principles and the EAC common market principles.

In an attempt to examine the theories related to the study and analyse the themes and concepts constituting this study an attempt is made in this chapter to show basic propositions of the said theories, the relationships between the key themes concepts, and the manner such concepts and themes are conceptually used in this study. This chapter is organised into five sections: the introduction, analysis of key themes and concepts, principles underpinning the study, theories related to the study and the conclusion.

2.2 Key Themes and Concepts in this Study

Examination of the implementation of free movement of workers in a common market in economic integration calls for clarification of various relevant themes and concepts. The respective themes and concepts are:

2.2.1 The Concept of Economic Integration

Economic Integration is not a new phenomenon in the today's aspirations for economic development and decent living. A good number of such integrations evolved not only in developing countries but also in developed countries as well.[73]This aspect was addressed in chapter one. In a normal language, integration signifies bringing together to form a complete unit. There is no clear – cut definition of the term 'Economic Integration' in the economic context. Various authors have endeavored to define the same differently.

Economic integration can be defined as a state of affairs and as a process. Viewed as a process the term connotes all initiatives aiming at abolishing discrimination of various economic units merged from various sovereign states. When observed as a state of affairs, the term implies joining distinct national economies hence non existence of various types of discrimination between voluntarily joined national economies (Balasa, 2013). This implies that economies of two or more countries are linked together through specific agreed form of integration hence eliminating economic barriers or restrictions between them.

[73] Example, one of the most prominent economic integration in Africa is the East African Community (EAC). Also in Eastern Africa there is the Intergovernmental Authority on Development (IGAD) comprising a bloc involving independent states from the horn of Africa Nile valley and the African great lakes. In West African there is Economic Community of West African States (ECOWAS), West African/Economic and Monetary Union (UEMOA), The Mano River Union (MRU) and the Community of Sahel – Saharan States (CEN-SAD). Also in Central Africa there is Economic Community of Central African States (ECCAS), The Central African Economic Community (CEMAC) and the Economic Community of the Great Lakes Region (CEPGL). While in Southern Africa Prominent economic integrations include the Southern African Development Community (SADC), the Southern African Customs Union (SACU), the Common Market for Eastern and Southern Africa (COMESA) and the Indian Ocean Commission (IOC), Also, in North Africa there is the Arab Maghreb Union (AMU). Outside Africa, Prominent Economic Integration involve the European Union (EU), the Caribbean Community (CARICOM), the Association of South East Asian Nations (ASEAN) and the North American Free Trade Agreement (NAFTA) only to mention a few.

In international institutional law, regional economic integration is normally achieved through Regional Trade Agreements (RTA's) by conclusion of treaties and protocols which binds partner states as highlighted in chapter one. Integration varies significantly depending on the degree or depth in which it is aimed at, yet still, the sole purpose is to eliminate or reduce barriers between member states (Kimbugwe, 2012). There are various forms of economic integrations as discussed in this item.

2.2.1.1 Stages of Economic Integration

Regional economic integration is always achieved through Regional Trade Agreements (RTA). Structures of RTAs take various dimensions. However, they have the common intention of reducing or eliminating barriers to trade between partner states. This creates a favorable environment for economic growth where factors of production move freely in the community. Though economic integration take a variety of forms, it is principally agreed that," all such arrangements for international economic integration rest on the conclusion of agreements among the member states that are intended to have a lasting character and which limit the unilateral use of those instruments of economic policy that are harmonised" (Robson, 2002). The basic forms of economic integrations are free trade area, customs union, common market, monetary union and political federation. Economists rank RTAs basing on the depth of integration intended as agreed by partner states. The most remarkable forms are:

Free Trade Area

This is the first basic form in economic integration. At this stage, "participating states are required to eliminate trade barriers such as import duties and other quantitative restrictions, but could maintain different external tariffs on goods imported from non members." (Mangachi, 2002). As a matter of emphasis, countries in FTA mutually agree to eradicate tariffs on trade between them but retain autonomy in trade policy with third party countries. In this case, third party countries mean non members hence automatically takes reference to the rest of the world in trade matters. The good example of FTA is the North American Free Trade Agreement (NAFTA).

A great setback in FTA agreement is the danger of trade deflection. This occurs when goods are imported through a member country with the lowest external tariffs hence over flooding in re the respective bloc (Kimbungwe, 2012). Generally, trade deflection can be managed through establishment of rules of origin; however, the best way is forming a customs union between members. Basing on the previous relationship existed before in East Africa, the EAC Treaty gives no mention of the FTA stage.[74] Hence, it was easy for member states to assume the customs union stage for effective development.

The Customs Union

The Customs Union (CU) is the crucial form in economic integration. Article 75[75] foresees the establishment of a customs union in East Africa to be contained in a Protocol. This led to an enactment of protocol on the establishment of the EAC customs union.[76] The CU as is characterised by tariff free trade between partner states, common external tariff and maintenance of common tariff policy in the community.

Principally, a CU is expected to be the next step when partner states have established an FTA. Of much importance is the fact that the EAC partner states have enshrined "asymmetry" as part of its operational principle as stated above. This principle means that partner states can address variances in the implementation of measures to achieve a common objective.[77] There are different opinions on the application of asymmetry principle by founders of the EAC as, "Tanzania and Uganda tend to support the principle of asymmetry, hoping that it

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[74] Treaty for the Establishment of the East African Community. Article 2 (2) *Op. cit*. The economic integration starts with a customs union and followed by other stages.

[75] *Ibid.* Article 75.

[76] Protocol on the Establishment of the East African Community Customs Union, 2005.

[77] *Ibid.*

would yield direct advantages. Kenya sees the application of the principle of asymmetry as being to its disadvantage" (Mangachi, 2002).

Objectives of the CU in the EAC involves among others:[78] to liberalise intra-regional trade in goods, promotion of efficient production in the community and promotion of economic development and industrial diversification in the community. Having adopted the EAC customs union in 2005, partner states aimed at promoting development through trade. This is expected to stimulate production and investments between partner states hence transform the socioeconomic status of the EAC countries (Mangachi, 2002). This stage called for an advanced stage of a common market.

The Common Market

The third form of economic integration is a common market. At this stage, there is removal of restrictions on factors of production. In this view point, there is total elimination of internal tariff and common external tariff together with free movement of factors of production like labour, capital and enterprise.[79]

The term common market signifies "the partner states markets integrated into a single market in which there is free movement of capital, labour, goods and services."[80] Thus, a common market in economic integration tends to link together economies of two or more independent governments by way of removing economic barriers between them (Kimbungwe, 2012). This allows free movement of not only goods but also people and capital between partner states as a result of coordinating their trade, fiscal and monetary policies and programs.

In this study, the concept common market is used to refer to partner states markets integrated into a single market where there is free movement of factors of production (labour and capital) and products (goods and services) between them for their mutual development.

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[78] *Ibid*
[79] Protocol on the Establishment of the East African Community Common Market, *Op. Cit.*
[80] Treaty for the Establishment of the East African Community. Article 1, *Op. cit*.

The concept of a common market in economic integration can be properly understood using the vivid example of the EAC common market. Article 76 (1) presupposes that in a common market there is free movement of labour, goods, services, capital and the right of establishment and residence.[81] This led to an enactment of Protocol on the establishment of the East African Community Common Market[82] with the same objective of free movement of factors of production within the community. This market was established in 2010 and aimed for its full implementation by December 2015. These freedoms and rights compose the common market in economic integration. A common market stage development leads to a monetary union.

The Monetary Union

The next evolutionary stage after a common market in economic integration is the creation of the Momentary Union (MU). This vision is well enshrined under article 5[83] in order to intensify and monitor the industrial, commercial infrastructure, cultural, social and political relations. The establishment of a MU requires the adoption of a single currency. This form adds to it all features of a common market and a customs union and advanced stage in economic integration.

Apart from member states adopting a single currency, they also form a central bank and maintain common monetary policy in the bloc (Robson, 2002). In this perspective, always a momentary union is established together within a common market and a customs union. Thus, "convention wisdom suggests that momentary union should follow and not precede the institution of arrangements for market integration (Finlay, Berganas & Tessler, 2011). The common currency was expected to be in place by 2012 in East Africa. It is beyond the scope of this research to account as to why this stage has not yet being attained. However,

[81] Treaty for the Establishment of the East African Community. Article 76 (1), *Op. cit*.
[82] Protocol on the Establishment of the East African Community Common Market. Article 2, *Op. cit*.
[83] Treaty for the Establishment of the East African Community. *Op.cit.*

success in this stage calls for a political cooperation between partner states as the final stage called political federation.

Political Federation.

Establishment of a Political Federation (PF) is believed to be most advanced stage and the final one in economic integration.[84] It is also evidenced that the EAC treaty explicitly emphasizes the PF as the ultimate goal underpinning regional integration efforts (Drummond, Wajid & Williams, 2015). This relies on the African model of economic integration in which political cooperation is considered to precede economic cooperation. The European model advocates that good political cooperation is achieved through increased regional trade in economic integration (Schulz & De Lombaerde, 2013).

PF embraces all features of a customs union, a common market and a monetary union. Logically, all the discussed forms of economic integration must exist in order for PF to exist and effectively survive in economic integration. The PF was expected to be in force in the EAC by the year 2015 (Finlay, Berganas & Tessler, 2011**).** Apart from the presence of all features of other forms of economic integration disused above, PF unifies monetary, fiscal, social and political policies under one supranational authority. However, partner states may decide to begin with any favorable stage depending on their previous relationship hence skip PTA and FTA stages.

Since the common market in which the right to free movement of workers forms the basis of this study, various components of a common market are also briefly discussed below.

[84] Treaty for Establishment of the East African Community. Article 5 (2), *Op. cit.*

2.2.2.1 Free Movement of Labour

Free movement of workers is guaranteed under article 10(1)[85] for citizens of the East African partner states. However, the term "worker" and "labour" can be misinterpreted. The term "labour" is defined to include a worker and a self employed person while the term "worker" signifies a person who performs services for and under the direction of another person in return for remuneration"[86] In this perspective, "the partner states shall ensure non discrimination of the workers of the other partner states based in their nationalities, in relation to employment, remuneration and other conditions of work and employment."[87] However, the focus of this study is on free movement of workers. The concept of a worker is discussed under part 2.2.3.

Article 10 of the respective protocol as sited above regulates all categories of workers in the community. Nevertheless, in order to provide for the conduct and regulation of cross border legal profession at large, the East African Community cross border legal practice Bill[88] was enacted. This bill puts article 126 and article 76 of the treaty for the establishment of the East African community[89] and article 10 and 11 of the protocol on the establishment of the East African community common market[90] into operations. Under this arrangement, an advocate eligible to practice in one partner state is automatically eligible to practice in other partner states.[91]

[85] Protocol on the Establishment of the East African Community Common Market. *Op. cit*. See also Article 7 (1) in which free movement of persons is guaranteed in the EAC.
[86] *Ibid.* Article 1. The concept of a worker is well discussed under part 2.2.3.
[87] *Ibid.* Article 10 (2).
[88] The East African Community Cross Border Legal Practice Bill, 2013.
[89] Treaty for the Establishment of the East African Community. *Op. cit*.
[90] Protocol on the Establishment of the East African Community Common Market, *Op. cit.* Article 10 focuses on free movement of workers while article 11 gears on harmonization and mutual recognition of academic and professional qualifications.
[91] The East African Community Cross Border Legal Practice Bill. *Loc. cit*.

2.2.2.2 Free Movement of Persons

Apart from free movement of workers which is the basic of this research, in the common market there is also free movement of persons as connected to it. Article 104 obliges partner states to take measure in order to achieve the free movement of persons within the community.[92] This is also foreseen by article 2 of the EAC common market[93] and guaranteed under article 7 (1) of the EAC common market protocol.[94] Free movement of persons calls upon partner states to make sure that there is no discrimination of citizens basing on nationality within the community.[95]

However, free movement of persons is subject to limitation imposed by other partner states on ground of public policy, public security and public health.[96] Partner states are called to effect reciprocal opening of border posts and open the posts and Mann them for twenty four hours.

In order to achieve the desired goal, the protocol directs partner states to establish a common standard system of providing national identification documents in order to identify and distinct citizens of other partner states effectively within the community.[97] Citizens of the community who aspire to travel within the community should use the identified documents, this in involve partner states who might have agreed to use machine – readable and electronic national identity cards –as travel documents.[98] The implementation of article 7 stipulated above is in accordance with the East African Community Common Market (Free Movement of Person) Regulations[99] issued for this purpose. As per regulation 2, "the purpose of the regulation is " to implement the provisions of article 7 of the protocol and to ensure that there is uniformity among the partner states in the implementation of

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[92] The East African Community Cross Border Legal Practice Bill, Article 104 (1). *Op. cit*.
[93] *Ibid*.
[94] Treaty for the Establishment of the East African Community. Article 104 (1). *Op. cit*.
[95] Treaty for the Establishment of the East African Community Article 7(2). *Op. cit.*
[96] Article 7 (5). *Ibid*. However, partner states imposing the same are bound to notify other partner state
accordingly.
[97] *Ibid.* Article 8.
[98] *Ibid.* Article 9.
[99] The East African Community Common Market (Free Movement of Persons) regulation), *Op.cit*.

the article and that to the extent possible , the process is transparent, accountable, fair, predictable and consistent with the provisions of the protocol."[100]

Free movement of persons involving entry, stay and exit within the community is done at identified designated points following national laws of the partner states and adherence to established immigration algorithm.[101] This means that, the respective person should present to the immigration authority a valid common standard and travel document or national identify card as described above and all the information required for entry and exit at particular member state designated points. Other procedures are as provided for under the respective stated regulations.

The concept of free movement of persons is relevant in understanding the concept of a common market but lies out of the scope of this study.

2.2.2.3 Right of Establishment and Residence

Besides the free movement of workers being connected to the free movement of persons, it is also linked to the right of establishment and residence. These rights are recognised from the inception of the common marked.[102] It was reinforced when partner states agreed to conclude a protocol on the free movement of labour, person, services and the right of establishment and residence as determined by the Council.[103]

The right of establishment is guaranteed under article 13 involving nationals of partner states within the community while ensuring non discrimination on the basis of nationalities.[104] This right entitles nationals of member countries to:[105]

(a) Take up and pursue economic activities as a self employed person , and

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[100] *Ibid.*
[101] Regulation 5. *Ibid*.
[102] Treaty for the Establishment of the East African Community. Article 76. *Op. cit*.
[103] *Ibid*. Article 104.
[104] *Ibid*.
[105] *Ibid*. Article 13 (3) (a) and (b).

(b) Set up and manage economic undertaking, in the territory of another partner state.

This also confers the right for a self – employed person in any partner state to join social security scheme available in the host country besting on national laws of the state concerned. This right extends to a spouse, child dependent of a worker.[106] In this case, member countries are supposed to mutually appreciate experience, requirement and respective licenses and certificates conferred to entities like companies or firm of member states. In order to make the right of establishment effective, partner states are supposed to remove administrative procedures and practices resulting from national laws or from agreements which form obstacles to the right of establishment and ensure that workers of other citizens employed in the territory of another state are allowed to remain in the respective territory for economic activities as self employed persons.[107] The Common Market (Right of Establishment) Regulations[108] ensure the implementation of article 13 for smooth implementation of right of establishment. Those regulations involve the categories of citizens of any partner state who actually move to, stay in and exit another partner state.[109]

The East African Community Common Market (Right of Residence) Regulations [110] governs the implementation of right of residence as guaranteed under article 14 of the protocol as outlined. According to its scope of application , only the citizens of a partner state who mainly move reside and exit another partner state as workers , self employed person and spouses , children and dependents of the worker and self employed persons .[111] These regulations also govern procedures for application for residence permit. A worker or self employed person aspiring to reside in the territory of a host state is required to apply to a competent authority for residence permit. Though the concept of right of establishment and residence

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106 *Ibid.* Article 13 (4).
107 Treaty for the Establishment of the East African Community. Article 13 (11). *Op. cit*.
108 The East African Community Common Market (Right of Establishment) Regulation, Annex III.
109 *Ibid*. Regulation 4.
110 The East African Community Common Market (Right of Residence Regulations), Annex 1V.
111 *Ibid*.

forms the basis in understanding a common market, this concept is out of the scope of this study.

2.2.2.4 Free Movement of Services.

Article 76 enriches the free movement of services as part of the freedom offered in the common market since its inception.[112] However, partner states are required to adopt specific measures in order to enhance within the community to boost social partnership in the bloc.[113] This was reaffirmed by the establishment of the protocol [114] where the free movement of service was concluded. The free movement of service is guaranteed under article 16 for services supplied by nationals of member states who are nationals within the community.[115] The term services as related to the common market involves service in any sector apart from services offered by government bodies provided for remuneration not provided in relation to free movement of goods, capital and persons.[116]

Main stake holders of the free movement of services are local government and local authority and non governmental organizations in every partner state. Member states are bound to take extra efforts and commitments in order to eliminate restriction in the free movement of services in East Africa through directives on methods to be adopted to achieve the same.[117] The concept of free movement of services is very relevant in understanding a common market, however it does not form part of this study.

2.2.2.5 Free Movement of Capital

Free movement of capital is another freedom offered under article 76 of the EAC treaty. Partner states are obliged to allow the free movement of capital within the community by developing, harmonising and coordinating their financial systems.

[112] Treaty for the Establishment of the East African Community, *Op. cit*.
[113] Treaty for the Establishment of the East African Community, Article 104 (1). *Op. cit*.
[114] Protocol on the Establishment of the East African Community Common Market, *Op. cit*.
[115] *Ibid*.
[116] *Ibid.* Article 7.
[117] *Ibid.* Article 23.

Partner stats are required to ensure unrestricted flow of capital within the community by removal of controls on transfer of capital among partner states, allow citizens and persons resident in a partner state to acquire stocks, shares and other securities and encourage cross-border trade in financial instruments.[118] Free movement of capital forms the basis in understanding a common market, however it falls out of the scope of this study.

Article 24 of the protocol requires partner states to remove restrictions between member states on free movement of capital and not put any new restrictions pertaining free movement of capital.[119] Annex VI outlines schedules on the removal of restrictions on the free movement of capital in the East African community.[120] Though the concept of free movement of capital is important in understanding a common market it is out of the scope of this study.

2.2.2.6 The Free Movement of Goods

The free movement of goods accomplishes the EAC common market together with other freedoms and rights so far explained in this part.[121] The free movement of goods between partner states is governed by the customs law of the EAC community which is outlined in article 39 of the protocol on the establishment of the East African community customs union.[122] Despite the fact that free movement of goods is necessary in understanding the concept of a common market it lies out of the scope of this study. Another concept which is relevant to the study is the concept of a worker.

As discussed in part 2.2.2.1 above, it is important to have a clear distinction between the term labour and worker for proper understanding of the study at hand.

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[118] Protocol on the Establishment of the East African Community Common Market. Article 86. *Op. cit* .
[119] Protocol on the Establishment of the East African Community Common Market. *Ibid.*
[120] The East African community Common Market, Schedules on the removal of restrictions on the free
movements of Capital Annex VI.
[121] Treaty for the Establishment of the East African Community. *Op. cit*.
[122] Protocol on the Establishment of the East African Community Customs Union. *Op. cit*.

2.2.3 The Concept of a Worker

In order to grasp properly the concept of free movement of workers in a common market, the term “worker” as related to the term “labour” deserve clear elaboration. Labour involves “a worker and a self employed person.”[123] The focus of the study is on workers and not labours as generally used in this context. However, where necessary, the term labour will be used in its context as used in a common market. This captures our attention on the term “worker,” which forms the basis in this study. The term “worker” is not defined by the EAC treaty, however, it is defined under the EAC common market protocol[124] as part of the treaty to mean “a person who performs services for and under the direction of another person in return for remuneration.”

Critical observation suggests that the above definition is not self sufficient as it is vulnerable to curtail other people’s rights in a common market. Literature suggests that the respective term should be interpreted widely in order to allow as many persons as possible to enjoy the freedom of free movement of workers in the common market (Davies, 2003). In another view point, a worker is defined to mean “any person employed by an employer including trainee and apprentices.” (Blanspain, 2008). In this context, an employer can be any natural or legal person who posses employment relationship with the respective worker hence having responsibility for the undertaking or establishment (Blanspain, 2008).

It is very unfortunate that there is no specific decided case from the East African Court of Justice which defines the term “worker.” Taking experience from the EU, this concept is neither defined in respective treaties nor any secondary legislation. Thus, development of the same was attained trough ECJ case law (Berry,

[123] Protocol on the Establishment of the East African Community Common Market, Article 1. *Op. cit*. The same Article defines a self employed person to mean “ a person engaged in an economic activity not under any contract of employment or supervision and who earns a living through this activity.”

[124] Protocol on the Establishment of the East African Community Common Market. Article 1. *Ibid*. It should be born in mind that the term “labour” is defined to mean a worker and a self employed person.

Homewood & Bogusz, 2015). In the case of **Hoekstra**[125] the Court observed that, "after all, if the definition of the concept of worker was a matter of national law, each member state could decide or modify, through its national law, which person or categories of persons would be protected under the treaty. Such attempt could severely undermine the effect and objectives of the treaty since national laws would be able to exclude certain categories of persons from the benefit of the treaty without any control by the EU institutions.

The concept of a worker is properly understood where there is employer and employee relationship. Generally the term worker refers to an employed person. In the case of **Blum v. Land Wurttenberg,**[126] the Court sought an importance of signifying salient features which should exit in employment relationship. These elements are:

(a) The person must perform services of some economic value.
(b) The performance of such services must be for and under the directive of another person
(c) In return, the person concerned must receive remuneration.

In the case of **Trojani,**[127] the term remuneration was widened to include benefit in kind performed within the community. This position was justified only upon the respective work being genuine and effective. Such development was attained after the celebrated case of **Nini-Orasche**[128] in which the ECJ held that "a person must

[125] *Hoekstra v. Bestuur der Bedrijfsvereniging* [1964] ECR 177. The Court further provided that "the relevant Treaty Article would be deprived of all effect if the meaning of the concept of worker could be fixed or modified by national law. See also Toader, C. and Florea, A., (2011), "Free movement of workers and the European Citizenship "*Online Journal of Free movement of workers within the European Union*, December 2011, No 3, ISSN 1831-922x, Luxembourg: Publications office of the European Union, 2011. Retrieved 28, March, 2016 from the World Wide Web: www.europa.
Eu/social/blobsenlet?docld728& langld =en EUl14191_fmwmag3_17122.pdf.

[126] *Blum v. Land Wurttenberg* [1986] ECR 2121. Payment is defined to mean, money in kind, made or owing to an employee arising from the employment of that employee. In furtherance of the concept of remuneration, in the case of *R.H Kempf v.Staatssecretaris* [1986] ECR 1741 the court maintained that limited income does not prevent a person from being considered a worker.

[127] *Michael Trojan v. Centre public daide sociale de Bruxelles* [2004] ECR -75-73.

[128] *Franca Ninni-Orasche v. Bundersminister fur Wissenchaft,* [2003] ECR 13 18A.

pursue an activity of economic value which is effective and genuine, including activity on such a small scale as to be regarded as purely marginal and accessory." In order to safeguard free movement of workers in the common market, in the case of **Levin**[129] the Court observed with emphasis that the concept of 'workers' and activity which a person performs should not be given restriction in interpretation hence wide coverage. This allows as much coverage for free movement of workers in the common market as possible. In this study, the term worker is used to denote an employed person in consideration for remuneration.

With the above clear concept of who is a worker, the concept of free movement of workers in a common market can be easily perceived. EAC common market Protocol guarantees free movement of workers in the EAC by stating that, "the partner states hereby guarantee the free movement of workers, who are citizens of the other partner states, within their territories."[130] Free movement of workers in a common market implies that partner states workers are able to accept offers of employment actually made in any partner state hence move freely within the Community for employment purposes.[131]

Workers are also entitled to enjoy the rights and benefits to social security in the same way as provided to workers of the host state.[132] Also, workers are entitled to enjoy the freedom of association and collective bargaining in order to improve their working conditions according to governing laws of the host state. In addition, workers are also conferred opportunity to be accompanied by a spouse and children in the host state.[133] It is worth to emphasize that when there is implementation of a common market in the community, workers are treated in the

[129] *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035. Essential elements exist, issues involving short duration of the employment, limited working hours or even law productivity are not relevant in construing the concept of a worker. Article defines the term Economic activity to mean a legitimate income generating activity.
[130] Protocol on the Establishment of the East African Community Common Market. Article 10 (1), *Op. cit*.
[131] *Ibid.* Article 10 (3), (a), (b) and (c).
[132] *Ibid*, Article 10 ((5) (f).
[133] *Ibid*. Article 10 (3) (e) and Article 10 (5) (a).

same way in the host state as the nationals, thus eliminating any form of direct or indirect discrimination with respect to nationality (Taliashvili, 2008). In order to implement effective free movement of workers in a common market, there are specific aspects to be looked at. These aspects are discussed below.

2.2.4 Aspects of Free Movement of Workers in the Common Market

There are three main aspects which require full implementation by partner states in order to realize the target for full implementation of free movement of workers in the community (Worley, 1994). These aspects are:

2.2.4.1 Removal of Immigration Restrictions to Community Citizens

The first aspect is the removal by each member states all immigration restrictions on entry for partner states workers in the community (Worley, 1994). Community citizens should be given the right to enter freely without any restriction, to seek for employment without pre arrangement of the same.[134] This aspect aims at allowing partner states workers to have free access to any partner state to access employment opportunities. To ensure that this crucial right is made realistic, there are other fundamental rights to be granted to migrant workers as explained below. Also, workers should be provided sufficient initial right of residence in the host state. This right should be available even if in such endeavor, employment is not secured.[135] The resident permit should be guaranteed once a worker has started working at any partner state. Also, the worker's family members should be given the same right for unrestricted entry and permanent residence.

2.2.4.2 Non Discrimination to Community Workers

The second aspect is ensuring non discrimination in the treatment of community citizens while residing at any member state. This is related to nationality,

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[134] Protocol on the Establishment of the East African Community Common Market. *Op.cit*
[135] *Loc. cit.*

conditions of employment, housing and other related matters.[136] This aspect is considered the second main aspect of free movement of workers. The principle ensures that member states workers receive equal treatment whenever they are within the community in relation to employment, housing and other related matters.[137] Basing on this requirement, partner states laws and regulations regulating employment opportunities which are differently applicable to the states own nations are amended. In this case, provisions and administrative decisions which are discriminatory are treated null and void. In the same way, partner states workers are required to have equal rights to join trade unions on the same tune with national workers as discussed above. Social security protection is another aspect which should be considered during implementation of free movement of workers in a common market.

2.2.4.3 Protection of Social Security Rights

The third and last aspect of free movement of workers is protection of social security rights to workers in the community while residing in another member state. This is to the effect that a worker should not be penalised by social security authorities at any partner state as a result of exercising his right to free movement of workers between one partner state to another within the community (Worley, 1994). Workers should be able to shift his social security benefits to any member state such that there is transferability or exportability of social security credits within the community.

Social security protection is the fundamental rights embedded in employment rights recognised during implementation of the right to free movement of workers n the common market.[138] The Universal Declaration of Human Rights recognizes social security as a human right. The Declaration provides that, "everyone, as a

[136] Protocol on the Establishment of the East African Community Common Market. *Op.cit*
[137] *Ibid.*
[138] Other labour rights include right to work, right to just and favorable conditions of work, right to equal
pay for equal work, right to freedom of association, right to collective bargaining and others.

member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organizations and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[139]

It should be in mind that during the course of free movement of workers within the community, workers are subjected to different and unrelated social security policies and laws. This necessitated ILO to enact the Convention No. 157[140] on maintenance of social security rights when moving from one partner state to another. This guarantees recognition and maintenance of social security rights in the course of acquisition of the same as a result of free movement in the community. With this context, social security in the course of acquisition assures maintenance of social security benefits while a worker crosses from one partner state to another and avoids the danger of losing social security rights as a result of free movement. This ensures preservation and totalisation of social security rights for migrant workers (Kaltenborn & Leinderer, 2013).

Adherence to the above social security protection is also guaranteed under the Equality of Treatment (Social Security) Convention,[141] which provides for equality of treatment in social security provision to nationals and non nationals in the community. Article 2 of the Convention covers all the nine benefits stipulated under the ILO Convention No.102 (Social Security (Minimum Standards) Convention discussed above. These benefits are maternity benefit, medical care, sickness benefit, invalidity benefit, old age benefit, unemployment benefit and family benefit.[142] Article 3 of the Convention, ensures that every member "grant

[139] United Nations, The Universal Declaration of Human Rights, 1948. Article 2.
[140] United Nations, ILO Convention No.157, Maintenance of Social Security Rights, 1982. Article 2 of the Convention outlines distinct social security benefits involved as medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivors benefit, employment injury benefit,
Unemployment benefit and family benefit.
[141] United Nations, ILO Convention No.157, Equality of Treatment (Social Security), 1962.
[142] United Nations, ILO Convention No.157, Equality of Treatment (Social Security). Article 2. *Op. cit*.

within its territory to the nationals of any other member state for which the Convention is in force equality of treatment under its legislations with its nationals both as regards coverage and as regards the right to benefits in respect of every branch of social security for which it has accepted the obligations of the Convention".[143] This is very relevant for safeguarding social security rights in course of free movement of workers in the common market. There are also other international instruments recognizing the right to social security within sovereign states and at the common market level as well.

The International Covenant on Economic, Social and Cultural Rights[144] recognises the right of every one to social security including social insurance. In addition, the Convention on the Elimination of All Forms of Racial Discrimination Against Women[145] calls upon partner states to eliminate discrimination against women in the field of employment in order to ensure equality of men and women on the right to social security in cases of retirement, unemployment, sickness, invalidity and other incapacity related to work. Pertaining children, the Convention on the Right of Child[146] recognizes social security rights including social insurance for better children protection.

With above international declarations on social security, ILO as the UN agent in charge of implementation of right to social security comes at the centre of the play in safeguarding workers rights including social security coverage during the course of free movement within the community. Endlessly, ILO calls upon states around the world to provide basic social security protection to workers in the common market. In connection to its Charter, the organization has adopted various

[143] *Ibid.* Article 5, clarifies on avoidance of conflict of laws in which the applicable law should be the national legislation of the host state. This calls for coordination of social security policies, laws and regulations of partner States in the Common Market.
[144] United Nations, International Covenant on Economic, Social and Cultural Rights, December 1966, United Nations Treaty Series, Vol. 1155, p. 993, p. 3. Article 9.
[145] United Nations, Convention on the Elimination of All Forms of Racial Discrimination Against Women, December 1979, United Nations Treaty Series, Vol. 1249, p. 13. Article 11.
[146] United Nations, Convention on the Rights of the Child, November 1989, United Nations Treaty Series, Vol. 1577, p. 3. Article 26.

Conventions and Recommendations concerning various issues involving social security in which all members are expected to abide to (Rwegoshora, 2016). With this spirit, ILO sets minimum standards with technical assistance and expertise to enable countries to reach desired objectives. This led to an adoption of the Social Security (Minimum Standards) Convention[147] which provides guidance on basic social security matters. This Convention outlines specific minimum benefits and contingencies as a guide in social security provision and protection. In order to give effect to ILO Convention No. 102, other specific and detailed Conventions were enacted.[148] This provides clear guidance on how to administer social security in various countries basing on basic minimum benefits and contingencies.

Despite the fact that article 10(1)[149] guarantees the free movement of workers, who are citizen of the other partner states, there are various limitations which can be legally invoked by partner states. One of the justified limitations is basing on the scope of application of free movement of workers. Article 10(10) states that, "the provisions of this Article shall not apply to employment in the public service unless the national laws and regulations of a host partner state so permit."[150] The literal meaning of the wording of this provision is clear. However, article 1 of the protocol defines public service to mean "government ministries, government departments and government agencies providing services to the public in partner state."[151] In addition, free movement of workers can be legally justified on the

[147] United Nations, International Labour Organization Convention No.102, Social Security (Minimum Standards) Convention, 1952, adopted during the 35session on 4th June 1952. The minimum standard benefits namely, medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors benefit.

[148] This involves ILO Convention No. 28 (Employment injury Benefit convention 1964), Convention No.28 (Invalidity, Old Age and Survivors' Convention 1967), and Convention No.168 (Employment Promotion And Protection against Unemployment Convention 1988) and other Conventions.

[149] Protocol on the Establishment of the East African Community Common Market. *Op.cit*.

[150] *Ibid*.

[151] *Ibid.*

basis of public policy, public security or public health. Article 10 (ii)[152] of the protocol states that free "movement of workers shall be subject to limitations imposed by the host partner state on ground of public policy, public security or public health." However, this limitation is justified only when there is notification to other partner states on such imposition.[153] It is very unfortunate that of the three terms, only public security is defined by the Protocol to mean, "the function of governments which ensures the protection of citizens and other nationals."[154] This definition is too general hence the need to find other sources and revisits other aspects which are stipulated to justify limitation not only in free movement of workers but also other stipulated freedoms and rights offered by the common market.

The above respective limitations are not a new invention of the EAC. Even in the EU, article 45 (4)[155] of the respective treaty justifies limitation on free movement of workers basing on public policy, public security and public health. Literature maintains that the concept of public security and public policy are more less the same such that public security may be invoked in place of public security. Public policy concept is 'vague' as a good number of activities may be found to threaten public policy. Terrorism and other criminal activities are found to justify limitation on grounds of public policy (Kaczorowska, 2013). Basing on the above reasoning, "member states are allowed to determine the scope or either derogating unilaterally."[156] In the EU, the scope is only determined by the EU law and the European Court of Justice (ECJ). Article 27 of the EU directive allows member states to restrict free movement on grounds of public policy, public security or public health. However, such limitations should not be imposed to serve for

[152] *Ibid*. These limitation are also justified in other freedoms and rights like free movement of persons, see (Article 7(5) and 7 (6), right of establishment (Article 13(8) 13(9) and right of residence (Article 14(4) and 14(5).
[153] Protocol on the Establishment of the East African Community Common Market. *Op.cit.*
[154] Article 1. *Ibid* .
[155] Consolidated Version of the Treaty on the Functioning of the European Union, October, and October 2012.
[156] *Ibid.*

economic ends.[157] In the case of public health, article 29(1) provides that, "the only diseases justifying measures restricting freedom of movement shall be diseases with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provision applying to nationals of the host member state.[158] A good example can be drawn from EBOLA epidemic. Upon sufficient evidence of such a disease, the EAC host state can provide such ground to justify entry basing on public health.

Taking example from the EU, the ECJ has always taken a very narrow interpretation in its decisions involving limitation basing on public policy, public security and public health. Such position is taken in consideration that partner states can use such exception to discriminate people who are genuinely eligible to exercise their free movement right and sometimes use the same to serve economic ends which is totally not justified (Horspool, 2006). In the case of **Olivery**,[159] the Court held that decision must base on a case by case basis in order to establish personal conduct which can amount to a present threat to public policy. In another case of **R v. Bouchereau**,[160] the Court held that, previous criminal convictions

[157] Directive 2004/38 of the European Parliament and of the council, official Journal of the European Union, L 158/77 of 29 April 2004. Directive 64/221 defined the scope of public policy, public security and public health. However this, Directive was replaced by Directive 2004/38. This directive incorporates various principles approved by the ECJ in its restrictive interpretation of these terms and various procedures to be followed in case of individuals faced with limitations of community rights. See also. European Commission online Journal on Free Movement of workers within the European Union ISSN: 1831-922 No. 5 January 2013. p.3 Free movement of workers might be discouraged by partner states during economic hardship. Such tendency should be discouraged. This is due to the fact that limitations basing on public policy, public security or public health cannot be invoked to meet economic ends. Journal No.1

[158] Directive 2004/38 of the European Parliament and of the Council, Article 29. *Op. cit*

[159] *Oliver v. United States* [1984], 466. In another case of *Van Duyn v. Home office* [1974], 4.1 74, the Court stated that UK government had to examine whether Miss Van Duyn's conduct affected public policy. Such assessment has to base exclusively on personal conduct of the concerned individual.

[160] *R v. Bouchereau* [1979]. See also *R v. Secretary of state for Home Affairs, ex P. Maria Santillo* [1980] in which the Court repeatedly stressed that past criminal convictions should only be taken into account in so far as they are basing on personal conduct of an individual. Such conduct should cause present danger. The present rather than the past conduct should be

alone were relevant only so far as they manifest a present or future to act in a manner contrary to public policy or public security. As observed above, such limitations should not be used as a shield to protect domestic labour market of partner states. In **Roger's Case**,[161] the Court observed that administrative requirements on work or residence permit should not justify expulsion of an individual. The concerned person should be given sufficient time to resist expulsion from competent administrative authority.

The discussion above has shown that removal of immigration restrictions to partner states workers, non discrimination of partner states workers in terms of employment and protection of social security rights in the course of free movement within the community are important aspects in the implementation of free movement of workers in the community.

In this study, free movement of workers is used to mean, the right conferred to EAC partner states citizens to apply for employment and accept offers of employment made in any partner state hence move freely with family members for employment purposes without any discrimination based on nationality or other conditions of employment. The modality of the study involved looking at partner states employment, immigration and social security laws and policies in order to examine how respective laws and policies facilitate free movement of workers in the EAC. Another concept worth of attention is the concept of coordination and harmonization of laws.

2.2.5 The Concept of coordination and harmonization of laws

In order to facilitate the implementation of the right to free movement of workers in the EAC, the protocol calls upon partner states to coordinate, approximate their

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reviewed. In another case of Mrs. Calfa, the Court reasoned that Greek rules based on automatic expulsion measures to personal conduct of an individual on the ground of public policy was contrary to Directive 64/221/ECC.

161 *Royer v. Belgium* [1976], 75.

national laws and harmonise their policies and systems.[162] It is very unfortunate that neither the EAC common market protocol nor the EAC treaty defines the terms coordination and harmonisation of laws. However, the black's law dictionary defines the term harmonisation as making procedures or schedules work together with compatibility (https://www.the lawdictionary.org/harmonization (https://www.the lawdictionary.org/harmonization , 2018). It can also be defined as a process which aligns rules or legal models work together between different sovereign states (https://www.elgaronline.com/view/nlm, (2018). In almost the same way, coordination can be defined as a process where different rules or elements work in harmony (https:en.oxforddictionaries.com/definition/coordination, 2018).

Despite the slight differences between coordination and harmonisation, when taken together they signify making systems, rules or laws work together effectively hence provide common standards and they do not mean for the same to be congruent or replica.

Authors are of settled mind that coordination and harmonization of laws in economic integration is an important feature in the modern legal system. Many international treaty obligations involve duties to conform and abide to treaty and regulation requirements (Andenaes, 2012). Furthermore, harmonization always takes two forms. The first is positive harmonization. This involves the approximation of national norms through community legislative intervention. This introduces certain standards considered to be important and reasonable across the bloc (Meletic, 2013). The second and last form of harmonization is negative harmonization. This involves direct approximation of national norms and standards as a result of deregulatory effects by member states. This follows their obligation and commitment to conform to the Treaty and regulations requirement.

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[162] Protocol on the Establishment of the East African Community Common Market. Article 11, 12 and 39 and the Treaty for the Establishment of the East African Community. Article 104, *Op. cit*.

All these two forms of harmonisation of laws work together for effective harmonisation of laws in the community. Generally, the term harmonisation simply means “approximation of national laws of member countries. This implies bringing together in proximity common areas of divergences in the targeted laws” (Kitonsa, 2012). This concept leads to another concept as discussed below.

2.2.6 The Concept of International Treaties

The Vienna Convention on the Law of Treaties defines the term treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”[163] Having fulfilled all procedures and requirement, the treaty for the establishment of the EAC and its respective protocol on the common market is legally binding and enforceable between members and “must be performed by them in good faith.”[164] The duty to act in good faith carries with it all measures to abstain from all actions which retard attainment of agreed objectives and members are obliged to remove all restrictions in their legislation which hinder achievement of the same (United Nations, 2016. In the EAC context, the treaty signifies the treaty for the establishment of the East African community.[165] A common market is normally governed by a protocol. Having appreciated the above concept, ratification of a treaty is a common phenomenon in economic integrations.

In order to understand how international treaties become enforceable in international law, the concept of ratification of international treaties deserves brief discussion. Ratification implies “acceptance, approval and accession mean in each case, the international act so named whereby a state establishes on the international

[163] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty,
Series, Vol 1155, p. 331.Article 2.
[164] Viena Convention, on the Law of Treaties. *Op. cit.* Article 26.
[165] The Treaty for the Establishment of the East African Community, *Op. cit*.

plane it consent to be bound by a treaty."[166] In this regard, states express their consent to be sound by a treaty through ratification.[167] Within the context of REI, it is important to understand how treaties and protocols are transplanted or domesticated into member states legal systems. Ratification of treaties depends on monism and dualism theories. Monism presupposes direct acceptance and applicability of international law in the domestic legal system without ratification. International law in this perspective acquire higher norm than domestic laws and assumes supremacy in case of any conflict of laws with the domestic laws of partner states (Kawenda, 2017).

Contrary to Monism, Dualism regards municipal law and international law as distinct and different legal systems hence independent to each other.[168] Basing on this theory with regard to REI, treaties cannot directly apply to national legal systems unless they are ratified by partner states (Mitanda, 2015). It is in this view point that the EAC partner states were required within twelve months after signing the EAC treaty to secure specific enactment for domestication of the EAC Treaty.[169] Pursuant to Article 8 (2) (b) of the EAC Treaty Tanzania, Kenya and Uganda[170] enacted specific domesticating legislations to give effect to the said treaty. Other partner states observed ratification procedures requirement in due time after accession. Fulfillment of ratification formalities make the EAC Treaty, the regulation, directives and decisions of the Council binding to all EAC partner states.[171] Thus, EAC member states are bound to give effect to all agreements and obligations regarding implementation of the right to free movement of workers in

[166] Vienna Convention on the Law of Treaties. Article 2 (b), *Op. cit*.
[167] Article 14 (i). *Ibid*.
[168] *Ibid.*
[169] Article 8(2) of the Treaty for the Establishment of the East African Community, *Op. cit*.
[170] Tanzania fulfilled this requirement by enacting the Treaty for the Establishment of the East African
Community Act, No.4 of 2001 which was enacted on 30th March, 2001. The aim was to give effect the
EAC Treaty and connected purposes. Kenya enacted the Treaty for the Establishment of the East African Community Act No.2000 with the same purpose and Uganda enacted the East African Community Act No.13 of 2002 in order to give the force of law the EAC Treaty in Uganda.
[171] Treaty for the Establishment of the East African Community. Article 16, *Op. cit*.

the EAC. Having discussed various themes and concepts above, it is worth to take note that this study is governed by specific theories and principles as presented below.

2.3 Theories and Principles Related to the Study

This study emanated from common market philosophy in economic integration as governed by international law. Free movement of workers in a common market is motivated by various theories notably: the theory of economic integration, the theory of comparative advantage and the theory of value and economies of scale. On the other hand, the World Trade Organization (WTO) is under watch to ensure that free movement of workers in a common market adheres to specific underpinning principles consented to by WTO members (Jovanovic, 2011). These principles are: Non discrimination, the Most Favored Nation (MFN), National treatment, Reciprocity, Transparency, and Binding and enforceable commitment principle. For clarity of discussion, before embarking on discussion of these binding principles, it is salient to begin with theories governing free movement of labour in a common market in economic integration starting with the theory of economic integration.

2.3.1.1 Economic Integration Theory

This theory was developed between 1930 and 1940s. However, the framework of Economic Integration was formalized by Jacob vainer in 1950 (Michelmann, & Soldatos, 1994). This theory maintains that "the more intensive a common market was, the more it would generate welfare gains within the area and therefore a full common market is preferable to a looser free trade area" (Worley, 1962). This creates more employment opportunities hence the need for free movement of workers and efficiency in economic development.

The basis for economic theory was further shaped by Bella Balassa in 1960. He emphasized that, "as economic integration increases, the barriers of trade between markets diminish" (Worley, 1962). The author maintains that, common market between member states with free movement of labour and other factors of production automatically create demand for further integration in economic prospective and may lead to political federation between partner states.[172] Economists in this theory normally consider trade flows of member states before and after the formation of a common market. Definitely, there is an increase in trade and intensified free movement of workers which improves welfare of the people.

Besides the theory of economic integration contribution in the realm of RECs, law is used as a tool in achieving objectives of RECs. This is justified by the theory of legal positivism focusing on law and economics.

In this study the economic integration theory provides the foundation and relevance of economic integration in which there is a common market which provides the right to free movement of workers. In the absence of economic integration, there is no free movement of workers which is rooted in a common market. Also, the economic integration theory justifies why sovereign states decide to form a common market which is for their mutual benefits and increase in welfare between them.

2.3.1.2 Comparative Advantage Theory

Effectiveness of free movement of workers in the common market and economic integration at large can be further justified by the theory of comparative advantage. Ricardo maintains that, international trade is sorely due to international difference in the productivity of workers (Carbaugh, 2008). Member states always take to consideration and find it equally advantageous to trade when production cost differs between them. In this basis, if comparative costs are the same, there is no gain or benefit to trade between them. The basic assumption in this theory is that partner states normally prefer to export specific goods in which their labour

[172] *Ibid.*

productivity is relatively high as compared to the respective country (Carbaugh, 2008). However, central to the theory of comparative advantage is labour and its contribution to partner state's economy. This calls for the discussion of the labour theory and its connection to economies of scale.

This theory is very applicable in this study as it facilitates free movement of workers because labour mobility is pegged according to demand as a region. Every partner state posses comparative advantage in producing certain categories of workers according to their resources. People move freely to where their service is required hence efficient allocation of workers thus solve unemployment problem which have proved to prevail in the EAC. Other theories are discussed below.

2.3.1.3 Labour Theory of Value and Economies of Scale.

This theory was advocated by Ricardo and has contributed highly to the literature development of economic integration. The theory accounts that, 'all costs ultimately could be reduced to labour' costs (Petiford, 2015). With this concept, the price, of a good or service is determined in terms of man power specifically time involved in production. He argued that differences in comparative costs depict differences in the productivity of labour. The theory suggests that, "high labour productivity countries could have a comparative advantage in the production of sophisticated high technology goods while low labour productivity countries would have comparative advantage in the production of low technology goods.[173] This situation encourages free movement of labour in the community and stimulates economic integration between independent states. Despite the remarkable contribution of this theory, the new classical theory advocated that labour cannot be considered as the only force in opportunity costs production differences.

The labour theory of value can also be accompanied by the theory of economy of scale. This theory explains the relationship between the scales of use of a property

[173] *Ibid.*

or services in consideration to the production trend with the rate of output desired (Leube & Moore, 1986). An economy of scale is believed to exist if total cost increases accordingly less than output in production of goods or services. Hence, an economy of scale indicates the reduction in the average cost of a product – set as the level of output expands in the long run (Smart, 1999). This theory is remarkable in economic integration as it involves the issue of market creation and organization and how member states control daily economic activities.

The labour theory of value and the theory of economies of scale are relevant to this study as they put to the forefront the relevance of workers in any production as valuable resources. Hence, workers are precious resources which need to be efficiently allocated for harmonious development in a common market. With this context, the right to free movement of workers ensures effective allocation of labour as valuable resources in a common market.

In order to achieve efficient common market development, there are various principles connected to the above discussed theories to be taken inboard. These principles are advocated by the WTO, EAC community and other scholars.

2.3.2 Principles Underpinning the Study

The study on free movement of workers in the EAC common market is guided by various principles at the World Trade Organization (WTO) level and at the EAC community level. These principles are important for the implementation of the right to free movement of workers in a common market. The principles are hereunder examined one after another starting with the World Trade Organization (WTO) common market principles followed by the EAC common market principles.

2.3.2.1 The WTO Common Market Principles

The World Trade Organization (WTO) has the duty to ensure that free movement of workers in a common market adheres to specific underpinning principles consented by WTO members (Jovanovic, 2011). These principles include non-discrimination, the Most Favored Nation (MFN), national treatment, reciprocity, transparency, and binding and enforceable commitment principle (General Agreement on Tariff and Trade [GATT], 1994).[174] For the purpose of conceptual clarity, this item examines each of the said rules and principles hereinafter.

Non Discrimination

This is the fundamental obligation imposed to WTO members not to discriminate against foreign products, services or labour (Cottier & Mavroids, 2000). The principle aims at having an equal treatment between member countries (Klemm & Cottiers, 2006). Notably, the principle of non discrimination calls upon partner states to assure equal treatment of goods and services so that WTO members posses equal access to ample market. In this case, the said principle guarantees market access for all WTO members.

In another view point, this principle prohibits discrimination on taxation, tariffs application, quotas and all kinds of barriers likely to prevent or obstruct free flow of goods, services and labour (De Burca & Scott, 2001). Furthermore, imposing high tax burden on foreign manufactured goods, workers and services than locally (domestic) produced goods and taxing products selectively amount to the breach of non discrimination principle under WTO rules. This is because this tendency is likely to hinder the flows of goods and services. In this sense, the said principle plays a big role in ensuring free flow of goods, services and labour by discouraging unnecessary hindrance to trade (Diebold, 2002). In this study the principle of non discrimination is used in examining the employment, immigration and social security laws and policies of the EAC partner states in order to see how the same

[174] Article XXIV specifically provide for free trade areas, the customs union and the economic integration at large. This Article provides specific rules governing agreements for contracting parities and the need for trade policy and other requirements for effective regional integration. Pursuant to this Article, the WTO stipulates some rules and principles to safeguard smooth implementation of free trade laws in an economic integration. These principles bind all member states and all the East African partner states are members to the WTO and therefore bound by the said rules and principles.

prohibits discrimination of workers from other partner states.[175] The non discrimination principle is also modified by sub principles of the most favoured nation and national treatment as briefly discussed bellow.

(a) The Most Favored Nation (MFN)

This principle encourages free trade by calling WTO member states to open their market by specific treatment to all members. This principle ensures that no less favorable treatment is provided to any other member state.[176] The principle implies that any product manufactured in one member country should be treated no less favorably than goods originating from any other country (Narlika, 2003). Principally, under this principle, all WTO members without considering their level of development are bound not to favor any partner to the disadvantage of other partner.[177] In the same way, MFN principle promotes free trade by forbidding all forms of less favorable treatment like using borders measures relating to duties from other countries. This principle also does not allow imposition of complicated domestic regulations and other conditionality to imports before admitted in the country. This complication might arise as a result of requirement of buying certain percentage of domestic goods before the imports are admitted in the country. This principle leads to the principle of national treatment. MFN may also be applied to the right to free movement by ensuring equal treatment between partner states.

MFN principle though mostly used in manufactured products not to be treated less favorable between partner states is also relevant to free movement of workers in a common market. This principle ensures equal treatment of workers without discrimination in the EAC common market. Basing on this principle, a partner state which desires to extend favorable conditions in any of the partner state should

[175] Protocol on the Establishment of the East African Community Common Market. Article 5 (2) (c) and Article 10 (2). *Op. cit.*
[176] *Ibid*.
[177] This is also reflected by Article 1 of the GATT which requires that "any advertise, favor or privileges
granted to specific member or members should be extended to other members.

do the same to other partner states. This ensures equality between workers in a common market.

(b) National Treatment

This principle under WTO requires members' states to allow the free flow of goods with no discrimination between imports and exports. In this case, imports and exports should be treated in the like manner in price and regulations. This also involves quantity circulating in the market together with taxes imposed to domestically manufactured goods or services should be the same as imports upon their entrance in the member static domestic market (Bagley & Savege, 2010). The main requirement under the national treatment principle is that taxes involving laws and other regulations should not be in a situation that they guarantee protection of local produced goods as compared to imported goods and services. [178]

Though national treatment principles have no direct link to free movement of workers in a common market, it can be associated with the principle of equal treatment of workers in a common market. Like goods, partner states workers should be free to exercise their right to free movement of worker in the EAC without discrimination basing on nationality, conditions of employment, remuneration, housing, taxation and other conditions of employment (Lal Das, 1998). The other important principle is reciprocity explained hereunder.

Reciprocity

This is another WTO Principle governing free trade policy. This principle calls upon member states to "offer concessions in the form of improved market access measures in return for market opening offers by other country" (Jones, 2004). Reciprocity has direct link to free movement of workers in a common market. This is simply because, generally, a partner state which has opened its domestic labour

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[178] *Ibid.*

market, should also expects other partner states to do the same. The significance of this principle can really be demonstrated in effective free movement of workers in a common market.

Transparency

WTO members are obliged to publish their regulations, and laws pertaining trade. They also have to respond basing on their trade policies. This also involves any other information related to trade upon request by any WTO member. Also, there should be notification to WTO incase of any changes of a country's law relating to trade and associated regulations in order to increase market competition (GATT, 1994).[179] Generally this principle requires WTO members to practice and encourage transparency in correlations to international trade in order to make the organization monitor its member's policies and regulations such that they do not breach cherished efforts encouraging globe free trade (Martin & Pangestu, 2003). Transparency principle is also related to free movement of workers basing on respective laws and policies which ought to be transparent and communicated between partner states. Transparency also signifies partner states publication of their laws, regulations and other information pertaining employment in the EAC. Transparency in this view point is very essential in the implementation of the right to free movement of workers.

It should be noted that WTO monitors trade policies and practices of member states as a fundamental activity, this gives opportunity for all WTO members to be reviewed (WTO Trade Policy Review, 2016). Thus, WTO trade policy review are mandated in the WTO agreements and conducted at regular intervals. The sixth trade review policy was performed in June 2013 (WTO Trade Policy Review, 2013). Lastly, partner states are bound with obligations to fulfill and enforce common markets commitments. This calls for a brief discussion on the binding and enforceable commitment principle

[179] Article X of the imposes obligation to all partner states to publish all applicable laws And Regulations and to administer them accordingly.

The Binding and Enforceable Commitment Principle

In order to ensure effective free global trade, the WTO calls upon partner states to have binding tariffs commitments through establishment of schedules of concession in its charter. This requires a country not to change its tariffs unless there is an effective negotiation with other country members trading with. In case another country is likely to be injured by such a change in tariff then such country should be subject to appropriate compensation for the loss incurred due to such changes (Arora, 2010).

The binding and enforceable commitment principle contributes highly to the development of free movement of workers in a common market. All agreements and obligations should be binding between member states. With respect to free movement of workers in the EAC common market, partner states agreed to remove restrictions on free movement of workers by coordinating and harmonizing their employment, immigration and social security laws and policies.[180] Besides the above discussed principles under WTO guidance, there are also EAC common market principles. The next item addresses the EAC common market principles.

2.3.2.2 EAC Common Market Principles

The EAC Common Market is guided by fundamental and operational principles involving among others mutual trust, political will, sovereign equality and equitable distribution of benefits.[181] The same fundamental principles guiding the EAC community also guides the EAC common market. These fundamental principles are hereby discussed one after another.

[180] Protocol on the Establishment of the East African Community Common Market. Article 5. *Op. cit.*
[181] Treaty for the Establishment of the East African Community. Article 6 and 7. *Op. cit*.

Mutual Trust, Political will and Sovereign Equality

Mutual trust, political will and sovereign equality as a principle comprises the most significant fundamental principle in the EAC common market and the community at large (Schlumberger & Weisskopf, 2014), as enshrined under article 6 (a) of the EAC treaty.[182] Member states cherish that peace and security are important in achieving social and economic development in the community. However, maintaining conductive atmosphere for peace and security depends on mutual trust, political will and sovereign equality between partner states.[183] Relationship between partner states within the community is exercised under the principle of good faith between partner states.[184]

The duty to act in good faith signifies that partner states should have mutual trust and political will between them hence obtain from all acts which defeat attainment of all agreed objectives (*Treaties and Protocols on Regional Integration*, 2011). Achievement of mutual trust, political will and sovereign equality reveals effectively through establishment of political federation which eventually strength good governance and rule of law in the EAC (Kiilu, 2013). Mutual trust, political will and sovereign equality principle is very relevant in this study. It is through mutual trust and political will that partner states agree to remove all restrictions to free movement of workers in the EAC. This directly affects implementation of all agreements and obligations[185] conferred by partner states relating free movement of workers. Apart from this principle, the following principle is also relevant.

[182] Treaty for the Establishment of the East African Community. *Op. cit*
Also the Protocol on the Establishment of the East African Community Common Market, Op. cit.
[183] See Article 124 of the Treaty for the Establishment of the East African Community. *Op. ci.*
[184] See Article 26 of the United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty, Series, Vol. 1155, p. 331.
[185] Protocol on the Establishment of the East African Community Common Market, Article 5 (2) (c) and Article 10 (2) *Op. cit.*

Peaceful Co-existence and Good Neighborliness

Peaceful co-existence and good neighborliness co-exist as an important principle which determines harmonious interstate relations. The narrow approach of the term 'good neighborliness implies the application of this principle between partner states in the community while a wide approach connotes application of the principle between member states and third party countries (Narine, 2015). The literal meaning of the attribute 'good' embedded to the term 'neighborliness' describes having positive relationship between partner states as opposed to the analogy 'bad neighborliness.' In the EAC, this principle is provided for under Article 6(b) of the Treaty[186] and re-instated under Article 3 of the EAC Common Market Protocol.[187] Basing on this principle, partner states consented that peace and security are necessary conditions for social and economic development hence contribute to the achievements of EAC stated objectives.

In order to facilitate peaceful co-existence and good neighborliness, partner states also agreed to maintain conducive environment for peace and security by co-operation and consultation in peace and security matters in order to prevent, manage and solve disputes peacefully between them.[188] As actors in the international community in economic integration, partner states normally interact not only between them but also with third part states. The EAC gears in "the promotion of peace, security, and stability within, and good neighborliness among, the partner states."[189] Peaceful co-existence and good neighborliness signifies having consented joint efforts to enhance regional stability and having harmonious relations between partner states.

This principle is very relevant to free movement of workers in the EAC. Peaceful and co-existence and good neighborliness promotes mutual trust and promotes

[186] Treaty for the Establishment of the East African Community. *Op. cit.*
[187] Protocol on the Establishment of the East African Community Common Market. *Op. cit.*
[188] Treaty for the Establishment of the East African Community, Article 124 (1). *Op. cit*. See also Article 124 (2) in which partner states determined to promote and maintain good neighborliness as the basis for promoting peace and security within the Community.
[189] Treaty for the Establishment of the East African Community. Article 5(3) (f). *Op. cit.*

dialogue, thus settle disputes through peaceful negotiation in order to attain common development (Wang, 2011). Peaceful co-existence and having good neighborliness relations implies living in peace with friendship rather than entertaining enmity between partner states and the rest of the world community. This facilitates free movement of workers as partner states are able to fulfill their agreements and obligations involving free movement of workers. Peaceful settlement of disputes is another cherished principle common market in the EAC common market.

Peaceful Settlement of Disputes

Peaceful settlement of disputes promotes peace and tranquility in REI. This fundamental principle is stipulated under article 6 (C) [190] of the EAC treaty and reconsidered under the EAC common market protocol.[191] This motive is in line with strengthening and consolidating the witnessed historical standing relationship in political, social and cultural ties between residents of the partner states.[192] The term "disputes" refer to, "complaints, litigations, disagreements or conflicts" between two subjects of international law. International disputes may be legal or political disputes (Grimberg, 2015). Prohibition of war and use of force and threat between partner states relations are determinant features in the recognition, appreciation and acceptance of principle of peaceful settlement of disputes in REI.[193]

Besides the EAC law requirement in peaceful settlement of disputes sited above, article 2(3) of the UN Charter states that, "all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered."[194] All EAC partner states are UN

[190] Treaty for the Establishment of the East African Community. *Op. cit.*
[191] Protocol on the Establishment of the East African Community Common Market, Article 3. *Op. cit*.
[192] Treaty for the Establishment of the East African Community. Article 5 (3) (d). *Loc. cit*.
[193] *Ibid*.
[194] Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945.

members hence bound by this obligation too. Peaceful settlement of international disputes involves negotiations, mediation, enquiry, conciliation, arbitration, judicial settlement resort to regional agencies or arrangements or other peaceful means in which partner states may agree to use.[195]

In order to strengthen peace and harmonious relations between nations, "states are required to use only peaceful means for resolving disputes among them, and their failure to do so by one such means, attract their obligation to seek a peaceful settlement through other means and to refrain from taking any action that is likely to aggravate the dispute" (Grimberg, 2015). Also, the UN declaration on peaceful settlement of international disputes calls upon nations to settle their international disputes by peaceful ways in order to promote international peace and security between nations.[196]

Peaceful settlement of disputes creates harmony between partner states hence provide the conducive environment in the implementation of free movement of workers in the EAC. Another principle in the EAC common market is good governance as briefly discussed below.

Good Governance

The fundamental principle of good governance is enshrined under the EAC treaty[197] and the EAC common market protocol.[198] This fundamental principle involves adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality together with the recognition, promotion and protection of human and people's rights.[199] Good governance is believed to be important ingredient for development of the EAC for

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[195] *Ibid*. Article 33.
[196] The United Nations, Declaration. Declaration No.2 United Nation, General Assembly,A/RES/37/10/15 November 1982.
[197] Treaty for the Establishment of the East African Community, Article 6. *Op. cit*.
[198] Protocol on the Establishment of the East African Community Common Market, Article 3.*Op. cit*
[199] Treaty for the Establishment of the East African Community, Article 6 (d). *Op. cit*.

assurance of peace and Security which are necessary for social economic development (Owora, & Mutabazi, 2016). Such recognition calls for proper understanding of the term "good governance." To begin with "governance," the term implies "the process of decision making and the process by which decisions are implemented (or not implemented) (United Nations, 2016). Good governance has distinct qualities in the sense that it should be participatory, accountable, consensus oriented, responsive, effective and efficient and should also follow the rule of law.[200] However, other literature presupposes that good governance involve four major pillars which are accountability, transparence, the rule of law and participation (IFAD, 1999).

Generally, good governance refers to the manner in which power is exercised in the management of a country's economic and social resources for development" (Hoen, 2001). Implementation of free movement of workers requires good governance. Hence, all EAC partner states should practice good governance in their respective countries. This leads to effective planning and arrangement on how to implement free movement of workers and the free movement of workers at large. However, co-operation for mutual trust becomes relevant at this juncture.

Co-operation for mutual benefit

REI's are established basing on expected mutual benefits to be achieved by partner states. Co-operation for mutual benefits is a recognized fundamental principle in the EAC.[201] This spirit is revealed in the objective of the EAC in which partner states are determined to "develop policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defense, security, legal and judicial affairs, for their mutual benefits."[202] In the context of the EAC common market,

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[200] *Op. cit*.
[201] Treaty for the Establishment of the East African Community. Article 6(f) *Op. cit*. Also, Article 3(1) of the Protocol on the Establishment of the East African Community Common Market, *Op. cit*.
[202] *Ibid*. Article 5.

partner states are driven by the overall objective of widening and deepening cooperation in economic and social aspects for the benefits of member states.[203]

It is advocated that for REI to be meaningful and sustainable they must "yield mutual benefits" between participating states (Rani, 2009). A common market enables production factors (labour and Capital) and products (goods and services) to move freely between partner states hence effective utilization of resources in the community (Van Der Mei, 2003). Economic integration lead to trade gains, increased investments between partner states hence attraction of Foreign Direct Investment (FDI). Such achievements increase cooperation and boost bargaining powers of the community which result to trust due to increased inter-trade and investment for mutual benefits of partner states (Van Der Mei, 2003). Such cohesion increase bargaining powers and negotiation strength of partner states with third party countries (Van Niekerk, 2015). This principle is very relevant in this study. It is maintained that REI aims at increasing welfare for mutual benefits between participating countries (Van Der Mei, 2003). Cooperation for mutual benefits is well manifested in free movement of workers in free movement of workers as it results to mutual benefits for all partner states in the common market.

Apart from fundamental principals stated above, there are also operational principles which govern the EAC common market. They operational principles are:[204] people centered and market driven co-operation, export coordinated economy, and equitable distribution of benefits driven from operation of the community. Also, the common market is governed by the principle of subsidiary, variable geometry, complementarily and the principle of asymmetry.[205]

Apart from fundamental principle and operation principles outlined above, the Protocol also enumerates other principles guiding the EAC common market. Partner states are obliged to observe the principle of non – discrimination of

[203] *Ibid*. Article 4.
[204] Protocol on the Establishment of the East African Community Common Market. Article 3, *Op. cit.*
[205] *Ibid*.

national of other partner – states on rounds of nationality, same treatment to nationals of other partner states, transparency and sharing information for effective implementation of the respective Protocol.[206] All the discussed principles aim at providing conducive environment and provide guidance for the success of the free movement of labour and the common market at large.

The above discussion in this part has elaborated various themes and concepts together with theories connected to free movement of workers in a common market and economic integration at large. Also, principles governing free movement of workers in a common market have been highlighted.

2.4 Conclusion

This chapter presented and discussed the conceptual and theoretical framework of this study. The relevance of free movement of workers in a common market has also been shown. It should be noted that implementation of free movement of workers relies on partner states demonstration of good faith in fulfilling their commitments and obligations as per treaty and protocol requirements. In order for free movement of workers to be realized, there should be removal of immigration restrictions to partner states citizens, non discrimination of partner states workers in relation to nationality, conditions of employment, housing and other associated issues. Also, there should be protection of social security rights to partner states workers in the course of exercising their right to free movement within the community. The community laws enjoys supremacy of law in relation to partner states domestic law, hence binds all partner states.

[206] *Ibid.*

CHAPTER THREE

LEGAL FRAMEWORK FOR FREE MOVEMENT OF WORKERS IN EAST AFRICA

3.1 Introduction

This Chapter presents analysis of the law and policies related to free movement of workers in East Africa community. In particular, an attempt is made to analyse the international labour standards on free movement of workers in economic integrations under various treaties and conventions, the treaty on the establishment of the EAC, the protocol on the establishment of the East African common market, and the employment, immigration, and social security laws and policies of the selected partner states of the East African Community (Kenya, Uganda and Tanzania). The idea is to determine how the employment, immigration, and social security laws and policies of the selected partner states of the East African community are compatible with international standards and enhance the implementation of the right to free movement of workers under the protocol on the establishment of the EAC common market.

The chapter is organized into five sections. The first section provides the introduction; the second section makes analysis of the international labour, immigration and social security standards, the third part examines the EAC treaty and its protocol on the establishment of the East African common market, the fourth section makes analysis of the labour laws and policies in relation to immigration and social security laws and policies in the selected EAC partner states, and the fifth section provides the conclusion of the chapter.

3.2 International Labour, Immigration and Social Security Standards

It is significant to note that the International Labour Organization (ILO) and the United Nations (UN) are standards setting organizations. Generally, ILO concentrates on the field of labour and economic life. ILO adopts standards and supervisory procedures at the request of the General Assembly of the UN. The UN adopts standards of general application and lays down broad principles. The ILO is the special argent of the UN in international labour standards and employment. In this perspective, "ILO conventions have equivalent status to other UN instruments in providing the normative basis for elaborating national legislations. While there is some specificity to labour law application and enforcement in some countries, most laws incorporating international labour standards are national laws enacted by national legislative or parliamentary bodies and enforced through national judicial systems as well as specialized mechanisms" (Ndjonko, 2007).

3.2.1 ILO Standards in Labour and Harmonization of Laws

One of the methodologies of harmonisation of laws in East Africa is through comparing laws in the EAC with international legal platform with established labour standards. Basing on this notion, "the emphasis needs to remain on legal reforms to bring national laws in the East Africa in conformity with ILO conventions and other standards such that they can be enforced using the machinery available to the relevant national law enforcement authorities" (Kayanyoga, 2015). In this case, international labour standards become part and parcel of East African labour standards. When all partner states implement international labour standards, harmonization of labour laws become easier hence facilitate the right to free movement of workers in the community.

In the recognition of harmonisation of laws using international standards, ILO entered into memorandum of understanding (MoU) with the EAC on January 18, 2001. ILO provides technical and institutional assistance to partner states. The cooperation involved in the MoU between ILO and the EAC is based on mutual consultation in harmonisation of labour, immigration and social security legislations, facilitation of free movement of labour in the EAC and social security protection together with other matters associated to (Musonda, 2006).

Codified labour standards vary from one country to another basing on stage of development, per capital income, political, social and cultural conditions and institutions. However, specific efforts have resulted to identification and attainment of consensus on core labour standards that should apply universally (International Labour Office, 2013). The governing body of ILO identified eight conventions as fundamental to the rights of human beings at work. These rights are precondition for all other rights as they provide a necessary framework for improving individual and collective conditions at work. The core standards are: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Right to Organize and Collective Bargaining Convention, 1949 (No. 98), Forced Labour Convention, 1930 (No.29), Abolition of Forced Labour Convention, 1957 (No 105), Minimum Age Convention, 1973 (No 138), Worst forms of Child Labour Convention, 1999(No 182), Equal Remuneration Convention, 1951 (No 100), Discrimination (employment and occupation) Convention 1958 (No 111).[207]

The above core standards apply to all states forming members to the ILO, and bind them without considering to whether or not they have ratified the core Conventions. For clear understanding it is important to highlight prominent aspects in some of the above ILO labour standards especially those related to workers in a common market.

One of the basic ILO conventions relates to Migration for Employment Convention[208] which is appropriate for workers moving for employment purpose within partner states in the economic bloc. This convention seeks for transparence in information on national policies, laws and regulations relating to emigration and immigration specifically provisions concerning migration for employment and

[207] International Labour Office, The International Labour Organization’s Fundamental Convention. *Op. cit.*
[208] ILO, Migration for Employment Convention (Revised) 1949, (No. 97).

other conditions.[209] As per article 2 of the convention, "each member for which this convention is in force undertakes to maintain or satisfy itself that there is maintained, and adequate and free service to assist migrants for employment, and in particular to provide them with accurate information."[210] This calls for equality treatment between immigrant workers and nationals in the aspect of employment and work (Ndjonkou, 2007).

The above convention is in harmony with the International Convention on the Protection of the Rights of All Migrant Workers and members of their families which provides that, "state parties undertake, in an accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction, the rights provided for in the present convention without distinction of any kind such as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, martially status birth or other status."[211] The convention upholds that migrant workers and members of their families are entitled to the right to equality with nationals in the respective state. They also deserve enjoyment not less favorable than that which applies to nationals of the state of employment and remuneration.[212]

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[209] *Ibid.* Article 1. Also, as per Article 11 the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

[210] *Ibid*. Also, Article 4 calls for member states to facilitate the departure journey and receptions of migrants for employment. This deals directly with immigration for migrant workers.

[211] United Nations, International Convention on the Protection of the Rights of all Migrant Workers and their Families, Adopted by General Assembly Resolution No 45/158 of 18 December 1990. The term migrant worker is defined to mean a person who is to be engaged, is engaged or has been engaged in remunerated activity in a state of which he or she is not a national .Article 2(1) also Article 4 defines the term members of the family as persons married to Migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage as well as their dependent children and other dependent persons who are legislation or applicable bilateral or multilateral agreements between the states concerned.

[212] ILO, Migration for Employment Convention (Revised) 1949, (No. 97). Article 18 and 25. In this case they are also entitled to overtime, hours of work, weekly, rest holidays with pay, safety, health and other related to labour and employment relationship.

Another convention concerns elimination of discrimination in respect of employment and occupation. This aspect is covered by the Equal Remuneration Convention.[213] Elimination of discrimination always begins with removing barriers within nations and between nations. Direct discrimination occurs when there is existence of laws, rules, practices and administrative decisions on particular grounds basing on nationality, sex, race and other related aspects. Indirect discrimination occurs where laws, rules and practices seem to be neutral but in practice discriminate others.[214] Equality at work implies that all individuals should have equal opportunities in developing knowledge, skills and competencies. Effective means and mechanism should address barriers whenever they exist.[215] The standards also apply to workers in a common market.

The equal remuneration convention calls upon each member state to ensure proper application of equality in remuneration for men and woman and all workers for work of equal value using specific mechanisms with consistency.[216] This principle may be implemented through national laws, legally established machinery for wage determination together with collective agreement between employers and workers.[217] The convention recognises the importance for member states to co-operate with employers and workers' organisations in order to meet required target for this convention.[218]

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[213] ILO, Equal Remuneration Convention (No 100), adopted: 29 June 1951, Entered in to force; 23 May 1953. ILO always fix minimum standard while national laws and practice may take broader approach and comprehensive means in eradicating discrimination at work.

[214] ILO, Discrimination (Employment and occupation) Convention (No 111), Adopted: 25 June 1958, Entered into force; 15 June 1960.Discrimination as any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupational.

[215] ILO, Equal Remuneration Convention (No 100), adopted: 29 June, 1951.

[216] *Ibid.* Article 2(1).

[217] *Ibid.* Article 2(2).

[218] *Ibid*. Article 4.

The methodology employed in the harmonization of laws in East Africa is comparing laws in East Africa with international legal platform especially the UN and ILO standards. This is aiming at conducting legal reforms in employment, immigration, and social security aspects to conform to ILO labour and employment standards. International standards taken together with obligations conferred to partner states in the EAC treaty and the respective protocol, aims at effective harmonisation of laws in the bloc. Having analised the international labour standard and their connection to harmonization of laws, it is paramount to appreciate the international platform on immigration for employment as it is crucial in free movement of workers in a common market.

3.2.2 International Framework on Immigration for Employment

Migration is part and parcel in the success of free movement of workers in a common market. It is believed that, "migration is the earliest form of international economic integration" (Van den Berg, 2014). This makes international workers migration an important aspect in economic integration as it "brings people into contact" for mutual benefit." (Van den Berg, 2014). It is worth to account as to why people immigrate between partner states in a common market in economic integration. The salient determinant of immigration seems to be variation in income levels and differences in economic opportunities in a community. Thus, income differences between countries explain the great part of the variation in immigration (Van den Berg, 2014).

Workers migration in economic integration results to benefits not only to countries of origin but also to host countries in a common market. It is in this basis that workers migration is regarded as an engine for growth and development for participating countries in a common market by providing work forces, skills transfer and economic gain to workers themselves (ILO, International Labour Migration and Development: The ILO Perspective, 2018). Like other aspects of international economic integration, immigration has become an issue of international concern due to challenges associated to (Van den Berg, 2014). While it has been easy for countries to accept admission for skilled workers in their immigration policies, low and semi-skilled persons are faced with barriers and challenges in obtaining their labour rights.[219] It is worth to emphasise that ILO is the UN special agency with constitutional obligation for the protection of workers interests while working outside their countries of origin including economic communities (ILO, 2012. This has made international migration to become a global issue hence provision of various international labour standards.[220]

Despite the fact that all ILO labour standards inclusive ILO core labour standards are applicable to migrant workers, a comprehensive legal framework for migrant workers is well established by ILO. This distinct framework involves the ILO Migration for Employment Convention,[221] the Migrant Workers (Supplementary provision) Convention,[222] and the 1990 International Convention on the protection of rights of all migrant workers and members of their families.[223] These conventions provide migration policies and related practices concerning treatment of workers in the cause of movement between states for employment purposes. ILO members are provided with guidelines and good practices in order to perfect their migration policies and standards hence great contribution to the success in effective free movement of workers in a common market. [224] In a nutshell, ILO members are bond to provide adequate assistance for employment and provide accurate information to migrant workers for the same.[225] Each country is also expected to facilitate free movement of workers for employment purposes within their nations without discrimination based on nationality in relation to race,

[219] ILO. *Op.cit*, p. 6.
[220] Refer part 3.3.2 for details.
[221] ILO, Migration for Employment Convention (Revised), 1949 (No. 97).
[222] International Labour Organization, Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).
[223] ILO, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.
[224] ILO. *Op.cit*. p. 9.
[225] ILO, Migration for Employment Convention. Article 2. *Op.cit.*

religion or sex.[226] For effective free movement of workers between nations, ILO members are generally expected to promote and respect basic human rights to all migrant workers as ans social security standards they do to their nationals.[227] This leads to the need to understand international social security standards.

3.2.3 International Social Security Standards

There have been international concerns in social security protection due to ever growing intensity regarding challenges related to poor working condition manifested by law income, sickness, discrimination, social injustice and insecurity in employment relationship between employer and employee. This led to proclamation of various declarations and recommendations with enactment of various conventions regarding social security protection (Rwegoshora, 2016). With this view point, labour laws and policies are always interconnected with social security rights recognition.

The Universal Declaration of Human Rights 1948 recognises social security as a human right. Article 22 provides that, "everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic social and cultural rights indispensable for his dignity and the free development of his personality."[228] This is based on the appreciation that every member of society has the right to work and equal pay for equal work with just and favorable remuneration without any discrimination.[229] Yet still, within this international conception, the International Convention for Economic,

[226] Migration for Employment Convention, Article 6. *Op.cit*.. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *Op.cit*, Articles 5, 7 and 9.

[227] Migrant Workers (Supplementary Provisions) Convention, *Op. cit*. Article 1.

[228] United Nations, Universal Declaration of Human Rights, 1948.

[229] *Ibid.* Article 23. As discussed here and then in this work, free movement of workers entitles worker to move freely between states in the Community. In this light, Article 2 declares that "everyone is entitled to all the rights And freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Social and Cultural rights stipulates that, "the states parties to the present convention recognise the right of everyone to social security, including social insurance."[230] This emanates from the respective instruments recognition of the right to work and enjoy favorable conditions of work with fair remuneration for work of equal value with decent living standard.[231]

With above universal declarations on social security protection, the ILO comes at the middle with its focus in safeguarding workers rights including social security observance. ILO endlessly calls upon sovereign states to "extend social security measures to provide basic income to all in need of such protection and comprehensive medical care. In pursuance of its Charter, ILO has adopted a series of conventions and recommendations concerning various matters including social security, which lay down international standards to which all members are expected to conform (Rwegoshora, 2016)." With this motive, ILO sets out minimum benchmarks standards for countries to adhere to and offers technical assistance and expertise in order to achieve the desired goal.

The above recognition led to an adoption of the Social Security (Minimum Standards) Convention[232] in order to give effective guidance on social security matters. The respective convention outlines nine minimum contingencies and benefits which every country has to offer to its citizens regarding social security. The minimum benefits are medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors benefit.[233] In order to cover a wide number of people focusing on their levels of income, ILO social security coverage involve 'social assistance' (normally financed by government mainly for those who are not able to have financial contribution to social security schemes), 'compulsory

[230] United Nations, International Covenant of Economic, Social and Cultural Rights, 1966.
[231] United Nations, International Covenant of Economic, Social and Cultural Rights. Articles 6-8. *Op. cit*.
[232] ILO, Convention No.102 Social Security (minimum standards) Convention, 1952. This instrument was adopted during the 35 Session on 4 June 1952.
[233] *Ibid.*

schemes' (for those who are able to contribute as supervised by the government) and 'voluntary schemes' basically a supplementary arrangements normally financed by individuals).

In order to give specific and detailed information on the outlined benefits under Convention No.102 of 1952, ILO adopted specific Conventions like Convention No.28 (Employment Injury Benefit Convention 1964), Convention No. 28 (Invalidity Old Age and Survivors' Convention 1967), Convention No. 168 (Employment Promotion and Protection against Unemployment Convention 1988) and other conventions.

The great challenge in social security protection in a common market lies on the fact that when workers exercise their rights to free movement, workers are subjected to different social security laws and schemes in different member countries. This calls for coordination of social security laws and programmes between partner states. This facilitates maintenance of social security credits in the course of free movement within the community trough aggregation and tatalisation of social security credits.

3.2.3.1 Maintenance of Social Security Rights during Free movement of workers in the Community

As already pointed out, free movement of workers subject individuals to different social security systems as a result of working in various partner state countries. Thus, there should be recognition of maintenance of social security rights in the course of acquisition for effective social security protection. In order to address the same, ILO adopted the Maintenance of Social Security Rights Convention.[234] This Convention applies to "persons who are or have been subjected to legislations of one or more members as well as to members of their families and to their survivals. In all cases, the international system for the maintenance of rights established by this convention requires that account be taken of the legislations of

[234] ILO, Maintenance of Social Security Rights Convention No. 157, 1982.

a member other than the member in whose territory the persons concerned are resident or temporarily resident.

The maintenance of social security rights convention applies to short term benefits mainly social health insurance benefit, maternity benefit, employment injury benefit, unemployment benefit and family relief benefit. Also, maintenance of social security rights apply to long term benefits notably old-age benefit, invalidity benefit and survivors benefit.[235]

The above benefits are the same benefits provided by the Social Security (Minimum Standards) Convention outlined earlier.[236] Each member state is obliged to safeguard and maintain rights in the course of acquisition as a result of workers being subjected to successful or alternative different legislations of member states in the common market.[237] In this context, all periods involved during working in various partner states are taken together for the purpose of acquisition, maintenance or recovery of rights to benefits in order to avoid loss of social security rights as a result of enjoying the right to free movement of workers in the common market. Thus, social security rights in the course of acquisition consider the working life of a worker who has worked in various countries in the community. It is evidenced that, "this principle ensures that such rights are all preserved and totalized when a migrant worker is entitled to social security rights which are dependent on periods of insurance" (Bender, Kaltenborn & Fleinderer, 2013). This might involve short term benefits like medical care and maternity benefits or long term benefits like old age and invalidity benefits as provided by ILO minimum standards discussed above.

In order to make sure that social security rights are further guaranteed, ILO adopted the Equality of Treatment (Social Security) Convention[238] which deals with equality of treatment of nationals and non nationals in social security. This

[235] Maintenance of Social Security Rights Convention. Article. 2. *Op. cit.*
[236] ILO, Convention No 102, 1952.
[237] Maintenance of Social Security Rights Convention No. 157, 1982. Article. 6. *Op.cit*.
[238] ILO, Equality of Treatment (Social Security) Convention No. 118, 1962.

convention covers nine minimum social security benefits namely medical care, sickness benefit, maternity benefits invalidity benefit, old age benefit, survivors' benefits, employment injury benefit, unemployment benefit and family benefit[239] as offered in other discussed ILO Conventions.

Equality of treatment calls upon member states to "grant within its territory to the nationals of any other member state for which the convention is in force equality of treatment under its legislation with its own nationals both as regards coverage and the right to benefits in respect of every branch of social security for which it has accepted the obligations of the Convention."[240] This treatment in benefits provision is accorded without any condition of residence consideration. Determination of applicable legislation in the administration of social security rights to migrant workers in the common market is important. Article 5 provides that "employees who are normally employed in the territory of a member shall be subject to the legislation of that member…"[241] This provision aims at avoiding conflict of law during determination of social security rights to migrant workers.

After having analyzed social security standards under various international instruments, it is paramount to observe the existing social security legal framework in the EAC common market. This will provide a platform of argument on what exactly should be done in the aspect of social security in order to achieve the target of effective free movement of workers in the community with social security protection. This leads to a discussion on what the EAC treaty provides specifically on employment, immigration and social security for effective attainment of effective free movement of workers in the EAC.

[239] Equality of Treatment (Social Security) Convention. Article 2. *Op. cit.*
[240] *Ibid*. Article 3.
[241] *Ibid.*

3.3 The EAC Treaty and the Protocol for the Establishment of the EAC Common Market

The right to free movement of workers in the EAC is guaranteed under article 10(i) of the protocol which provides that "the partner states hereby guarantee the free movement of workers, who are citizens of other partner states within their territories."[242] This entitles partner states citizens to apply for employment and accept offers of employment made, move freely within the territories of the partner states for the purpose of employment, conclude contracts of employment without discrimination, reside and establish in the host territory and enjoy the rights and benefits of social security as accorded to the workers of the host partner state.[243]

In order to ensure effective social security protection, article 10 (4)[244] presupposes issuance of specific regulations and directives governing social security by the Council. This aims at coordination of social security laws between partner states such that there is transferability of social security credits in the course of free movement of workers within EAC. Such target of securing the right to free movement workers with social security protection can only be achieved when all partner states ensure that there is no discrimination for workers within the community on the basis of employment, remuneration, social security and the related condition of work and employment.[245]

For proper implementation of the right to free movement of workers to be realistic and attainable, partner states are conferred specific obligation by the EAC common market protocol. Effective implementation of free movement of workers in the bloc is hinged on successive harmonization of labour policies, laws and programmes. This goes hand in hand with reviewing and harmonization of national social security policies, laws and programmes in order to aggregate social security

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[242] Protocol on the Establishment of the East African Community Common Market, *Op. cit.*
[243] *Ibid*. Article 5 2 (c)). Also see Article 10(3) (d) which entitles workers to "enjoy the rights and benefits of social security as accorded to workers of the host partner state.
[244] *Ibid*.
[245] *Ibid*, Article 10(2).

benefits when workers move from one partner state to another in the community.[246] Free movement of workers has direct connection with immigration policies and laws. Partner states are obliged to easy cross border movement of persons and formulate integrated and common boarder management systems and procedures.[247]

Article 5 2 (c) of the EAC treaty provides that partner states are obliged to "remove restrictions on movement of labour, harmonize labour policies, programs, legislation, social services, provide for social security benefits and establish common standards and measures for association of workers and employers, establish employment promotion centers and eventually adopt a common employment policy."[248] Restrictions in free movement of workers is normally witnessed where there are immigration restrictions, discrimination in employment based on nationally, colour and age or when social security regime does not allow coordination of social security benefits. Generally, all policies, laws and administrative procedures need to be harmonised in the community in order to support and facilitate free movement of workers in the community.

There is a close connection between free movement of workers and harmonisation and mutual recognition of academic and professional qualifications. In the recognition of the same, partner states are also obliged to mutually recognise

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[246] *Ibid*, Article 12. Also see, Article 39 in which partner states are expected to coordinate and harmonize their social policies to attain protection of decent work and improve living standard of citizens of member states.

[247] Protocol on the Establishment of the East African Community Common Market, Article 5(2) (b). *Op. cit*.

[248] *Ibid.* Article 5(2) (c). Also partner states are called to "remove restrictions on the right of establishment and residence of nationals of other partner states in their territory in accordance with the provisions of this Protocol. Right of establishment and residence are extended rights to rights offered in free movement of workers. In all EAC partner states, work permits entitle a person to work but not to reside in the host state. In this case, an application for a work permit is the first stage. The second stage is application for a residence permit. Example, section 16(I) of the Immigration Act No.7 of 1995 states that, "no person shall engage in paid employment- an employer resident in Tanzania except under a permit issued in accordance with the provisions of this Act. This condition applies in all EAC partner states. See also, Musonda, F. M., (2006). *Migration Legislation in East Africa*, International Migration Papers, International Labour office, Geneva, 2002. Retrieved March 17, 2016 from the Wide Wide Web:www.eac.int/migration/index.pdf.

academic and professional qualifications and harmonize their curricular, examinations and standards.[249] It has to be noted that effective and full implementation of the right to free movement of workers in the EAC community depends on partner states commitments and fulfillment of partner states obligations as briefly discussed above.

3.3.1 Procedures Involved in Free Movement of Workers in the EAC Common Market

In order to implement provisions of article 10 of the EAC common market protocol effectively with uniformity among partner states, Free Movement of Workers Regulations were enacted.[250] This is intended to ensure consistence, transparence, fairness and accountability of member states in fulfilling their treaty and protocol obligations. The regulations clarify that scope in free movement of workers involves workers, spouses of workers and children of workers.[251] A worker who utilizes the right to free movement of workers should fulfill the following conditions which involve presenting a contract of employment to the immigration officer, showing valid travel documents and declare all other information required for entry and exit.[252]

However, the above conditions apply to a worker and not to the spouse and child of a worker. In order to complete formalities of securing a work permit and residence permit, a host state is required to issue a pass which entitles a worker to stay for six months period. Spouse and children of a worker are also required to secure a pass in order to accompany a worker. These passes are issued free of charge.[253]

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[249] *Ibid*. Article 11.
[250] The East African Community Common Market (Free movement workers) Regulations, Regulation 2.
[251] *Ibid*. Regulation 4.
[252] *Ibid*. Regulation 5 (2).
[253] *Ibid.* Regulation 4, 5 and 6.

The duration of contract of employment determines whether a worker is to be issued a work permit or a special pass. A contract of employment which lasts for more than 90 days calls for a host state to issue a work permit while a contract of service of not more than 90 days require a special pass to stay in a host state.[254] The procedure requires that work permits be issued by a host state authority within thirty days of application for a work permit. A work permit is normally issued for up to two years with renewal upon application for the same.[255] This implies that the protocol does not provide limit in which workers can stay in the host state bearing in mind that the right of residence entitles for right of establishment.

The law demands work permit and special pass to be issued through the harmonized "classification of work permit and form, fees and procedures".[256] Such guidance is provided by the Council. Changing employment for a workers calls for notification to the relevant authority within fifteen days in writing and re application for another work permit to the concerned authority.[257]

Rejection for a work permit by the competent authority should be in writing with reasons for the same. The applicant may appeal against the decision of the competent authority using national laws of the host partner state.[258] This procedure is doubtful as appeal is made at the same host state laws which have rejected to issue the same. It could have been better if this procedure was to be done at community level in a distinct section. Cancellation of work permit is justified if a worker is expelled or deported from the territory of the host state. This occurs where a worker does not utilise the work permit according to specification of the same and where the work permit is obtained fraudulently.

For effective implementation of the right to free movement of workers in the EAC the above discussed procedures are important. However, there are challenges

[254] *Ibid*. Regulation 6.
[255] *Ibid*. Regulation 7.
[256] The East African Community Common Market (Free movement workers) Regulations, *Op. cit* Regulation 9.
[257] *Ibid*. Regulation 12.
[258] *Ibid*. Regulation 7.

involving the stated procedures pertaining work permit fees and requirement of contract of employment. Other partner states have not yet waved work permit fees as required by stated protocol. Also procedures demand that a worker should present a contract of employment to immigration officers before entry to any partner state. This requirement denies worker's right of free entry to search for employment opportunities as practiced by other successive community notably the EU.

Above all, the practice reveals that there are delays and rejection of work permits due to employment and immigration conditions imposed by member states. Free movement of workers in the EAC does not cover all categories of workers as envisaged under article 10 of the EAC common market protocol. Only selected skilled workers are involved as discussed below.

3.3.2 Schedules for the Free Movement of Workers in the EAC

The implementation of free movement of workers in East Africa is implemented according to schedule for the free movement as committed by partner states in the respective regulations.[259] Partner states committed to have full implementation for the agreed categories of workers at different levels. The committed categories of workers for Kenya involve directors, chief executives and specialized department managers. Other categories are professionals in physical science and teaching professionals. Also, Kenya committed for legal professionals and social science and related professionals. Furthermore, the country committed for medical and health science professionals including technical and associate professionals. Primary and pre-primary teachers, craft and trades skills are also committed for the same.[260] The country committed to have full implementation of the outlined categories of skilled workers by the year 2010.

[259] The East African Community Common Market (Free Movement of Workers) Regulations, *Op. cit*.
[260] *Ibid*.

Tanzania committed for professionals in teaching involving university and higher education teachers secondary and primary school and other teaching professionals. Other categories of workers involve professionals in engineering, science, health and land survey. The last group is the technical and associate professionals in air traffic involving air traffic controllers.[261] Tanzania committed to have full implementation of the same between 2010 and 2015.

Uganda committed for the categories of workers for the full implementation in 2010. The committed groups are administrators and managers involving directors and chief executives in administration, sales and marketing, public relations, information technology, research and planning together with production and operations managers. Other professionals involve professionals in science and engineering, health, business and administration, teaching business and administration computing and legal professionals.[262] Other skills involve craft and trade workers together with metal, machinery and related trade workers.

Burundi committed for professionals in physical, mathematical and engineering science basically involving physicists, chemists, mathematicians, architects, engineers and other professionals. Another groups committed to is life science and health professionals. Also, University teachers are committed in the teaching professionals. Other categories of professionals involve business, archivists, librarians, social science and related professionals.[263] All these groups where committed for the full implementation by 2010.

Lastly, the country of Rwanda committed for the professionals in physical science, mathematicians, statisticians and engineering science professionals. Other groups involve technicians and associated professionals. Also, technicians and associated professionals were committed involving engineering technicians, civil engineering,

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261 The East African Community Common Market (Free Movement of Workers) Regulations, *Op. cit*.
262 *Ibid.*
263 *Ibid*.

medical equipment operators, physiotherapists and related associated professionals.[264] All these groups were committed to be implemented by 2010.

The discussion above depicts that all partner states selected and committed their own categories of skilled and highly skilled workers in the common market according to their need. However, the committed categories are few relating to the vast available categories of workers existing in the community. What about other categories of skilled and highly skilled workers not committed? What about unskilled workers who also would like to exercise their right to free movement of workers in the Community? This demands practical experience from other successive communities on how free movement of workers is implemented in the common market as discussed under Chapter Four of this work.

The issue at stake is whether the EAC partner states offer social security protection involving minimum standards according to ILO Convention No.102, Social Security (Minimum Standards) Convention 1952 as discussed in chapter three above. Also it is salient to examine as to whether, EAC partner stats adhere to ILO convention No. 157 on Maintenance of Social Security rights 1982 and ILO Convention No 118 on Equality of Treatment (Social Security) 1962 as outlined earlier. This leads to a brief examination of partner states labour, immigration and social security laws and policies in East Africa.

3.4 Labour Laws and Policies in East Africa

Labour laws and policies are necessary in facilitation of free movement of workers in a common market. However, free movement of workers in a common market in economic integration is also highly influenced by partner states immigration and social security laws and policies. The following part gives an analysis of labour laws and policies in the EAC in a view to see how respective laws and policies facilitate free movement of workers in the community, and how immigration and

[264] *Ibid.*

social security laws influence effective free movement of workers in a common market.

3.4.1 Employment Laws and Policies of the Selected EAC Partner States

There are various legal instruments regulating employment and labour relations in East Africa. Since movement of workers is the interstate phenomenon, migration laws and procedures play a crucial role in the failure or success of free movement of workers in the EAC in the common market perspectives. The following part discusses employment laws and policies of Tanzania, Kenya and Uganda as justified in chapter one to represent other EAC countries.

It is worth to pinpoint that there was overhauling of employment and labour laws in **Tanzania** in 2004. The respective reformation led to enactment of two pieces of legislations to govern employment and labour relations together with settlement of labour disputes. These two major instruments are the Employment and Labour Relations Act[265] and the Labour Institutions Act.[266]

The employment of non citizens is regulated by the Non- Citizens (Employment Regulation) Act.[267] A non citizen is forbidden to work in Tanzania unless in possession of a valid work permit issued by relevant authority which allows him/her to work in the occupation specified in the respective occupation specified in the respective permit or holds a valid certificate of exemption issued under the respective authority.[268] The application for work permit is made while the aspiring candidate is in the country of residence to the Labour Commissioner prior entry to Tanzania. The Commissioner is empowered to issue, vary, renew or cancel any work permit applied for including the power to reject any application. With such

[265] The Employment and Labour Relations Act, No 6 of 2004. This Act came into force in 2006.
[266] The labour Institutions Act, No 7 of 2004. This Act came into force in 2007.
[267] The Non – Citizens (Employment Regulation) Act, No 1 of 2015.
[268] *Ibid*. Section 9.

responsibility, the Commissioner advises the responsible Minister in all matters relating to employment of non- citizens in Tanzania.[269]

For a person to be eligible to work in Tanzania should posses class “B” or “C” work permit. The main conditions given to the Labour Commissioner before approving a work permit is “to satisfy himself that all possible efforts have been explored to obtain a local expert.”[270] Also with supervision of the Commissioner, an employer intending to employ a foreigner is required by law to prepare a well established succession plan through effective training programmes in order to produce local employees to take duties of non citizens.[271] If this is the case, critically, one can argue on whether the EAC common market is real or hypothetical. Section 12 (4) also limits the working period of migrant workers such that the total period of validity of first and renewals of work permit should not exceed five years in any case.[272] This is contrary to the Protocol which offers unlimited period in the course of free movement of workers in the community as discussed earlier. The Act creates five categories of work permit namely: Class A (Issued to a foreign investor who is a self employed), Class B (issued to a non citizen in possession of a prescribed profession), Class C (issued to a non citizen in possession of other professions), Class D (issued to a non citizen

[269] *Ibid*. Section 5. Application for work permit before entry to Tanzania is made through the Labour Commissioner using a form provided for in the first schedule of the respective regulation. This form should be accompanied with relevant fees, as per six schedule and relevant documents specified in the second schedule. These applicable fees are $ 1000 for investors and self employed. $500 for non- citizens in possession of prescribed professions and $ 500 for non citizen employed or engaged in approved employment signed by the employer and employee, religious activities. Among other things the accompanying documents required are contract of employment, curriculum vitae of the employee, passport size, academic/profession certificates, photocopy of passport tax identification number(TIN), value added tax (VAT), and other documents as outlined under the Second schedule.). See also section 18, upon refusal or cancellation of the work permit by the labour Commissioner an aggrieved person can appeal to the Minister within 30 days from the date of decision. Upon proper consideration, the Minister may confirm the decision of the Labour Commissioner or vary the provided decision by the commissioner.

[270] The Non – Citizens (Employment Regulation) Act. *Op. cit* .Section 11 (2).

[271] *Ibid*. Section 7.

[272] *Ibid.*

employed/engaged in religious or charitable organization) and Class E (issued to refugees).[273]

Apart from the Non- Citizens (Employment Regulation) Act discussed above, the Employment and Labour Relations Act[274] and the Labour Institutions Act[275] govern employment standards and labour relations, establish labour institutions and set out procedural mechanisms of resolving labour grievances" (labour.disputes.handling- procedure, 2016). [276] The reform of labour law in Tanzania goes back to May, 1986 when the minister for justice and Attorney General gave special direction to the Law Reform Commission of Tanzania (TLRC) to review and report to him matters pertaining adequacy and effectiveness of the permanent labour Tribunal Act of 1967.[277] This led to the formation of a Task force in 2001 under the Ministry of Labour, Employment, Youth and persons with Disability in order to review labour laws, labour policies and respective institutions. As a result of the Commission's work the Employment and Labour Relation No 6 of 2004 Act and the Labour Institutions Act No 11 of 2004 together with Workers Compensation Act No 20 of 2008 Acts were enacted.[278] As provided

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[273] *Ibid*. Section 13 (1).

[274] No 6 of 004.

[275] No 11 of 2004.

[276] Retrieved February 2016 from www.labour.disputes.handling- procedure-in- Tanzania pdf. The general effect of the two Acts resulted to overhaul of the whole system of labour relations and employment matters including dispute settlement procedures which existed in Tanzania mainland previously. Example the employment and labour relations Act mentioned repealed a number of statutes like. The Employment Ordinance, cap.336, the Security of Employment Act, 1964, The Industrial Court of Tanzania Act, 1964, the Industrial Court of, Tanzania Act, 1967, Trade Unions Act, 1998, The Severance Allowances Act 1962, The Regulation of Wages and terms of Employment Ordinance, cap 300 and other related Acts.

[277] *Loc. cit*. p.3. See more the Report of the Law reform Commission. Retrieved March 17, 2016 from World Wide Web:www.lrct.go.ts, See also www.ilo.public. The LRC generally came up with six sues noting that the labour laws are scattered in various statutes unclear definition of terms like an employee, providing straight guidelines for redundancies, unsatisfactory mechanism for industrial disputes and need to harmonize workers' education and labour laws.

[278] The Commission was chaired by Hon. Justice Mrosso of the Court of Appeal of Tanzania. See paper presented By Dr. Cornel Mtaki, at a Dialogue seminar on new labour laws in Tanzania, conference Hall of the Economic and Social research foundation, 12th September 2005 (unpublished). Phase one of the work's Commission involved Employment laws, labour relation laws, disputes prevention and settlement procedures together with legal structure and regulatory framework involved. This phase resulted to enactment of the Employment and Labour Relations Act and the Labour Institutions Act as cited before. Phase two of the Commission's work concerned Occupation health and safety, workers, compensation, and

above, the law combines employment and labour relations in one enactment. The Employment and Labour Relations Act provides for labour standards together with rights and duties conferred by the law (Kapinga, 1985).

Besides discussed legislations, the Constitution also provides that every person has the right to work.[279] It provides that, "every person who works in entitled to just remuneration."[280] Non discrimination principle is embodied under article 23(1) where every person is entitled to fair remuneration according to work done without any kind of discrimination.[281] The Constitution also enshrines human rights ethics by which every person is entitled to enjoy fundamental human rights generally as stipulated under article 12 to 18 of the Constitution.[282]

The Employment and Labour Relations Act, 2004 provides for core labour rights, basic employment standards, a framework for collective bargaining prevention and settlement of disputes and other employment and labour relation issues. This motive is enumerated in the principle objectives of the Act which involve among others promotion of economic development, provision of legal framework for effective labour standards and enhancing legal framework for voluntary collective bargaining.[283]

It is obvious that the Employment and Labour Relations Act was enacted before the common market coming to force in 2010. However, one would have expected necessary amendments to be made to acknowledge the presence of the EAC

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employment promotions which resulted to enactment of the Worker's Compensation Act No 20 of 2008.

[279] Constitution of the United Republic of Tanzania, 1977. Article 22(1).

[280] Constitution of the United Republic of Tanzania. *Ibid*. Article 23(2).

[281] *Ibid*. The term discrimination is defined under Article 13(5) as originating from the word discriminate which means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or the situation which submits other persons or class of people as weak or inferior, thus subjected to restrictions as compared to other people. See more Article 12 and 13 which enshrine human rights principle that all human rights are born free and equal. This is build to the fact that all persons are equal before the law hence entitled to protection and equality before the law without any discrimination. Article 14 also provides for right to life in which every person has the right to live and protection of his life in accordance to the law.

[282] Constitution of the United Republic of Tanzania. Article 29. *Ibid.*.

[283] The Employment and Labour Relations Act, No 6 of 2004, Section 3.

common market. of all objectives provided above, none of them touches the EAC common market. Generally, the Employment and Labour Relations Act embodies fundamental matters to the core conventions of the international labour organization and other conventions as discussed in part 3.3.

Discrimination in work place is prohibited where every employer should promote an equal opportunity in employment hence work hard to eliminate discrimination in any employment policy and practice.[284] Direct or indirect discrimination is unlawful on the grounds of colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or region, sex, gender, pregnancy, HIV/Aids, age or station of life. This includes any form of harassment to an employee.[285] An offence is conducted when any person contravenes the above cited provisions.

The law also allows trade unions and federations to affiliate with and participate in any international workers' organization.[286] Trade unions are important in employment and labour relation. This lies to the assumption that states do not provide enough protection for workers on the basis of employment and social security. Governments normally legally involve organized trade unions in decision making. Hence improve labour, employment standards and conditions. Trade unions are normally advantageous as they represent large group of workers (Wilbarto & Riethof, 2002).

The Tanzania Employment and Labour Relations Act cited above also provides for employment standards. Employment standards involve wage determination that provides a minimum term and conditions of employment. Thus, employment standards involves terms of contracts between employer and employees.

[284] The Employment and Labour Relations Act, Section 7(1). *Op. cit.*

[285] The Employment and Labour Relations Act, *Op. cit*. Section 7(4). Section 8 (1) also prohibits discrimination in trade unions and employer associations in admission, representation or termination of employment or any collective agreement.

[286] *Ibid*. Section 11.

The Employment Act[287] provides for core labour rights, basic employment standards and other employment issues in Zanzibar. Recruitment in Zanzibar is done by established private employment Agents who are representatives of employers.[288] There are distinct legal challenges which affect free movement of workers involving Zanzibar as part of the United Republic of Tanzania. Employment of foreigners which definitely involve workers from the East African Community is regulated by law. Necessary conditions which should be fulfilled before a foreigner is employed involve making sure that there is no Tanzanian with required qualifications available for the respective post and is a managerial position investment consideration.[289] This restriction keeps the EAC common market in danger as it curtails the right to free movement of workers as offered under the protocol.

All foreign employees should posses a work permit issued by the commissioner upon payment of fees prescribed by the Minister.[290] The long term work permit is valid for between six and twelve months which may be renewed by the commissioner for not more than one year. This is upon application by the employers and employee on the condition that it is proved to be necessary, however in any case the total period for a foreigner employee eligible to work in Zanzibar should not exceed four years.

Apart from the above restrictions, the employment Act provides the fundamental rights and protection like prohibition of child labour, prohibition of the worst

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[287] The Employment Act No 11 of 2005. This act was enacted by the House of Representative of Zanzibar. As per Section 2, this Act applies to all employment in the private section. However, this Act does not apply to members of the special department employees covered under the current legislation related to merchant shopping and other class public officers.

[288] The Employment Act, Section 29 (1). *Op. cit*. Private Employment Agent" means any natural or legal person, independent of public authorities who provide specified employment services. This is provided under a valid special license. However, the Government may set its own procedures for recruitment of employees.

[289] The Employment Act, *Ibid.* Section 36(1).

[290] Section 36 (2) and (3). *Ibid*. See more Section 39(1) which holds that individual investors whose investments are approved under the provisions of the Zanzibar Investment Promotion and Protection Act 2004 shall be exempted from payment of work permit fees.

forms of child labour, prohibition of discrimination and sexual harassment, freedom of association, collective bargaining and other rights as provided.[291]

Generally, as it has been discussed above in the Zanzibar Employment Act and Zanzibar labour relations Act, which Zanzibar labour laws discriminate against nations of not only the EAC, but also other nations. It is clear in the labour regime of Tanzania that "labour laws are a non-union matter hence the Union Government has no legal mandate to change these laws" (Maalim, 2014).

Tanzania is a union of two independent and sovereign states, the Republic of Tanganyika and the Republic of Zanzibar. Article 1 proclaims that Tanzania is one state with sovereign powers.[292] However, the Constitution recognizes the revolutionary government of Zanzibar with authority over all issues which are union matters as provided by the Constitution.[293]

In the same way the Constitution of Zanzibar provides that "Zanzibar is an integral part of the United Republic of Tanzania."[294] Union matters are provided for under the first schedule of the Constitution involving among others immigration, foreign affairs, citizenship, the constitution of Tanzania and the government of the United Republic.[295]

As explained earlier, migration is part and parcel of labour and employment matters in East Africa. It is provided that, "successful management of migration lies at the heart of successful implementation of the EAC Common Market

[291] The Employment Act, Section 42 (1)-(4). *Op. cit.*
[292] The Constitution of the United Republic of Tanzania, *Op. cit*. See also Article 2 which defines the territory of the United Republic of Tanzania as the area of mainland Tanzania and the whole of the area of Tanzania Zanzibar inclusive of territorial waters.
[293] Article 102. *Ibid*. In this case Zanzibar exercises its authority in accordance with the provisions of the Constitution of Zanzibar, 1984 and the Republic of Tanzania Constitution with its own president. See Also Article 104(1). The president of the Revolutionary government of Zanzibar elected by the people in Tanzania Zanzibar in accordance to procedures provided for by the house of representatives of Zanzibar and the Constitution of Zanzibar, 1984. Article 106(1) establishes the house of representative of Zanzibar.
[294] The Constitution of Zanzibar, 1984. Article 1.
[295] *Ibid*. First Schedule. Other union matters are as listed in the Schedule.

Protocol" (Kanyangoga, 2010). With this, respect, the free movement of workers between partner states.

It should be noted earlier that labour and employment aspects are not union matters hence Zanzibar has exclusive jurisdiction as the Revolutionary Government. In the case of **Haji v. Nungu and another,**[296] the Court of Appeal of Tanzania held that under the scheme of the present Constitution there are matters falling under the exclusive domain of the Government of the United Republic in which the Zanzibar government has no jurisdiction. However, labour matters fall under non union matters.

The case of **S.M.Z v. Machano Khamis Ali and 17 others,**[297] addresses whether Zanzibar is a state or not. The Court of appeal clarified that Zanzibar is not a state under the Union Constitution and international law. However, it has exclusive jurisdiction in non union matters including labour and employment as pointed out above. The Union Government negotiated, concluded and ratified the treaty for the establishment of the EAC involving Tanzania mainland and Zanzibar (Tanzania), thus involving union matters and non union matters.

In this case, Zanzibar is not an independent member of the EAC hence part of the EAC under the coverage of the United Republic of Tanzania. However, "the United Republic has no competence to commit Zanzibar to the EAC when it comes to the Zanzibar non-union matters and any such commitment was, and is being done in manifest contravention of its internal law of fundamental importance (Articles of the union, Tanzania and Zanzibar constitutions).

Zanzibar's autonomy within Tanzania is coupled with Zanzibar's exclusive jurisdiction over its non-union matters is public knowledge. Should Zanzibar refuse to implement the EAC commitments on non-union matters, the other EAC partner states will not be able to either legally force Zanzibar to respect the

296 [1987] L.R.C (Constitution), 224.
297 Criminal application No 8 of 2000 (Revision from the ruling of the High Court of Zanzibar, at p. 202.

commitments since Zanzibar is not an independent member (Maalim, 2014). As pointed out above, labour and employment laws fall under non union matters.

The challenge is centered upon the fact that labour and employment affairs are non union matters, Tanzania mainland is guided by its own regime[298] while the revolutionary Government of Zanzibar has its own labour and employment regime as discussed before hence, the Union Government has no legal powers to harmonise and amend those laws to conform to the EAC protocol requirement. This demands permanent legal solution for effective free movement of workers in the EAC. The above discussion leads to another discussion of the EAC founding country.

Kenya as another founder of the EAC has distinct labour laws and employment policy. The employment relation in Kenya is governed by a number of legal instruments involving the Constitution, Labour Act, Employment Act, Immigration laws and a number of statutory regulations. These enactments have direct relations to the movement of workers in East Africa.

Prior to 2007 Kenya had laws which governed the stated disciplines.[299] The government worked on legislation and policy reforms which resulted to new laws and various amendments to govern labour relations, employment and immigration affairs (Ogalo, 2012). Despite the regulatory reforms in the stated fields it is said that there are notable cases of denial of work permits and delays in processing the same which hinders effective free movement of workers in East Africa (Ogalo, 2012). This being the case, the regulatory reforms might not match in practice with the treaty and protocol on free movement of labour in East Africa.

[298] Tanzania mainland is regulated by Employment and labour Relation Act, 2004, Labour Institutions Act, 2004. National Employment Promotion Services Act, 1999. In the Revolutionary Government of Zanzibar, labour and Employment matters are regulated by Zanzibar Labour Relations Act, No 1 of 2005 and the Employment Act, No 11 of 2005.

[299] These laws include the Kenya citizenship Act (cap 170) immigration Act (cap 172), Alien Restriction Act (Cap 170), Immigration Act Cap 172), Alien Restriction Act (Cap 173) and various visa regulations.

Apart from Kenya employment laws, migrant workers are admitted in the country in accordance with the Kenya Citizenship and Immigration Act[300] which governs issues relating to citizenship, travel documents and immigration affairs, this is in coordination with the Kenya Citizenship and Immigration Regulations[301] as provided by the respective authority. These instruments provide guidance on conditions which should be adhered to before a work permit is issued. The Minister of state for immigration and registration of persons is empowered under section 59 of the Act to make regulations stipulating conditions which must be adhered to before a migrant worker is admitted in the country. Section 20 (1) (4) provides that "the Director shall not issue a class K residence permit to any person unless that person has proven that he or she has funds or has in his or her own right and at his or her full and free disposition of an assured annual income of at least twenty four thousand US dollars or its equivalent to Kenyan shillings."[302] This is equivalent to TSH 62,400,000 per annum. This sum of money is quite much to a person normal person seeking employment. Such salary is mostly earned by directors and managers who are highly skilled, hence, frustrates the implementation of the right to free movement of workers as advocated by the EAC common market protocol.

Additionally, work permit is also issued on condition that the applicant should be "not less than thirty five years of age and whose presence in Kenya will be of benefit to Kenya."[303] This condition of age restriction appear to be of great impact in East Africa as more than 60% of the EAC population are youth aged below 35 years who are highly hunting for employment opportunities offered by the EAC common market protocol. As it is also maintained by other partner states the regulation states that "no permit shall be issued or renewed under the Act for a period exceeding five years from the date of issue or renewal, as the case may

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[300] The Kenya Citizenship and Immigration Act, No. 12 of 2011.
[301] The Kenya Citizenship and Immigration Regulations, Legal Notice No 64, 2012.
[302] *Ibid*.
[303] *Ibid*. Seventh schedule.

be."[304] The discussed conditions undermine the right to free movement of workers and against the spirit of the EAC common market.

The Kenyan Constitution also governs employment relations and labour rights. However, without consideration to the EAC treaty the Kenya constitution[305] is considered to be the supreme law of the republic which binds all person and all state organs.[306] Labour relations are provided for under article 41 where every person is considered to have the right to fair labour practice.[307] Rights and fundamental freedoms which also govern labour relations are provided under chapter four of the Constitution.

Equality and freedom from discrimination is provided in which it is stated that "the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[308]

Furthermore, The Employment Act[309] provides for fundamental rights of employees, basic conditions of employees and other employment standards. Part

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[304] *Ibid*. Regulation 24 (2).

[305] The Constitution of Kenya, Revised Edition, 2010.

[306] The Constitution of Kenya , *Op. cit*. Article 2(1), see also Article 2(3) in which the validity or legality of the Kenya constitution is not subject to Challenge by or before or any court or other state organ.

[307] The Constitution of Kenya, Revised Edition, 2010. See also Article 41(2) in which every workers has the right to fair remuneration, reasonable working conditions, right to form, join or participate in trade union affairs and right to strike as per Article 41(3), every employers organization and participate in activities and programmes involving employer organization see more Under Article 41(4)(5) where every trade union and employers organization has the right to determine its programme and administration involving forming and joining a federation. Also every employer, trade union and employers organization has the right to involve in collective bargaining.

[308] *Ibid*. Article 27(4). See Article 27 (2). This equality and freedom from non discrimination extends to equal employment and other fundamental freedoms.

[309] Employment Act (Cap 226 [Rev. 2012]. The Act defines employee as a person employed for wages or salary and includes an apprentice and indentured learner. Also it defines the term employer as any person, public body, firm ,corporation or company who or which has entered into a contract of service to employ any individual and include the, foreman manager or factor of such person, public body, firm, corporation or company. Person also by contract of service the Act implies an agreement whether oral or in writing, and whether expressed or implied, to

11 of the respective statute lays down general principles in employment relations. Forced labour is prohibited in using or assisting another person in recruiting and trafficking.[310]

Also, equality of opportunity in employment is encouraged by prohibiting discrimination in employment. No discrimination is allowed on grounds of race, colour, sex, language, nationality, political disability and other forms of discrimination.[311] However, employment of citizens according to nationality employment policy and limiting access to employment for the interest of state security is justified.[312] This forms the basis of discussion as this option might be misused to defend the National interest in restricting foreign employment. Other rights and duties in employment are provided for under part V of the Act where employment standards especially basic minimum conditions of employment, hours of work, annual leave, maternity leave, sick leave are provided for.[313]

In order to discharge effectively the employment and labour matters, the Labour Institutions Act[314] establishes labour institutions, functions and powers and other issues associated to. Section 5 establishes the National Labour Board.[315] Among others, the functions of the board involve advising the Minister on all matters concerning employment and foreigners employment.[316]

The National Labour Board consists of work permits committee, National Manpower Development Committees as provided for under section 8(1).[317] These committees are established in consultation between the Board and the respective Minister for employment issues. Apart from the work permit committee, the

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employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership and does not include a foreign contract of service.

310 The Constitution of Kenya, *Op. cit*.

311 Section 5. *Loc. cit*.

312 Employment Act, Section 4(d). *Op. cit*.

313 *Ibid*. Section 26-34.

314 The labour Institutions Act, 2007.

315 *Ibid*.Section 5(1).

316 The Labour Institutions Act, Section 7(1). *Op. cit*.

317 The labour Institutions Act, *Ibid.*

Minister, in consultation with the Board is duty bound to advise the Government on the issuing of immigration entry permits and work permits to non-citizens.[318] For proper administration of labour and employment laws the Commissioner for Labour and Director of employment and other labour officers and employment officers are appointed.[319] The office of Commissioner for labour and Director of employment are given powers of monitoring and enforcing compliance with labour matters. Employment officers have the duty of collecting labour market data for effective employment operations, this being the case, powers conferred to labour officers are also given to employment officers.[320] Also Wages Councils are established under section 43 of the Act to deal with remuneration and other conditions of employment and minimum wages considerations. Having discussed the labour and employment policy of Kenya and concerned limitations, the following part examines the same to Uganda as the last founding partner state.

The **Uganda** Constitutions[321] safeguards fundamental and other human rights and freedoms. Discriminations basing on race, colour, sex, ethnic origin, tribe, birth and other traits are prohibited.[322] By guaranteeing the right to own property individually or in association with others, the right to work is also guaranteed.[323] This is secured in the form of economic rights. In this case, the Constitution directs

[318] The labour Institutions Act, *Op. cit*. Section 7(2)(a). As per Section 10 the Commissioner for labour shall be the secretary to the Board.
[319] Section 30, *Ibid*. however, as per Section 32, the Commissioner for labour may delegate in writing to any labour officer any of the commissioners powers, functions and duties. In the same way, the Director of employment may also delegate in writing the Director's powers, functions and duties.
[320] The labour Institutions Act, Section 36. *Op. cit*. Labour officer powers are provided under section 25 (1) a –g. See also section 42(1) the Commissioner for labour and the Director of employment are required to prepare and publish an annual report every year for activities conducted in their respective departments.
[321] Uganda Constitution, 1995.
[322] Uganda Constitution, Article 21(2). *Op. cit*. In this case, discrimination is defined by the Constitution to mean giving different Treatment to different persons attributable only or mainly to their respective descriptions, Article 21(3). See also Article 24 on which it is illegal to subject any person to torture, or cruel, inhuman or degrading treatment or punishment.
[323] *Ibid.* Article 26(1). See *also* See Article 29 where other fundamental rights like freedom of speech and expression, freedom to assemble and to demonstrate with others peacefully, this extends to freedom of association which involves forming and joining associations or unions.

the parliament to enact laws in order to provide for the right to work under safe and health conditions and equal treatment without discrimination.[324]

As a matter of procedures, migrant workers are not allowed to work in Uganda involving the East African Community workers without valid work permit. Matters involving employment and industrial relations are also dealt with by the Employment Act[325] and its regulations.[326] In order for a person to be eligible to work in Uganda there should exist a contract of service between employer and the respective employee. This applies to oral and written contracts.[327]

Apart from the above statutory employment enactment, the control of migrant workers is managed by the Uganda Citizenship and Immigration Act[328] and the Uganda Citizenship and Immigration Control Regulations.[329] Section 53 maintains that entry to Uganda is prohibited unless such a person has been granted a work permit by relevant authority. That implies that as for the rest of the EAC states, a work permit should be secured by an aspiring person while in the country of residence.[330]

The two conditions which should be met before granting a work permit involve making sure that such skill is not available for the Ugandan to fill the same hence demand for an expert. The other condition is ensuring that such employment is of

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[324] *Ibid*. Article 40(1), Also under Article 40 (2) and (3) workers have constitutional rights to join trade unions, collective bargaining and representation.

[325] The Employment Act, 2006.

[326] The Employment Regulations, 2011.

[327] Employment Act, *Op. cit*, Section 25. Contract of service is defined to mean any contract, whether oral or in writing whether express or implied where a person agrees in return for remuneration to work for an employer and includes a contract of apprenticeship. This includes any person who is employed by or for the Government of Uganda which includes public service, a local authority or a parastatal organization. However, The East African Community is not mentioned, the term employer is defined to mean any person or group of persons, including a company or corporation, a public, regional or local authority, a governing body of a Union corporate association, a partnership. Parastatal organization or other institution or organization whatsoever, for whom an employee works or has worked or normally worked or sought to work, under a contract of service. An employee is defined to mean any person who has entered into a contract of service or apprenticeship contract.

[328] The Uganda Citizenship and Immigration Control Act, Cap 66, 1999.

[329] Uganda Citizenship and Immigration Control Regulations, 2004.

[330] The Uganda Citizenship and Immigration Control Act, Cap 66,1999. Article 53.

benefit to Uganda.[331] Even the duration of work permit does not exceed one year with a limit in employment period in the country.[332] Other conditions are also discussed under part 3.4.2 below. As noted above, it is illegal to work in Uganda without a valid work permit. This also involves persons organizing unlawful movement of migrants for employment purposes.[333] The stated conditions work against the spirit of the right to free movement of workers as governed under the EAC common market protocol.

Various employment standards are also enshrined like weekly rest, length of working hours per week, annual leave and public holidays, sick pay, maternity leave and paternity leave in Uganda labour standards.[334] Core labour rights are also enshrined where it is illegal to employ a child under the age of twelve years. However, a child under the age of fourteen years is not supposed to be employed in any business serve for light duties or works under supervision of adult person who is over eighteen years.

In order to administer employment issues effectively, the Labour Advisory Board is established under section 21 to deal with matters affecting employment and industrial relations. The Labour Advisory Board has powers among others to advise the minister on all labour and employment matters and to review monitor the status of migrant workers.[335]

The success of implementation of the right to free movement of workers in the EAC is hinged on protection of social security during the course of free movement within the Community. The following part gives discussion of the social security laws and policies of the EAC founding members.

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[331] Uganda Citizenship and Immigration Control Regulations, 2004, Regulation 23.
[332] *Ibid*. Regulation 6.
[333] The term migrant workers is defined to mean a person who migrates or has migrated from one country to another with a view to being employed by another person and includes any person regularly admitted as a migrant work.
[334] Uganda Citizenship and Immigration Control Regulations. *Op.cit*. Section 51-61.
[335] Uganda Employment Regulation, 2011. Section 10.

3.4.1.1 Influence of Social Security Laws and Policies on free movement of workers in a Common Market

Social security rights enjoyment is an aspect of labour laws. Free movement of workers in the EAC entitles workers to "enjoy the rights and benefits of social security as accorded to workers of the host partner state."[336] Thus, effective implementation of free movement of workers in the common market ensures that workers who move for employment purposes within the community have the right to be treated as if they were citizens of that host state (Bernaciak, 2015). This involves labour related matters and social security protection. It is worth to be noted that the EAC partner states have different social security laws and policies. In this manner, workers who exercise their right to free movement in the common market are subjected to different social security regimes as well. This calls for coordination and harmonization of social security laws and policies within the community. As a result, through application of exportability and aggregation principles, workers are able to maintain their social security credits when moving from one partner state to another. Such achievements can be attained despite the fact that member states maintain their own social security regimes. Thus, proper alignment of partner states labour laws with partner states social security regimes within the community is important for effective free movement of workers in the common market.

It should be clear from the beginning that there is no social security policy at the regional level. Despite the fact that workers moving within the community are entitled to enjoy the rights and benefits of social security accorded to workers of partner state, the Council has a great role in order to attain the set target. Article 10(4)[337] provides that "…the Council shall issue directives and make regulations on social security benefits." Thus, social security administration solely relies on partner states Constitutions, policies and national legislations. This can be

[336] Protocol on the Establishment of the East African Community Common Market. Article 103(f). *Op. cit.*
[337] *Ibid.*

examined by a brief discussion on social security laws and policies of EAC founding partner states notably Tanzania, Kenya and Uganda.

Social security Protection in **Tanzania** has Constitutional legal framework. Article 11(i) states that "the state authority shall make appropriate provisions for the realization of a person's right to work, self education and social welfare at times of old age sickness or disability and in other cases of incapacity."[338] However, the fundamental objectives and directives principles of state policy in which social security is anchored upon is not well guaranteed as the same cannot be enforceable by any court of law.[339] Another challenge is that there is insufficient coverage of social security services to the Tanzania society.

The policy declares to abide to standard minimum number of benefits as provided for under ILO Convention (Minimum Standards) 102 of 1952 discussed above. However, among the challenges facing social security in Tanzania involve limited coverage, inadequacy of benefits paid (The country has managed to provide 7 benefits outlined under ILO Convention No. 102), fragmentation and lack of co-ordination between schemes, hence lack of mechanism for portability of benefits rights between them (Mwalimu, 2004). Portability of social security benefits is not only important within the country but also between member states in the common market for effective free movement in the community.

Portability of benefits ensures that member's accrued benefits are not lost by a member changing employer, changing employment from one sector to another or by migrating from one country to another." (Mwalimu, 2004). This arrangement ensures continuity of benefits rights possessed by workers. This proves to be a problem and challenge not only to Tanzania but also other EAC partner state members. Example, a Tanzanian might have contributed to a certain social security scheme in Tanzania for 3 years then decides to work in Uganda for 5 years,

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338 The Constitution of the United Republic of Tanzania, *Op. cit*. Right to education is also recognized under Article 11(2) and 11(3).

339 *Ibid*. Article 7(2).

thereafter in Kenya for 6 years and in Rwanda for 5 years before returning to Tanzania. Due to the fact that there is no totalisaiton of periods of contribution spent in two or more countries, the respective worker cannot qualify for pension. This is due to the fact that EAC social security schemes demand between 10-15 years as qualification for old age pension and other long term pensions.

Another scenario can be drawn for short term benefits in Tanzania. Members of NSSF Tanzania mainland qualify for social health insurance benefit[340] after having contributed to the fund for not less than three months. When a migrant from Kenya or any other partner state countries who have been a member in the respective schemes in his country comes to Tanzania cannot qualify for Social Health Insurance Benefit (SHIB). This also applies to Maternity Benefit (MB) which demands three years of statutory contributions as one of qualifications to receive the same. Had the principle of maintenance of the rights in the course of acquisition been in operation, such migrant workers would have qualified for SHIB and MB Benefits in Tanzania.

Currently there are various reformations taking place in the Tanzania social security regime. The Public Service Social Security Fund Act bill[341] has resulted to enactment of the Public Service Social Security Fund Act[342] which merges the Parastatal Pension Fund (PPF), the Local Authorities Provident Fund Act (LAPF), the Government Employees Pension Fund (GEPF) and the Public Service Pension Fund (PSPF). The newly established social security fund provides coverage to public servants only. The National Social Security Fund (NSSF) still exist amid social security changes in Tanzania. NSSF has been given exclusive jurisdiction to provide social security coverage to private and informal sectors in Tanzania.

Besides the expected changes, there are various social security schemes in Tanzania under statutory legislations. However, none of these schemes are

[340] The National Social Security Fund Act, No 28 of 1997.
[341] 2017. No 8A, ISSN 0856-01001, Special Bill Supplement, 19 October, 2017.
[342] No 2 of 2018.

compatible with the rest of the EAC country's schemes. Despite non existence of such compatibility, registration of workers from the EAC and outside the bloc is allowed.

The following brief account can be made. There have been recent changes of social security regime in Tanzania. The National Social Security Fund Act (NSSF)[343] covers employees in the private sector and public sector together with self employed persons and informal sector. The scheme offers long term benefits[344] and short term benefits[345] with a total of seven benefits. The contribution rate is 10% for the employer and 10% for employee making a total of 20% per month. Before merging of social security schemes to two major schemes as discussed above, the formally existed schemes included the Parastatal Pensions Fund (PPF) is established by the Parastatal Pensions Fund Act[346] which covered public sector, private sector, self employed and the informal sector. This scheme offered old age benefit, disability benefit, death benefit, survival benefit, gratuity benefits, education and withdrawal benefit. The contribution rate was 5% employees and 15% making a total of 20% of the employee salary.

Apart from the mentioned schemes, the Local Authorities Provident Fund (LAPF) under the Local Authorities Pensions Fund Act[347] (LAPF) which covered local government authority employees, private sector and the informal sector also existed. The Government Employees Pension Fund under the Government Employees Pension Fund Act[348] co existed with the above discussed schemes. It covered (GEPF) covered employees in government sector, private sector and the informal sector. Also, currently, the National Health Insurance Fund (NHIF) under

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[343] Public Service Social Security Fund Act. *Op.cit*.
[344] Long Term Benefits or Pension Benefits involve old age pension (Sections 23-27, Invalidity pension (Sections 28-32) and Survivals pension (Sections 33-36).
[345] Short Term Benefits include funeral grant (Sections 38) maternity benefit (Sections 44-45), employment injury (Sections.39- 40) and Social health insurance benefit (Section.41).
[346] No. 14 of 1978.
[347] No. 9 of 2006.
[348] Government Employees Pension Fund Act, No 8 of 2013.

the National Health Insurance Fund Act[349] is the compulsory scheme for public sector employees also covers private sector and the informal sector. The Fund provides coverage to principal members, spouses and four children. The contribution rate is 3% of the employee's monthly salary.

Furthermore, the Public Service Pension Fund (PSPF) under the Public Service Retirement Benefits Act[350] covered pensionable public servants, the private sector and the informal sector. The contribution rate was 15% for the employer and 5% for the employee in monthly salary. This scheme has been merged to PSSSF. In addition, there is also the Political Service Retirement Act[351] which provides benefits to political leaders and the Judges (Remuneration and Terminal Benefits) Act, which covers benefits for judges.

As seen above, Tanzania labors a multiplicity of schemes almost covering the same people in the public, private and the informal sectors also managed under different Ministries. The Tanzania Social Security Regulatory Authority was established under the Tanzania Social Security Regulatory Authority Act.[352] It should be recalled that, labour and social security governance are non Union matters[353] hence, Tanzania Mainland and the Revolutionary Government of Zanzibar maintains different social security schemes. The Zanzibar Social Security Fund (ZSSF) under the Zanzibar Social Security Fund Act[354] covers employees in public and private sectors and self employed persons. The benefits offered are old age benefits, survivor's benefits, maternity benefits, medical benefits and invalidity benefits. The contribution rate is 5% to the employees and 10% to the employer making a total of 15% of the employee monthly salary. Other partner states offer different pattern as discussed below.

[349] No 8 of 1999.
[350] 1999.
[351] 2007.
[352] No 8 of 2008.
[353] United Republic of Tanzania Constitution, Article 4. *Op. cit*. Article 4.
[354] No. 2 of 2005.

Unlike Tanzania, **Kenya** has no National Social Security Policy. Provisions of existing schemes do not accommodate exportability of social security credits outside the country, hence they offer no compatibility with the rest of the EAC social security schemes. The social security legal framework relies on the Constitution and national legislations.

Also, the Constitution upholds the values of human dignity, equality, social justice inclusiveness, equality, human rights, non-discriminations and protection of the marginalized which are fundamental to social security protection.[355] It is maintained that, "the above article essentially sets out major elements of social security and social protections necessary for Kenyan citizens. The relevant rights are those of health, reproductive health and emergency health care, housing, food, safe water, education and general social security" (Barya, 2011).

Apart from the above constitutional social security provisions there are also various national legislations on the matter at hand. The National Social Security Fund (NSSF) under the National Social Security Fund Act[356] provides coverage for the private sector as a mandatory scheme for organizations/firms employing five or more workers. The benefits provided are age benefits (under Section 20 (ii), survivors' benefit (S.21), invalidity benefit (S.22) withdrawal benefit (S.23) and emigration grant (S.24).

Like Uganda NSSF Act, it is worth to mention that the benefits provided are very limited and do not meet the minimum benefits stipulated under ILO convention No. 102, Social Security (Minimum Standards) 1952. In the same trend, the Act offers one off lump sum payment with no pension arrangements in monthly basis contrary to ILO standards specification. It is very limited to formal sector while excluding the informal sector and firms with less than 5 employees. This implies

[355] *Ibid*. Article 10(2) (b). Also Article 41 provides right to workers involving fair remuneration, reasonable working conditions and other labour rights. See also Article 54 on rights to persons with disabilities and youth rights as provided for under Article 53. Rights to the elderly are provided for under Article 57.

[356] Kenya National Social Security Fund Act, No 45 of 2013.

that employers employing less than 5 employees do not have social security protection. With this notion, many workers are neglected.

Furthermore, the Kenya Pensions Act[357] is confined to provision of gratuities and various allowances to public service servants. Besides the above limitations, pension is not regarded as a right as section 5(i) states that, “no officer shall have an absolute right to compensation for past service or to pension, gratuity or other allowance, nor shall anything in this Act affect the right of the Government to dismiss any officer at any time and without compensation.”[358] Other limitations are also stated under sections 14(i), section 15(1), section 16, section 17 and section 19. Apart from being contrary to the spirit of the Kenyan Constitution, the said Act falls short of various international legal instruments standards discussed earlier.

In addition, the National Health Insurance Fund (NHIF) under the National Hospital Insurance Fund Act[359] apart from being a mandatory contributory scheme, the Act also provides coverage to self employed persons. The Act caters for medical benefits involving in patient and out patients. The Act covers mainly the formal sector and excludes the informal sector due to its contribution operation nature. Also, the Retirement Benefit Authority (RBA) is established under the Retirement Benefits Authority Act.[360] As per sections 6-19, the Authority has power to manage and supervise retirement benefit schemes in the country. Due to its regulatory nature, the Authority regulates compulsory registration of retirement benefit schemes for social security protection.[361]

To be precise, this Authority is almost similar to Tanzania Social Security Regulatory Authority (SSRA) discussed earlier. However, most people in the informal sector are not covered and also the formal sector is not well covered. The

[357] Kenya pensions Act, Chapter 189 [R.E 2009].
[358] *Ibid*.
[359] No. 9 of 1998.
[360] No. 3 of 1997.
[361] No. 3 of 1997.

last founder of the EAC partner state is Uganda. The following part gives brief discussion of the Uganda social security legal framework.

Like Kenya, **Uganda** has no social security policy thus social security is build upon Constitutional provisions and national legislations. Also, like Tanzania and Kenya, Uganda's social security schemes are not compatible with other social security schemes in East Africa. However, a brief account can be made as follows. The Constitutional national objectives and directive principles of state policy base on fundamental and other human rights and freedoms, protection of the aged and provision of medical services in social and economic objectives. The Constitution focuses on sufficient access to education, health services, clean and safe water, shelter, clothing, food security and provision of retirement pension. Also, the government aims at protecting the family as the basic unit of the society.[362]

Public servants appear to have Constitutional protection in the form of pension than any other kinds of benefits. Article 254 states that "a public officer, on retirement, receives such pension as it commensurate with his or her rank, salary and length of service."[363] This also involves exemption from tax with periodic review according to inflation. Pensioners are also guaranteed prompt and easily accessible payment.[364] With this emphasis this leaves questions pertaining protection of other types of benefits basing on ILO convention No 102 social security (Minimum Standard) 1952 analyzed in this chapter. This leads to the need for examination of the national legislations on social security in Uganda.

The Uganda National Social Security Fund (NSSF) under the National Social Security Fund Act[365] operates as a compulsory scheme for private sector. Any firm or organization employing five or more employees must register for monthly

[362] The Constitution of the Republic of Uganda, 1995, the preamble. Also reflected under Articles 30, 34, (2), 33, 35, 36 and 39. Workers rights are also enshrined under Article 40.
[363] The Constitution of the Republic of Uganda, 1995.
[364] *Ibid*.
[365] Chapter 222, 1985.

contributions.[366] With this distinction on number of registration eligibility it is very obvious that eligible employees are left unprotected in social security. With this respect, a good lesson can be drawn from Tanzania Social Security Schemes where all employers with one or more employees are required under Social Security law to register the respective employee or employees. This ensures that all eligible employees get access to social security protection.

The Uganda National Social Security Fund offers only three benefits namely age benefits,[367] invalidity benefit[368] and survivors' benefit.[369] Other services like emigration grant[370] and withdrawal provisions[371] cannot be termed benefits as they are not even recognized under ILO Convention No.102 Social Security (Minimum Standard) discussed earlier 1952. This leaves short term social security benefits like social health insurance benefit(SHIB), maternity benefit(MB), employment injury benefit(EIB) and funeral grant(FG) in exclusion.

Worse still the Uganda National Social Security Fund operates as a provident fund due to the fact that there is no pension arrangements as insured persons are only awarded lump sum grant with no monthly payments. This is contrary to social security principles in which provision of suitable income in old age should be guaranteed in the form of long term benefits. As per section 11 and 12 of the respective Act, employees should contribute 5% and employers 10% to make a total of 15% to be submitted to the Fund monthly.

Another scheme is the Public Service Pension scheme (PSPS) under the Pensions Act[372] which provides social security coverage to public servants belonging to central and local governments as per section 9 of the Act. This is a non contributory scheme which depends in consolidated fund from the government. As

[366] *Ibid*. Section 6 and Section 7.
[367] Chapter 222, *Op. cit*. Article 20.
[368] *Ibid*. Article 22.
[369] *Ibid*. Article 24.
[370] *Ibid*. Article 23.
[371] *Ibid*. Article 21.
[372] Pensions Act, 2007.

a result, many eligible employees are not attended. The scheme is required to attend staff like teachers, prisons, army and police. The Fund leaves many employees unprotected who work as supportive staff in public entities and local governments and other Commissions (Barya, 2011). As outlined in the Act, the scheme provides limited benefits contrary to ILO Convention No.102 with lump sum payment excluding monthly pensions which defeats the international guidelines on social security protection discussed earlier. Apart from the discussed schemes, there are also other unregulated social protection schemes which provide services below the minimum social security international guidelines. Other EAC countries like Rwanda and Burundi also offer social security protection almost like the countries of Kenya and Uganda.

As discussed above, there are similarities and differences in the EAC partner states concerning social security governance. Most of the similarities noted like social security coverage, variations in contribution rates, limit in social security benefits covered and failure to provide benefits on pension arrangements in place of lump sum payments resulting from failure in abiding to international social security standards. These standards are like ILO Convention No. 102 Social Security (Minimum Standards) Convention,[373] Maintenance of Social Security Rights Convention,[374] Equality of Treatment (Social Security) Convention[375] and other international instruments discussed earlier.

The EAC community has no baseline standards in social security provision at the regional level. Generally, it is testified that social security regimes in the EAC embrace remarkable diversity. As observed, there is no compatibility of social security social security schemes in East Africa. Such differences exert more challenge on how effectively free movement of labour should be implemented in the bloc Rwegoshora, 2016). Though the prevailing EAC labour law advocates

[373] 1952.
[374] Convention No.157,1982.
[375] Convention No. 118, 1962.

protecting equality of treatment for workers in the host state[376] the existing laws do not protect social security rights when workers move from one partner state to another within the bloc. Thus, existing social security schemes law provisions do not provide social security rights across borders trough exportability of social security credits and aggregation of insurance periods within the Community. This situation results to loss of social security rights acquired in the course of exercising right to free movement for workers (Bender, Kaltenborn & Pfleiderer, 2013). In this case, a worker is obliged to start afresh his/her contributions to specific scheme in the host country hence failure to qualify in most benefits in social security coverage. This frustrates implementation of the right to free movement of workers in the region.

Since exportability and aggregation of social security benefits is a fundamental challenge in East Africa, besides the light provided in various international instruments examined before, it is important to have special experience elsewhere on how social security protection can be offered in the common market. The EU and CARICOM offer special experience on successive free movement of workers with effective consideration of social security protection during free movement across borders as discussed in chapter one. Having discussed the EAC partner states labour, immigration and social security regime, it is important to discuss briefly how immigration laws and procedures affect implementation of the right to free movement of workers in the common market. Labour laws and immigration laws are part and parcel to the success of free movement of workers in a common market. The following part examines the influence of immigration laws and policies of selected EAC partner states in the success of free movement of workers in a common market

[376] However, as discussed in Chapter three, even the existing EAC labour laws do not guarantee equal treatment for EAC citizens.

3.4.1. 2 Influence of Immigration Laws and Policies on free movement of workers in a common market

Labour laws and policies in a common market interact with immigration laws and policies in the implementation of the right to free movement of workers in economic integrations. The EAC partner states posses various immigration laws which also determine how workers are admitted in their respective states. Thus, there is great connection between immigration laws and the right to free movement of workers in a common market. A worker who utilizes the right to free movement should adhere to immigration laws and procedures as stipulated by the host partner state.

There is a great connection between employment and immigration laws in a common market. In **Tanzania**, a migrant worker granted the relevant work permit should also apply for the appropriate residence permit. It is worth to not that, "the implementation of free movement of persons and workers is anchored upon immigration and labour laws." Bender, Kaltenborn & Pfleiderer, 2013). This being the case, the Tanzania Immigration Act[377] and related regulations under the Act is another instrument administering and controlling labour movements in the United Republic of Tanzania (Mwalimu, 2004). The Immigration Act deals with immigration matters in Tanzania mainland and Zanzibar as provided for under section 2(1) of the Act. Prohibition on employment of non citizens is clearly stated that "no person shall engage in paid employment under an employer resident in Tanzania except under a permit issued in accordance with the provisions of this Act."[378] In this case, any person from any place outside Tanzania involving the

[377] Act.No.7 of 1995.

[378] The Immigration Act.No.7 of 1995. Section 16(1).This extends to studying opportunities in Tanzania where no person is allowed to study at any educational institution without holding a valid and appropriate permit.

EAC can enter the country if in possession of a valid passport, holding a residence permit or having a special pass.[379]

The Act provides for three classes of residence permits which are class "A" permits, class "B" permits and class "C" permits.[380] Resident permits are issued subjects to specific conditions regulated from time to time.[381] In order to manage effectively immigration matters, the office of the Director of Immigration services is established under section 4(1).[382] This is the highest post in immigration by which the Director is considered to be the chief executive officer of Immigration Division and answerable to the Minister.[383]

The law provides that the Minister responsible for immigration affairs has the last say on residence permits granting and all issues relating to administration of non-citizens. All appeals relating to residence permits and resident permits lie to the respective Minister. It is clearly provided that "any person aggrieved by any decision of the Director refusing an application for residence permit or varying the conditions or period of validity specified in the work permit, may appeal to the Minster against the decision and the decision of the Minister on that appeal shall

[379] Section 15(1). *Ibid*. See also Section (15) (1), the wife or any dependent child of any person shall not engage in Any employment, business, trade or profession in Tanzania without obtaining a residence permit.

[380] The Immigration Act, *Op. cit*, section 18(1). *Op. cit* Class 'B' residence permit for employment purpose, Class A residence permit immigrants who intend to enter or remain in Tanzania and engage in trade, business profession, agriculture, animal husbandry, prospecting of minerals or manufacture. Class 'C' residences permit for immigrants not granted Class A and B permits as per discretion of the Director.

[381] *Ibid*. Section 22(1).

[382] *Ibid.*

[383] *Ibid,* Section 4. *Op. cit.* The term "the Director" is defined by the Act as the Director of immigration services Appointed under section 4 and includes any person exercising the powers of the Director duly delegated to him pursuant to section 5. See section 4(3) "The Director is assisted by a number of immigration officer for proper and efficient administration of immigration affairs. Powers of immigration of officers are provided for under section 64(7) of this Act. Also under section 24 the Director on his own motion or in any prescribed may vary the conditions and the period of validity of the work permit. In addition, under section 27, the Director through a written notice may revoke any permit if satisfied that the holder has failed to comply with permit requirement, obtained any permit by representation or concealing any material information. The Director may also revoke any permit where holder has failed to observe any conditions specified in the permit.

be final and shall not be subject to any inquiry by any court of law."[384] The Minister is considered to be the authority in all matters relating to employment of non-citizens. With this power, apart from coordinating all affairs pertaining employment of non citizens, he can also give directives to the Labour Commissioner or any authorized officer in the performance of his duties.[385]

Immigration is very important as related to employment of non citizens in Tanzania. Apart from immigration legislation discussed above, there are also migration policies. The term migration policy implies "those government interventions that regulate the arrival or departure of foreigners according to their nationality, purpose of their arrival and duration of their stay." (Musonda, 2006). Policies involving migration and employment affect free movement of workers in the bloc hence determine the success or failure of the effective free movement of workers in the community. This also involves all administrative handles which affect the movement of workers between one partner states to another.

There is no comprehensive policy involving labour migration and employment matters in Tanzania. These policies are fragmented and backed up by various legislations (Mwalimu, 2004). The general policy maintained in Tanzania is that foreigners are to be employed in certain occupations for specific reasons. The law maintains that, "no employers shall employ a foreigner as an employee in any employment or class of employment which the Minister may from time to time by notice in the gazette declare to be employment or class of employment in which citizens only may be employed" (Mwalimu, 2004). This implies that the domestic labour market in Tanzania is protected against foreign workers employment including the EAC partner states workers.

[384] *Ibid*. The Immigration Act, Section 23.
[385] The Non-Citizens (Employment Regulation) Act, *Op. cit*. This regulates and realign the legal regime for employment of non-citizens in mainland Tanzania and other related matters. See section 4(3). Directions given by the Minister must be complied with by every person responsible.

It is well stated that any employer who employs any foreigner in distinct categories of employment reserved for citizens commit offences and liable on conviction to a fine of not less than one million shillings or to imprisonment for a term of not less than six months or both fines and imprisonment.[386] All employment should follow procedures for foreigners' employment as discussed earlier. Any person besides employers who is convicted is also liable to the same fine and imprisonment or both as the employer as sited above.

The National Employment Policy maintains that "the problem of unemployment and under employment has now become so serious, that, it should be regarded as a major national development challenge.[387] Among others, the specific objectives of the National Employment Policy are enhancing skills and competences in formal and informal sectors, promoting decent and productive employment and safeguarding basic rights and interests of workers in accordance with international labour standards.[388]

The policy recognizes that unemployment is a serious problem worth to be the fundamental development challenge which affect the economic welfare, social stability and human dignity.[389] Thus, the Government builds strategies for sustainable employment of Tanzanian citizens. In recognition of the same, the National Employment Promotion Services has the National Employment Advisory Committee. This committee is established under section 7(1) with responsibility of

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[386] National Employment Promotion Service Act. Section 25. *Op. cit.*

[387] National Employment Policy, 2008, Ministry of labour, Employment and Youth Development, Dar es Salaam. The said Policy defines unemployment as a situation of total lack of work of an individual. Thus, viewed as an enforced idleness of potential wage earners or self employed persons that are able and willing to work, but can not find work. A great number of people earn their living by working for others, finding job is an acute problem. The unemployment rate is defined as the percentage of the unemployed relative to the labour force available.

[388] *Ibid*. p. 8.

[389] National Employment Policy, *Op. cit*. Ministry of labour, Employment and Youth Development, Dar es Salaam. p. 2 The Government recognizes the connection between economic growth, poverty reduction and labour market performance. Thus various policies have been developed to monitor labour market in Tanzania. The vision of the National Employment Policy is to have a society engaged in sustainable decent gainful Reduce un employment, underpayment rates and enhance labour productivity.

consulting and advising the Minister upon matters relating to execution of the provision of the National Employment Promotion services.[390]

In another view point, the Government of Tanzania is very positive regarding investors. The Tanzania Investment Act[391] was enacted in order to provide for more favorable conditions for investors and related matter. Investment sector provides abundant employment for non-citizens. Section 4(1) establishes the Tanzania investment body as an agency of the Government which is under the supervision of the respective Minister.[392]

Analysis of labour and immigration legislations discussed earlier reveal that the government of Tanzania is aiming at protecting the domestic labour market. However, exception to the general rule is in investment sector. The Tanzania Investment Act and the Mining Act as discussed above allow the Minister to employ unlimited number of foreign workers upon issuing certificate of incentives. Also the Tanzania Investment Centre provides notable assistance to facilitate the procedure and acquisition of work permits (Musonda, 2006). The above discussion leads to another brief discussion on immigration laws and procedures of Kenya as among the dominant founders of the EAC.

The **Kenya** Citizenship and Immigration Act[393] governs issues relating to citizenship, travel documents and immigration affairs, this is in coordination with the Kenya Citizenship and Immigration Regulations[394] as provided by the respective authority. No migrant worker is admitted without the relevant residence

[390] National Employment Promotion Services Act, Section 8. *Op. cit*. the committee consults and makes recommendation to the appropriate authorities regarding matters for employment and other issues related to.

[391] The Tanzania Investment Act, 1997, No 26. Foreign investor in the sense of a natural person means a person who is not a citizen of Tanzania, and the case of a company, a company incorporated under the laws of another country other than Tanzania in which more than fifty of the shares are held by a person who is not a citizen of Tanzania, and in the case of partnerships, means a partnership in which the partnership controlling interest is owned by a person who is not a citizen of Tanzania.

[392] National Employment Promotion Services. Section 8. Minister in this case means the Minister responsible for investments. See section 5, this Centre is one shop centre for investors.

[393] The Kenya Citizenship and Immigration Act, No. 12 of 2011.

[394] The Kenya Citizenship and Immigration Regulations, Legal Notice No 64, 2012.

permit. In order to administer effectively immigration issues the law establishes the Kenya Citizens and Foreign Nationals Management Service.[395] This body is responsible for among other activities implementation of policies, laws and other issues relating to citizenship and immigration involving foreign nationals management.[396]

As a matter of procedure, all foreign nationals who desire to work in Kenya should posses the relevant residence or work permit. Application for a residence or work permit is made to the Director for service using special form No 25 as per respective regulations.[397] The Citizenship and Advisory Committee and the Permit Determination Committee under the Board of service have among other duties to advise the Director on proper control and issuance of work permits.

In order for a person to be eligible to be employed hence become eligible to worker in Kenya should posses a class "D" or "K" permits. These classes of work permit are issued to persons with specific employment by a specific employer. The regulation provides that the respective person should be in "possession of skills or qualifications that are not available in Kenya and whose engagement in that employment will be of benefit to Kenya."[398] This restriction curtails the implementation of the right to free movement of workers in the community.

The same limitation is reinforced under the Kenya Citizenship and Immigration Act which provides that "where the Director is of the opinion that the issue of permits to an applicant is not in the interest of the country or for any other sufficient reason, the Director may upon giving reasons, in writing, both the applicant and the committee…refer the matter back to the Committee for further

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[395] The Kenya Citizens and Foreign Nationals Management Act No 31 of 2011.

[396] Section 4(1). *Ibid*. The term foreign national is defined to mean any person who is not a citizen of Kenya.

[397] The Kenya Citizenship and Immigration Regulations, 2012. The respective form is provided in the nineth schedule. Upon recommendations of the respective committee the Director may issue or revoke a permit as per regulation.

[398] The Kenya Citizenship and Immigration Regulations. *Op. cit.*

consideration or decline to issue the permit to the applicant."[399] It is the duty of the employer to apply and obtain a work permit for a foreigner before being granted employment. The law regulates that no employer can employ a foreigner who entered in Kenya illegally or employ a foreigner whose status does not permit to engage in employment. The employer should follow all requirements to engage a foreigner in employment as briefly discussed above.[400] The above brief discussion leads to discussion of immigration laws and procedures for Uganda as the last founding member of the EAC.

The **Uganda** Citizenship and immigration Act provides for the regulations and control of aliens in Uganda and other matters involving compulsory registration of all Ugandans, issuance of national identification numbers, national identity cards to citizens, and issuance of passports to citizens of Uganda.[401] The law forbids non citizens to take employment in Uganda unless possessing valid entry permit for employment before entry.[402] A valid work permit should also be supported by a valid residence permit.

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[399] The Kenya Citizenship and Immigration Act, No. 12 of 2011.Section 40(7). Apart from Class D permit (employment). Other Classes of permits are: Class A; for processing and mining (issued to person who intends to engage, whether alone or in partnership in prospecting for minerals or mining in Kenya. Class B: for Agriculture and animal Husbandry in Kenya. Class C prescribed profession (issued to a member of a prescribed profession who intends to practice that profession where alone or partnership in Kenya. Class F specific manufacturing (issued to a person who intends to engage whether alone or in partnership in a specific manufacture in Kenya). Class G, specific trade, business or consultancy or profession in Kenya. Class K; ordinary residents (A person should be less than thirty five years of age. Class M; refugees (issued to a person who has been granted refugee status in Kenya. In case of refusal of work permit an aggrieved person can appeal to the High Court for determination. As outlined above, work permit can be granted to foreigners on the condition that such employment will be of benefit to Kenya. See F.M. Musonda. Migration Legislation in East Africa, p.16.See also Section 5 Mining Act No 5 of 1998. This concepts is not well defined by any law. There is also no guidance provided as what "of benefit to Kenya" mean or is to be understood. This exposes the Director and the respective committee to the increase of the degree of discretion in granting permits.

[400] The Kenya Citizenship and Immigration Act, No. 12 of 2011. Section 45.

[401] Section. 68. An "alien" is defined by the Act to mean any person who is not a citizen of Uganda.

[402] The Uganda Citizenship and Immigration Control Act. Section 53.

Article 16 of the Constitution establishes the National Citizenship and Immigration Board. This Board is responsible for granting and cancelling immigration permits together with registering and issuing identity cards to aliens.[403]

The EAC citizens in exception of Ugandans together with other non Ugandans are not allowed to work in the country without valid entry and work permits. Also employing an alien without a valid work permit is the criminal offence which attracts a fine or imprisonment or both upon conviction.[404]

The relevant work permit which should be secured by a foreigner before entering Uganda borders is class "G" However, the Commissioner or Minister is empowered to declare a person undesirable immigrant hence unlawful to continue his or her employment in Uganda[405] thus able to limit the number of jobs available to foreigners. Section 23 provides two conditions which should be fulfilled and testified by the Uganda Citizenship and Immigration Board before issuing a work permit to non citizens. These conditions are ensuring that the post to be occupied by the non citizen cannot be filled by Ugandan worker and that the employment of a non citizen is of benefit to Uganda.[406]

The conditions stated above are very cumbersome and discriminatory to the EAC workers. Besides, the application by the prospective employee, the employer should also submit to the relevant authority work and residency permits while the desiring person to be employed is outside the boarders of Uganda on behalf of the employee.

[403] Uganda Constitution, 1995. See section 7 of The Uganda Citizenship and Immigration Control Act, Cap 66. In which the functions of the respective Board are described involving granting and cancelling immigration permits, registering and issuing identity cards to aliens and determining any questions which may arise in the implementation of the citizenship and immigration Act or any other issues as directed by the responsible Minister. The National citizenship and immigration Board works as the principle agent of government to control the immigration of workers.

[404] *Ibid*. Section 59.

[405] *Ibid*. Section 52.

[406] Uganda Citizenship and Immigration Control Regulation, 2004.

3.5 Conclusion

This chapter has presented the laws governing free movement of workers in the EAC. Various international labour, immigration and social security standards have been discussed. It has been vindicated that partner stated employment, immigration and social security laws are diverse. This diversity provides a great challenge to free movement of workers in the community. In order to facilitate implementation of the right to free movement of workers in the EAC, partner states are given specific obligations to coordinate and harmonize their labour, immigration and social security laws and policies

CHAPTER FOUR

FREE MOVEMENT OF WORKERS IN OTHER ECONOMIC COMMUNITIES

4.1 Introduction

The degree to which free movement of workers is facilitated in the community, varies depending on the level of economic integration attained in respective economic communities. Low level of economic integration allows free movement of workers with limitation to certain categories of workers mainly highly skilled labour (OECD, 2012). The common market and the economic union (sometimes referred to as the common currency) as higher levels of economic integration call for the recognition of the right to free movement of workers to all categories of workers within the partner states (OECD, 2012).

The EAC being at the stage of a common market, it is expected that the right to free movement of workers be fully enjoyed by all categories of all workers. It is for this reason that this chapter attempts to analyse the implementation of the right to free movement of workers in some other selected economic community which have attained similar or higher level of economic integrations with a view to determining best practices that the EAC partner states may learn wherefrom. Specifically the chapter examines the implementation of the right to free movement of workers in the EU, CARICOM, ECOWAS, COMESA and SADC.

In this chapter, an attempt is made to analyse the employment, immigration and social security laws and policies with the member states of the selected economic communities in a view to determining how the same support the right to free movement of workers in the respective economic integrations. This analysis will help to establish the similarities and differences that exist between the employment, Immigration ad social security laws and policies of the communities in the selected economic integrations and that of the EAC partner states. It is from such comparative analysis that best practices will be determined for EAC to learn on how to make the implementation of the right to free movement of workers effective. The chapter is organised into seven sections. The first section provides the introduction, the second section examines the implementation of the right to free movement of workers in the EU, the third section examines the implementation of the right to free movement of workers in CARICOM, the fourth section examines the implementation of the right to free movement of workers in ECOWAS, the fifth section examines the implementation of the right to free movement of workers in SADC, the sixth section examines the implementation of the right to free movement of workers in COMESA and the seventh section provides the conclusion.

4.2 The European Union

Free movement of workers in the EU finds its origin with the establishment of a common market in 1952 in the European Coal and Steel Community (ECSC) (Mastrianna, 2009). The respective common market involved six countries namely France, Germany, Belgium, Italy, the Netherlands and Luxemburg. ECSC aimed at pooling together the coal and steel resources hence eliminating barriers between them.

This being the case, free movement of workers between the six country members involved coal and steel sectors only. The success of the ECSC led to the formation of the European Economic Community (EEC) maintaining the common market between the same six countries in 1958 (Mastrianna, 2009).

Free movement of workers under the EU common market and the integration at large is based on four founding Treaties (i) The Treaty which established the European Coal and steel Community (ECSC), (ii) The Treaty establishing the European Atomic Energy Community (EAEC), signed on 20th March 1957 (this treaty entered into force on 1st January 1958), (iii) The Treaty establishing the European Economic Community (EEC) Commonly known as the Treaty of Rome which was signed alongside the EAEC Treaty and (iv) The Treaty on European Union which was signed on 7th February 1992 in Maastricht.[407]

The EU offers the best example in economic integration for the success achieved in the implementation of the right to free movement of workers without discrimination when examined in terms of the extent to which workers are allowed to move freely and number of countries involved. The EU is now an economic integration representing 28 member states.[408] It is maintained that "the freedom of movement of workers is a core feature of the EU and from its inception distinguished it from other regional economic integration'' (Weiss & Kaupa, 2014). Free movement of workers previously involved workers in the coal and steel sectors only.[409]

Later, the Treaty of Rome (1957) came up with the method of gradual establishment of free movement of workers in the EEC involving all workers with transition period of almost 12 years. Article 48(1) of the treaty provides that

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[407] However, there were also various reforms which brought various Changes in the European Union, these treaties are as follows:

(i) The Merger Treaty which was signed on 8th April, 1965 and came in force on 1st July, 1967. This treaty introduced the Single Commission and a Single Council of the previous three European communities.

(ii) The Single European Act (SEA) which was signed on 1st July, 1987 in Luxemburg. This Treaty provided for formalities necessary for the attainment of the internal market.

(iii) The Treaty of Amsterdam which was signed on 2nd October 1997 and come into force on 1st May 1999. This treaty modified the Articles of the EU treaties formally recognized by letter A to S in numerical form.

(iv) The Treaty of Nice which was signed on 13th December 2007 and entered into force on 1st February 2003. This Treaty amended some provisions in the EU and EC Treaties respectively.

(v) The Treaty of Lisbon which was signed on 13th December 2007 and came into force on 1st December, 2009. This Treaty enabled the European Union to assume legal personality.

[408] The European Union was started in 1950 after the second World War by six member Countries involving Germany, France, Belgium, Netherland, Luxembourg and Ireland and Italy. The EU enlarged from time to time. In 1973, Denmark, Ireland and EU United Kingdoms joined the organization. Greece joined in 1981 while Japan and Portugal joined in1986. In 1995, Austria, Finland and Sweden followed. The largest enlargement occurred on 1st May, 2004 when 10 new countries became EU members. These are Poland, Estonia, Latvia, Lithuania, Slovakia, Slovenia, Cyprus, Malta, Czech Republic and Hungary. The last enlargement was on 1stJanuary, 2007 when Bulgaria and Romania joined. Other countries like Republic of Macedonia, Croatia and Turkey have also applied for membership. This makes the EU the largest Economic integration in the world.

[409] European Coal and Steel Community Treaty, 1951. Article 1.

"freedom of movement of workers shall be secured within the community by the end of the transitional period in 1969."[410]

Thereafter, community institutions and partner states started to implement treaty provisions involving free movement of workers in the community at large. This means that citizens from partner states have, "the personal rights to free mobility, entailing the right to move freely, without any visa requirement, within the territories of all member countries of the area to look for a job and take up employment, under the same condition applying to the nationals of the countries concerned, the right to reside there for the purpose of working and subject to minimum income requirements, the right to remain after having been employed" (OECD, 2012). In order to facilitate free movement of workers between member states, some measures were taken to confer citizens the right to move to any member state to look for a job freely and to take up employment, right to reside and remain after having been employed, mutual recognition of academic qualifications, international transferability of social security rights, rules for family reunification and right to remain for establishment after employment (OECD, 2012).

In order to implement effectively the right to free movement of workers in the community, general principles stated in Treaties and Protocols have to be translated into specific regulations (Boeri, 2002). In most cases this takes the form of issuing specific directives, recommendations and comments. Basing on this fact, the right to free movement of workers in the EU was not fully implemented in the EU until the provision of secondary legislation No. 1612/68 which provided procedures on how to implement the right to free movement of workers in the common market.[411]

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[410]Treaty Establishing the European Economic Community, 1951. Article 48(1). However, new members were given sufficient period to maintain restriction on free Movement of workers Example, the 2004 and 2007 enlargement gave up to seven year for new Members to fully implement the provisions on free movement of workers.

[411] Regulation (EEC) No 16/2/68 of Council of 15 October 1968 on freedom of workers within the Community (1968). However, the first initiative to effect the right to free movement of

The stated regulation was followed by various regulations, directives and recommendations thereafter. It is also worth to mention that the legal framework of the EU has managed to reduce barriers to free movement of workers through mutual recognition and recognition of education and harmonisation of education systems. In order to guarantee proper enforcement of workers' rights a special directive was issued in April 2014. The respective directive aimed at provision of uniform application of workers' rights across the community. The directive assisted workers in entering another partner state to look for employment without restrictions. The directives also provided uniformity working conditions on the basis of wages, taxes and other social benefits (Boeri, 2002). As a result, there was equal treatment of citizens within partner states as also justified by the ECJ. The ECJ has specific roles to play in the success of implementation of the right to free movement of workers in the EU.

The ECJ maintains two specific objectives when dealing with free movement of workers' rights for migrant workers in the EU: (Mancini, 2000).

(a) To derive directly effective subjective rights as offered from the principles of free movement of workers' rights for migrant workers.

(b) To guarantee uniform application of community law. This ensures any direct and indirect discrimination which exist in the legal and administrative procedures of member states are eliminated to allow effective free movement of workers.

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workers as guaranteed in the Treaty was adopted in 1961. Regulation No/15/1961 was issued to establish key principles governing free movement of workers within member state involving entry and access to domestic labour market, how job offers are coordinated and specific Authorities for carrying out those duties. Example, Article 2 of the regulation provided mechanisms on how citizens can enter member states labour market and reside. After extension of work permit a worker was entitled to change employer, this was after three years of employment. After completion of four years employment, a worker was entitled to free access of labour market under the same conditions as nationals of host state. The regulation also provided for equal treatment of EU workers in terms of conditions of work, employment, remuneration and dismissal. This involved protection of family members of EU migrant workers. Example Council Directive 68/360/EEC of 15th October 1968 OJ1968, L 257 p.13 abolished restriction on movement of workers and their families. Council Directive 73/148/EEC of 21 May 1973 abolished restrictions on movement and residence within the Community for workers of member states.

However, article 48(2) of the treaty maintains the elements of employment, remuneration and other condition of work and employment. In 1982 the Court Maintained that article 48(3) must be interpreted in a non exclusive manner in order to accord certain rights for nationals of member states to move freely and stay within the territory of another member state for the purpose of seeking employment" (Mancini, 2000). This is contrary to the EAC in which a worker is allowed to move to other partner states after fulfilling certain conditions involving securing a contract of employment while in his or her home country.

In order to give effect to free movement of workers in the community, the Court ruled out that Article 48 of the EC Treaty and regulation 1612/68 had direct effect. This position was held in the case of **Commission v. France**[412] in which the Court further provided that "equality of treatment guaranteed to migrant workers may also benefit national workers in that it protects them against the risk that wages or working conditions inferior to those guaranteed under national law may be offered to migrant workers." Limitation imposition by partner states on ground of public policy, public security or public health also received an attention of the ECJ.

Denying free entry and residence to a member state on the grounds of public policy, public security and public health was interpreted by the Council Directive 64/221.[413] Article 3 of the respective Directive directed that national measures adopted must base on "personal conduct of the individual to whom they apply."

In the case of **R v. Pierre Boucherau**[414] it was held that there must be a real threat to public order which fundamentally affect interests of society. In addition, Directive 64/221 stated member states obligations regarding limitations on the right to free movement of workers. Member countries are required to grant or refuse at first instance the residence permit not later than six months from the date of application. The person concerned must be allowed to remain in the territory waiting for decision, not to issue restrictive decisions basing on administrative

412 [1974] ECR 359.
413 Council Directive 64/221/EEC of 25 February, 1964.
414 [1977] ECR 1999.

authority until the respective matter is legally determined, and finally notify the respective person on decision reached and remedies available (Mancini, 2000).

In the joined cases of **Rezgui Adoui v. Belgium State** and **Cornuaille v. Belgium State**[415] the Court established the principle that Belgium was not entitled to deport waitress prostitutes who were nationals of other member states as the same was not applied equally to Belgium prostitutes. The Court also held that decision to deport or refuse residential permit must provide enough details for the same and give the person concerned an opportunity to lodge an appeal.

In other case of **Van Duyn v. Home officer**,[416] Ms Van Duyn, a Dutch Citizen applied for residence in the United Kingdom to be employed as a secretary with the church of scientology which the country considered the church to be a socially harmful organization. Despite the fact that such right was provided under article 3(b) of the Directive 64/221/EEC. UK refused to offer the same on the ground of public policy. Ms Van Duyn challenged the refusal of entry on the basis of article 45 of TFEU and article 3(i) of the Directive stated above. The Court held that, article 45 TFEU has a direct effect in the legal order of member states and confers individual rights which national partner states courts must protect.

As an extension of the right to free movement of workers, the ECJ recognized the right of partner states citizens to move freely to look for employment opportunities within the community.

In the case of **Loannidis**[417], the Court held that job seekers should enjoy the right to equal treatment under article 45(2) of TFEU. Such right includes the right of entry and move freely within a member state for the purpose of seeking employment. This position was maintained in the case of **Antonissen**[418] and applies equally through the EU. Proper implementation of the right to free

[415] [1982] ECR 1665 8,115/81 and 116/81.
[416] [1974], ECR 1337.
[417] [2005] ECR 1-8275.
[418] [1991] ECR 1-745.

movement of workers in the EU was facilitated by effective labour migration policy as briefly discussed below.

There is a notable difference between the EU and the EAC though they all belong to REI. While the EU is at an advanced stage of REI towards a political federation, the EAC is at the CM stage looking ahead for the common currency and PF.[419] As observed from the above discussion, the right to free movement of workers in the EU involve all categories of workers however insignificant the category of workers might be. This gave sense and the spirit of the right to free movement of workers as advocated by the treaty and associated protocols. The EAC common market only involves selected highly skilled workers from vast categories of workers in the community as discussed previously.[420] Above all, in the EU all citizens are conferred the right of entry to any partner state to look for employment opportunities. In the EAC, there is no entitled right of entry in partner states to look for employment opportunities, instead there is a requirement that a contract of employment should be secured by the potential worker while still in his/her home country. This discourages rather than encouraging aspiration for enjoyment of the right to free movement of workers in the community.

It is worth to be noted too that general principles stated in various treaties and protocols were practically translated in directives, recommendations and comments in order to provide specific guidance and instructions to partner states. This is contrary to the EAC where few regulations, directives, recommendations have been issued by the Council. Despite the use of the discussed tools in the facilitation of implementation of the right to free movement of workers, specific policies were also promulgated as briefly discussed below.

4.2.1 The EU Labour Migration Policy

The right to free movement of workers in a common market entails the freedom to enter freely in any member states to look for employment opportunities. This

[419] See Chapter two part 2.2.1.1 for details.
[420] The East African Community Common Market (Free movement workers) Regulations, *Op. cit*.

entitles a person automatically to residence permit. This implies equal treatment of all EU citizens with regard to immigration and employment while eliminating barriers to labour mobility within the community. Free entrance and right to residence permit, call for a comprehensive European Migration Policy which aims at "putting forward a series of policy guidelines that would enable improved comprehensiveness of community action in this contested area" (CEPS, 2008). Hence, there was a global approach for the EU migration policy on migration in order to facilitate free movement of workers and other rights in the common market.

Establishment of a harmonised labour migration regime has been emphasised from time to time. However, member states demonstrated a "fierce strategy of resistance in relation to any sign of communication or liberalisation in this field at the international level (CEPS, 2008).

This necessitated formulation of rules to provide the general immigration framework between different member states at the community level, this guaranteed unrestricted free movement of worker in the community (De la Rica, Glitz & Ortep, 2013).

The first effective initiative for developments of a joint and common EU migration policy was revived in 1999. The Hague programme 2005-2009 adopted for the first time a policy plan for labour migration for efficient free movement of workers in the EU (OECD, 2012). This led to partner state agreement to the Hockholm Programme (2010 -2014) which composed of all ingredients required for labour migration rights and the rights of non EU nationals (OECD, 2012).

Enforcing the EU labour migration policy re-emphasise the notion that every citizen of the union has the right to move freely and reside within the territory of the member states (Council of the European Union, 2001). The EU labour migration policy recognised the right for every EU citizen to move freely to any partner state within the community to look for employment opportunities without any discrimination. Such freedom of movement facilitated implementation of the right to free movement of workers in the EU.

It should be clear that there is no labour migration policy in the EAC. Absence of labour migration policy results to restrictions to entry between partner states until the prospective worker is in possession of a contract of employment with other requirements in the immigration procedures. It proves difficult to search for employment opportunities while a worker is in his/her home country. Partner states manages their borders differently while imposing restrictions which curtail implementation of the right to free movement of workers in the common market. Apart from having proper labour migration policy, the EU social policy was also necessary to give effect to implementation of the right to free movement of workers in the community in the EU as discussed below.

4.2.2 Free movement of Workers and the EU Social Policy

The EU Social Policy is considered to be fundamental to implementation of the right to free movement of workers in the EU. In this view point, it is considered that "European social policy can make a contribution to the establishment and functioning of the market in Europe" (Shaw, 2000). Social policy mainly involves all aspects of public policies that are part and parcel to the well being and life of daily activities notably employment matters in this case. Social policy provides protection of people in the common market specifically on employment and other social risks like unemployment, sickness, old age and other related aspects (Anderson, 2015).[421]

[421] Previously in 1950's, social policy was viewed as the domain of the partner states, hence controlled all aspects of social policy. After six years of European integration experience it was leant that social policy should be the Community concern in order to facilitate employment labour mobility and general well being for workers, currently, EU law covers all aspects of social policy. See Chaw, (2000), *Op. cit*. p. 3. EU Social Policy involves a number of issues relating to labour market policy regulation of employment relationship, the role of partner states and social partners in industrial relations, free movement of persons, welfare of people, principle of non discrimination and other aspects. See also, Cechin – Crista, (2013). *The Social Policy of the European Union*, International Journal of Business and Social Science, Vol.4 No. 10 (special issue – August 2013). The term social policy indicates a set of public Policies

The EU social policy originated from the Treaty of Rome specifically under articles 117 -128 (Cram, 2005). However, development of the same has been slow and inconsistent. It is considered that "intervention by the Commission in the field of social field is justified as being instrumental to the smooth implementation of the single market (Cram, 2005).

Efforts to enact the EU social policy were clearly marked in the single European Act[422] and the Maastricht Treaty.[423] Article 2 of the treaty outlines a number of social goals and objectives involving economic and social development, increasing employment opportunities and other social aspects.[424] Also article 3 stipulates various aspects of social policy[425] covering entry and movement of persons in partner states, approximation of laws in order to give effect to full implementation of the common market, developing common strategies in the social field and establishing a European Fund for the same (Shaw, 2000).

The Fundamental Social Rights of Workers[426] also contributed to the development and stability of social policy elements. The said Charter stated that EU citizens have right to freedom of movement through the community subject to restrictions which can be justified on the basis of public order, public safety or public health.[427]

Title 1(2) provides that, "the right to freedom of movement shall enable any worker to engage in any occupation or profession in the community in accordance

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aiming at ensuring social protection and welfare. It aims at promoting full employment of people able to work, improving living and working conditions and harmonizing frameworks for working conditions, and harmonizing frameworks for working and growth. See also, Esenturk, N. N. EU Social Policy. Progressive Development in Legal and Governance aspects, available at www.social- Policy.org.uk/Lincoln/esenturk.pdf, member states were not working and not willing to decrease their sovereignty to the community level on aspects of social issues. With this inclination, it was seen important to develop a social policy in order to protect and improve rights and quality of community workers.

422 1992.

423 1992.

424 The Treaty on European Union, 1992.

425 *Ibid*.

426 Community Charter of the Fundamental Social Rights of Workers, European Council, 1989.

427 *Ibid*. Title 1(i).

with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country."[428] Also, the Charter of fundamental rights of the European Union confers rights to every citizen of the community to seek for employment, to work and to have the right of establishment in any partner state.[429] The right to choose an occupation and freely work in any partner state was also reaffirmed by the ECJ cases.[430] This brought uniformity between partner states in employment matters which facilitated implementation of the right to free movement of workers in the community.

Despite the significance of having appropriate social policy in the community, the EAC does not possess any social policy at community level. That gives implication that there is no specific instrument which details the EAC employment matters apart from international instruments. In the absence of social policy in the community, partner states operate different standards in employment, thus no protection of workers in work related issues like loss of employment, sickness and other labour matters. This frustrates implementation of the right to free movement of workers in the community.

Apart from having effective EU social policy, free movement in the EU was also facilitated by establishment of proper social security protection regime within the EU. The following part addresses the contribution of the EU social security regime in the facilitation of implementation of free movement of workers in the community.

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[428] Community Charter of the Fundamental Social Rights of Workers, European Council, *Ibid*. Title 1(3) emphasize that freedom of movement involves harmonization of condition of states involving family reunification, recognition of academic qualification and improvement of the living and working conditions of frontier workers.

[429] Charter of Fundamental Rights of the European, Union, Council of the European Union, Office for Official publications of the European Community, Luxemburg, 2001.

[430] Example, *Nold-KG v. Commission [1974]* ECR 491, Judgment of 14 May 1974. Case44/79 Hauer, (1979) ECR 3727, Judgment of 8 October 1986 and Case 234/85 Keller (1986) ECR 2897.

4.2.3 The EU Social Security Protection

Article 48[431] of the treaty authorizes the EU legislators to take appropriate measures to coordinate partner states national social security systems for effective free movement of workers in the region. This initiative aimed at assuring that workers are not deprived their social security rights under partner states national legal systems.[432] The above foundations led to enactment of a series of European social security regulations. The aim of the regulations have been to provide "social Security rules and procedures for the implementation of national systems of social security laws for insured persons (Employees, the self-employed and their families) moving within the European social security law, which coordinates different national social security schemes" (Davulis, 2012).

The Council Regulation (EEC) No. 1408/71[433] focused on the application of social security schemes to employed persons, to self employed persons and members of their families moving within the Community. This regulation declared that coordination of national social security legislation is firmly secured within the framework of freedom of movement of workers and contribute to improvement of employment and living standards in the community.[434] The regulations also sought the need to guarantee equal treatment within the community under various partner states national legislations. The regulations covered various benefits and contingencies. The benefits covered include: Sickness and maternity benefits, invalidity benefits, old-age benefits, survival's benefits, accidents and occupational diseases benefits, death grants, unemployment benefits, and family benefits.[435]

[431] *Ibid*. Article 165 and 166.
[432] Article 10 of the Community Charter of the Fundamental Social Security Rights of Workers, European Council, 1989. The stated article provides that "every worker of the European community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed enjoy and adequate level of social security benefits."
[433] Regulation (EEC) No 1408/71 of the European Parliament and of the Council of 14 June 1971 on the Application of Social Security Schemes to employed persons, to self- employed persons and to members of their families moving within the Community. OJ No. L 149, 5.7.1971.
[434] *Ibid*.
[435] *Ibid*. Article 4.

The above regulation applies to all social security schemes whether contributory or non contributory in all partner states within the community. Articles 18-34 of the regulation provide specific and detailed rules on how to administer the listed above benefits and contingencies across the community.[436] The discussed above Council regulation (EC) No 1408/71 was amended and updated by the Council Regulation (EC) No. 883/2004[437] on 1st May 2010 and enforced by the implementing regulation (EC) No. 987/2009.[438] The regulation covers all benefits and contingencies as covered by the previous regulation with emphasis on equal treatment of benefits, income, facts or events.[439]

Title III (Article 17 - 86) of the stated regulations gives detailed guidelines concerning the categories of benefits stipulated above. The former regulation was amended and updated in order to accommodate various developments at the EU level with consideration to various judgments of the ECJ and various legislative changes at partner states level. Modernising and simplifying respective rules also aimed at achieving the goal of free movement of persons in the community.[440]

It is very unfortunate that there is no EAC social security policy. Such a policy would have detailed all aspects related to social security in the course of implementation of the right to free movement of workers in the community. Due to absence of social security policy in the EAC, there is no coordination or harmonization of social security laws in the community which renders

[436] Regulation (EEC) No 1408/71 of the European Parliament and of the Council, *Op. cit.*

[437] Regulation (EC) No 883/2004 on the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, Official Journal of the European Union, L 166 of 30 April 2004. Article 4 of the regulations provides that workers should enjoy same social security benefits involving unemployment benefits in every partner state.

[438] Regulation (EEC) No 987/2009 on the European Parliament and of the Council of 16 September 2004 laying down the Procedure for Implementing Regulation (EC) No 883/2004, on the Coordination of Social Security Systems, Official Journal of the European Union Official Journal of the European Union L 284/ 1, 30.10.2004, 72.

[439] *Ibid*. Article 3 and 5.

[440] Regulation (EC) No 883/2004 on the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, Official Journal of the European Union, L 166 of 30 April 2004 .

transferability of social security credits impossible.[441] This frustrates free movement of workers in the EAC. Besides enactment of the EU social security police and associated regulations on social security administration, it is salient to examine specific principles applied in the EU which led to effective provision of social security in the course of implementation of the right to free movement of workers in the EU.

4.2.3.1 The Principle of Coordination in Social Security Protection

Article 48[442] of the EU treaty empowers the Council to take necessary measures in the realm of social security to facilitate free movement of workers in the EU. As hinted above, coordination of social security rights differs from harmonisation of the same. While harmonisation aims at having similarities between social security systems, coordination maintains autonomy of partner states social security laws in social security provision using distinct agreed principles. Coordination does not eliminate the differences in social security systems between partner states. With the aid of ECJ, various principles were formulated to enable effective social security provision hence effective free movement of workers in the community.

It is very unfortunate that the principle of coordination is not established in the EAC. This might be due to the fact that besides Article 10 3(d) and Article 10 (4)[443] which specifically provides for the right to free movement of workers in the course of free movement of workers and other related Articles, there is no any regulation or directive which guides protection of social security in the EAC common market. Gaining an experience from the EU, the principle of coordination of social security laws led to establishment of various other principles guiding social security protection in the EU as discussed below.

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[441] Protocol on the Establishment of the East African Community Common Market. Article 10 (4), *Op. cit*. The law directs the Council to issue directives and make regulations on social security benefits.

[442] Treaty on the Functioning of the European Union, Official Journal of the European Union, C 325/33, 2002.

[443] Protocol on the Establishment of the East African Community Common Market, *Op. cit*.

4.2.3.2 Choice of Law

In order to avoid conflict of laws between partner states during determination of social security rights to migrant workers within the community, choice of law principle is important. The choice of law principles came to existence as a result of adoption of ILO standards in the EU. The ILO convention No. 157[444] provides that, "employees who are normally employed in the territory of a member state shall be subject to the legislations of that member state, even if they are resident in the territory of another member or if the undertaking which employer has his place of residence, in the territory of another member." The above principle provides an answer as to which law to be applicable in the course of free movement of workers within the community in relation to social security protection.

The choice of law principle is maintained by the Council under article 13[445] and reaffirmed under paragraph 15 of the Council regulation (EC) No.883/2004. This principle is famously known as '*Lex Loci Laboris*' rule. In this case, an insured person moving within the EU is administered by only one member state which further prevents overlapping in social security provision between EU partner states. It is provided that this principle is relevant and has been applied by all EU countries. Hence, "the application of *Lex Loci Laboris* principle in solving conflicts of substantive labour has been used when determining the relevant national legislation in social security provision (Davulis & Petrylaite, 2012).

Due to the prevailing situation of non existence of the principle of coordination of social security laws in the EAC discussed in part 4.2.4 above, the choice of law principle does not find any room in the EAC. This remains to be a lesson to be leaned by the EAC in social security protection in the common market. After the determination of which law to be applied during social security protection, non discrimination principle becomes necessary.

[444] ILO, Convention No. 157, Article 5(a).

[445] Regulation (EEC) No 1408/71 of the European Parliament and of the Council. *Op. cit,* on the application of Social Security Schemes to employed persons, to self- employed persons and to members of their families moving within the Community. OJ No. L 149, 5.7.1971.

4.2.3.3 Non Discrimination on ground of Nationality

The Principle of non-discrimination is an essential one as provided for under article 39(2)[446] and re-enforced thereafter. Article 4 of the treaty provides that, "unless otherwise provided for by this regulation, persons to whom this regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any member states as the nationals thereof."[447]

This is in line with article 68 (2) of ILO Convention. No. 102[448] which maintains the principle of non-discrimination by which equality in treatment in providing social security between nationals and non-nationals in the host state where reciprocal treatment exists in the form of bilateral or multilateral agreements is maintained. Non discrimination principle ensures equal treatment of partner states workers in all employment aspects involving protection of social security rights.

The principle of non discrimination in free movement of workers based on their nationalities in relation to employment, remuneration and other conditions of employment is enshrined under the EAC common market.[449] However, there is no stipulation in the Treaty or associated protocol which directly link social security, though social security protection is recognized as a right in the EAC common market protocol.[450] The following part discusses how social security can be implemented in the course of free movement of workers within the community.

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[446] Consolidated Version of the Treaty Establishing the European Community, Official Journal of the European Community, C 325/35, 24.12.2002.

[447] Regulation (EC) No. 883/2004 on the European Parliament and of the Council. *Op. cit*. Before the Coordination Regulation came into being reciprocity principle applied in which EU states treated nationals of a partner state in the same way. However, since all EU countries are bound by the respective EU Social Security regulations, this rule does not apply under EU law. The principle is found under ILO Convention No.118 under Article 3.

[448] ILO, Convention No. 102.

[449] Protocol on the Establishment of the East African Community Common Market, Article 10 (2). *Op. cit*.

[450] *Ibid*. Article 10 (3) (f).

4.2.3.4 Exportability Principle

This principle ensures that social security contributions and payment of benefits are maintained in the course of free movement of workers between partner states without consideration of insured person's residence. In this context, it is considered that "pension benefits must be paid regardless of where the pensioner resides" (Neergaard, et al. 2012). If this would not be the case, insured persons could be denied their pension benefit on the basis of residence. Example, a Kenyan who secures employment in Tanzania is able to export his or her social security credits to Tanzania in order to be eligible in various short and long term benefits.

It is very unfortunate that exportability principle is not provided in the EAC Treaty and the EAC common market protocol. Another principle which facilitated maintenance of social security in EU common market is the principle of aggregation.

4.2.3.5 Aggregation of Insurance periods principle

This principle maintains that in order to be entitled to various short term and long term benefits, all periods in which an insured person worked and contributed in various social security schemes in different partner states should be considered and aggregated. Most national social security schemes peg their entitlement to various benefits on condition that an insured person must have contributed a certain number of contributions at respective scheme. In this sense, "when periods completed in other member states do not count for the fulfillment of such conditions, cross-border movement leads to serious problems" (Pennings & Vonk, 2015). This principle is emphasized in order to protect an insured person to qualify to various benefits regardless of moving from one partner state to another in the course of enjoying the right to free movement of workers in the community. In this case, relevant authorities are obliged to take into consideration all periods in which a claimant has been insured to determine qualification in social security benefit provision (Neergaard, et al. 2012).

In order to facilitate the mobility of workers in the bloc, social security systems have been coordinated among EU member states (OECD, 2012). This lies at the heart of article 51 of the Treaty of Rome[451] and the implementing legislation which allows workers who move to another partner state to maintain the already acquired social security credits in all partner states.

This enables to combine social security contribution periods for pensions and other social security benefits. However, the EU legal framework does not target at harmonising social security schemes in the community (Boeri, et al., 2002). Instead, coordination of social security schemes had been maintained.

In this manner, "a number of regulations demand that claims against social insurance are portable and that they can be set off-against each other. This holds true for pension schemes, disability, health case, unemployment benefits, family benefits and other associated benefits.[452] Social security rights involve national workers, EU workers and posted workers.[453] Social security provisions in the EU adhere to the principle of non discrimination which should be maintained in the common market.

In order to achieve this objective, the Council issued regulation No 2 and N0 4 which formulated coordination in order to avoid loss of social security rights as a result of free movement of workers within the community. These regulations were replaced by regulation No 1408/71[454] and 574/72[455] in 1971.These two regulations were formulated in order promote co-ordination of social security systems in order to facilitate maintenance of social security credits within the community hence effective free movement of workers in the community. Apart from various

[451] The Treaty of Rome, 25 March 1957.
[452] *Ibid.* However, since social security schemes are coordinated and not harmonized, different rules are applied in taxing pensions as per partner states national laws.
[453] Posted workers involve persons employed within member states but sent temporarily by their employers to another partner state. Their rights are endangered hence protected by law.
[454] This regulation sets specific rights which a migrant work enjoy when moving from one partner state to another.
[455] This regulation lays out administrative rules for implementing the respective rights.

principles discussed above, there are also other fundamental matters which facilitated implementation of free movement of workers in the EU.

It can be deduced that as far as social security is concerned, the treaty gives a legal basis for coordination rules, not for harmonisation rules. This stand can be found in several judgments of the ECJ (Pennings & Vonk, 2015). In the **Pinna** Judgment, the Court held that it has to be observed that "the treaty provides for the coordination, not the harmonisation of legislation of member states. As a result there remain differences between the member states social security systems."[456] Such position is also in accordance to regulation (EC) No. 883/2004 which emphasizes the need to respect special features of national social legislation of partner states and to set only a system of coordination.[457] This goes hand in hand with the principle of equal treatment in benefit provision as accorded under article 5 of the respective regulation.[458]

Unlike harmonisation which seeks to have similarities in national laws, coordination sets standards to be used by all partner states while eliminating discrimination in social security benefits provision. In another case of **Coonan**,[459] according to the British old age pension, insurance for sickness was offered for insured person with over 65 years only. Mrs. Unna Coonan did not qualify according to British qualification for old age. But qualified for Irish Pension she worked before. Thus, failure to be eligible for sickness benefit provided. The Court reasoned that, "it did not require the UK to treat the Irish pension as a British Pension for this purpose. It considered that it is for the legislature of each member state to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme,

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456 *Pinna v. Caisse* [1986] ECR 1.
457 Regulation (EC) of the European Parliament and of the Council on the Coordination of Social Security Systems, April, 2004.
458 Regulation (EC) No 883/2004 on the European Parliament and of the Council. *Op. cit*.
459 *Coonan v. Insurance Officer* [1980] ECR 1445.

provided that there is no discrimination between nationals of the host state and the nationals of other member state."[460]

It is unfortunate that aggregation of insurance periods principle is accommodated in neither the EAC treaty nor the EAC common market protocol. This provides a room for the EAC to gain experience on how social security can be administered in the common market. Apart from the discussed principles, there are also other mechanisms used in the implementation of community law.

4.2.4 Enforcement of Community Law

The EU constitutes a legal system with law making mechanisms and enforcement powers. A conflict of interest may occur between community law and that of partner states. Partner states should surrender some sovereignty to the community for the success of economic integration despite the fact that an economic community is not a state.

It is generally agreed that "enforcement of community law in partner states is fundamental to the success of the integration process" (Herman & Terhechte, 2011). Community objectives, principles and partner states obligations are stated in the community law (treaties, regulation, directives and recommendations). Interests of the community should be cherished by partner states.

Economists maintain that "without effective enforcement, each member state can continue to operate its own protection barriers. Success in the implementation of the right to free movement of workers in a common market demands elimination of all limitations for effective growth and development. In the case of **Costa V. ENEL**, the Court of justice held that the EEC Treaty has created its own legal system which became an integral part of the legal systems of the member states and which their courts are bound to apply.

[460] *Ibid.*

This is due to the fact that community law forms part in every partner states domestic legal systems. Rights and obligations are enforced not only by the community but also through the ECJ and domestic national courts. In order to ensure proper enforcement of community law by partner states there are various fundamental rules which are taken into consideration. These rules are discussed below.

4.2.4.1 Direct Applicability of Community Law

The EU law is build on various principles which help to understand the relationship between the community law and member states law in order to eliminate confusion in enforcement of community law. Direct applicability deals with the process or means by which community law is implemented by member states (Oppong, 2011). The EU law in this perspective is directly applicable in partner states legal systems for effective enforcement of community law. Another rule is supremacy of community law. As compared to the EAC, there is no stipulation in the EAC Treaty or the EAC common market which provides that there is direct applicability of the EAC law, however it can be inferred from another principle as discussed in the following sub heading.

4.2.4.2 Supremacy of EU Law

One of the distinguishing features of the EU law is the doctrine of supremacy of community law. As discussed above, the EU legal system is distinct from that of partner states. However, community law forms part in each partner states legal system. The doctrine of supremacy of community law was largely developed by the ECJ due to the fact that there is no article which states directly that EU law is supreme to national laws (Foster, 2007).

In the **Van Genden**[461] and **ENEL**[462] cases it was held that the EU law constitutes its own legal system of law and it is supreme to that of partner states law. The ECJ

[461] *Van Genden en Loos v. Nederlandse* [1963], case 26/62, ECR 3.

confirmed that where there is conflict between EU law and national law, the EU law must take precedence. Partner states have submitted their sovereignty to the community law. The ECJ has always maintained that, "a provision of national constitutional law cannot be invoked in order to exclude the application of EU law given that this is contrary to EU public order and further, this position of the ECJ remains unchanged when fundamental rights enshrined in the constitution of a member state are at issue (Kaczorowske, 2013). The matter of priority between EU and national law of member states arose before national courts in early time and was referred to ECJ for clarification.

Also, various provisions of the TEU, the TFEU and legislations impose obligations to member states to make sure that their national legislations are in conformity with community law (Rogers, N. Scannel, & Walsh, 2012). Under the EU law, the Commission or member states are entitled to bring an action before the ECJ for any breach of obligation by member state. The matter at hand is whether the EAC enshrines the supremacy of the EAC law. The EAC treaty provides that, subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this treaty shall be binding on the partner states…"[463] From this provision, it can be reasoned that if the Treaty, regulations, directives and decisions are binding to partner states, the EAC law is supreme to partner states laws. Supremacy of community law is very important in the implementation of not only the right to free movement of workers but also other associated freedoms and rights offered in the common market. Another principle relevant in the implementation of community law is the principle of direct effect.

4.2.4.3 Direct Effect of Community Law

This is another principle enshrined in the EU law. It is provided that "direct effect is the term given to judicial enforcement of rights arising from provision of

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[462] *Flaminio Costa v. ENEL* [1964] ECR 585.

[463] Treaty for the Establishment of the East African Community. Article 16. *Op. cit*.

community law which can be upheld in favor of individuals in the courts of the member states" (Foster, 2007). In the case of **Commission v. France**,[464] the Court ruled out that article 48 of the EC treaty and regulation 1672/68[465] had direct effect.

In another case of **Simmenthal**,[466] there was a conflict between Italian Constitution and Community law. The ECJ in the first place declared that the doctrine of direct effect of Community legislation was not dependent on any national constitutional provisions but a source of rights in it. In this case, national courts when called upon to apply provisions of community law are under a duty to give fully effect for those provisions including a refusal to apply conflicting national legislation and even those adopted subsequently.

Direct effect deals with the "legal enforceability of rights created by the laws that have become parts of the national law" (Oppong, 2011). This principle was developed mostly in EU as a tool for effectiveness of community law. Direct effect of community law justifies partner states national courts to use community law in an independent as direct basic for legal decision. With this view point, direct effect coordinates and effectively integrates community law directly into partner states legal system national court and individuals become enforcers of community laws (Oppong, 2011). This is because citizens are able to invoke community law in their respective national courts, thus rights created at the community level are brought home by individual citizens in the community. In order for the discussed above principles to operate effectively in the community, coordination and harmonisation of laws between partner states is necessary.

It is very unfortunate that the principle of direct effect of community law is not provided in the EAC law. Also, there are no decided cases which would have given directions on the same. The following part gives a brief discussion on the

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[464] *Commission. v. France* [1974] ECR 359, Case 167/73.
[465] Regulation (EEC) No. 1612 of the Council of 15 October 1968 on freedom of movement of workers Within the Community, OJT 1968L.
[466] *Amministrazione delle Finanze v. Simmenthal* [1978] 106.

relevance of harmonisation of laws in economic integration and its connection to implementation of the right to free movement of workers in a common market.

4.2.5 Harmonization of Laws in Economic Integration

Effective economic integration results from well managed legal framework at community level and partner states legal systems. Partner states are legally obliged to implement principles and objectives laid down in various treaties. As discussed earlier, treaties lay down general principles and objectives. Mechanisms must be employed on how to detail the same into workable procedures for implementation and enforcement by community authorities. The following are commonly used ways:

4.2.5.1 Regulations

Regulations issued by the Community are important as they detail specific ways and procedures on how to attain objectives laid down in treaties.[467] Regulations are subordinate to the Treaty thus most important source of law under the treaty. Article 189 of the treaty of Rome provides that a regulation have general application and binding in its entirety and direct applicable in all member states.[468] In this case, regulations have mandatory effect and must be observed by member states. They are directly applicable thus creates rights and obligations not only to all partner states but also to all people in their respective states.

Thus, regulations are binding to all partner states and operate uniformly across the community. Regulations have always been used as a tool in the EU harmonisation of laws as they detail what partner states should do in order conform to community law. It is always maintained that "a regulation cannot be overridden by any subsequent legislation inconsistent with it" (Worley, 1974). In this sense,

[467] Treaties are legal instruments directly created by member states thus they are primary source of law in the EU. They involve various founding treaties like treaties of Amsterdam, Lisbon, Nice and Maastricht. Regulations like treaties contain basic provision outlining EU objectives thus setting up the General Constitution of the EU law.
[468] The Treaty of Rome, March 1957, *Op. cit*.

regulations are above partner states legislations. However, many regulations are in general terms, thus they have to be simplified into directives and decisions.

4.2.5.2 Directives

Directives have been used as primary tool for building the EU common market (Duina, 1999). Article 189 (3) the EEC states that a directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and method.[469] In this way, directives have transformed the major principles provided in treaties into binding works (Duina, 1999. Thus, directives are so specific and well detailed to an extent that they leave little chance for member states on how to be transformed into national laws. Of great importance is that, "normally a directive sets a time limit within which it must be implemented in the states" (Worley, 1974). Various directives have been issued in elimination of barriers to free movement of workers, gender equality, immigration, education, workers rights and other relevant aspects in the common market. Another tool used in the EU harmonization of laws is the use of decisions.

4.2.5.3 Decisions

Another way of harmonising and enforcing the EU law is through decisions. Decisions are administrative acts on how to implement community law. Article 189 of the treaty provides that a decision shall be binding in it's entirely upon those to whom it is addressed.[470] It is stated that, "a decision may be addressed either to member states or to individuals, it binds only the addressee, and binds in it's entirely, that is to say, there is no discretion in the way it is to be carried out " (Worley, 1974). In order for free movement of workers to be realistic, partner state ought to remove all barriers that discriminate workers from other partner states. This calls for harmonisation of labour and migration law regimes in partner states.

[469] Treaty Establishing the European Economic Community (EEC), 1957.
[470] *Ibid.*

Such obligations given to partner states can be enforced by way of decisions at the community level.

The above discussion has vindicated how the right to free movement of workers has been implemented in the EU. Basing on the number of participating countries and the degree in which free movement of workers is facilitated in the EU common market, the EU provides best practices on how the EAC can implement free movement of workers in the community. Enactment of specific regulations, policies, directives and recommendations facilitated implementation of free movement of workers in the community which involves all categories of workers in the community without discrimination.

From the discussion above in this part, it can be reasoned that it is not a miracle that the EU has been successful in the implementation of free movement of workers and the common market at large. Such achievements have been facilitated by effective harmonisation of laws in the community and proper enforcement of EU law using various principles which are binding to partner states.

With this view point, the EAC has a lot to learn on proper implementation of the right to free movement of workers in a common market and economic integration at large. The following part provides experience on how the right to free movement of workers is implemented in the Caribbean Community.

4.3 Free Movement of Workers in the Caribbean Community

The Caribbean Community (CARICOM) was formally established in 1973 by the Chaguaramas Treaty.[471] Formally between 1965 – 1972, the Caribbean Free Trade Association (CARIFTA) was organized to unite the English Caribbean speaking countries. The revised treaty of Chaguaramas establishes the Caribbean

[471] Treaty Establishing the Caribbean Community, Chaguaramas, July 4. 1973. As per Revised Treaty of Chaguramas establishing the Caribbean Community including the CARICOM Single Market and Economy, Article 2 Provides for membership of the Community to include Antigua and Barmuda, the Bahamas, Barbados, Belize, Dominica, Grenade, Guyama Jamaica, Montserrat, St.Kitts and Nevis, Saint Lucia, St.Vincent and the Grenadines, Surname, Trinidad and Tobago.

Community involving Single Market and Economy (CSME). This Treaty was signed by CARICOM heads of government of the Caribbean Community on 5 July, 2006.[472]

The objectives of the community involve among others implementing free movement of labour and other factors of production, improving standards of living and work and expansion of trade and economic relations with third party states.[473] It is salient to pin point that CARICOM is in the common market stage hence in the same pace with the EAC in economic integration. However, the EU is at an advanced stage of a monetary union towards a political federation as discussed before.

The right to free movement of workers was first granted in 1989 involving specific categories of workers only. This right started with university graduates in 1996 and gradually extended to artists, sports persons, musicians and media workers (Blanpain, Tiraboschi & Ortiz, 2008). Despite the fact that partner states committed themselves to attain the goal of free movement of their citizens within the community,[474] article 46 of the treaty specifically allows movement of skilled community nations only in the categories of artistes and musicians.[475] Article 46(2) of the treaty calls upon partner states to facilitate movement of skilled people only without harassment between partner states.[476]

It is only in 2007 and 2009 that additional skilled categories involving mainly artisans, associated degree recipients and certified domestic workers became eligible for the right of free movement of workers (Opeskin, Peruchoud & Redpath, 2012). However, despite the above limitations in the categories of workers involved, the CARICOM Single Market and Economy managed to

[472] This Community was fond in 1973 and currently has 15 members. The Community promotes Economic Integration and collaboration among its members with cooperation in foreign policy. It is said that CARICOM is a good example of Community which attempts to strengthen regional labour mobility together with efforts to create a single market economy.

[473] Revised Treaty of Chaguaramas establishing the Caribbean Community Including the CARICOM Single Market and Economy, Article 6.

[474] Article 45. *Ibid.*.

[475] *Ibid*. Article 46.

[476] *Ibid*.

introduce CARICOM passports starting with twelve member states. This provided an identity as a CARICOM citizen. Apart from the little achievements attained in free movement of workers in the sense of skilled labour categories only, CARICOM is said to have made achievements concerning other freedoms of the common market involving liberalisation of movement of services as signed from 1998 in Protocol II concerned (Chauffour & Maur, (2011). However, a successive free movement of workers involves generally all categories of workers in the community.

It is also reported that, the community experiences the challenge of lack of strong enforcement mechanisms at the community level to enforce community Treaty and Regulations (Hall & Sang, 2007). This becomes a limitation for the achievements in free movement of workers even for eligible categories. The community also experiences the challenge of having big differences in size for the partner states, hence difficult to establish a common labour migration policy which is very essential for free movement of labour (Blanpain, Tiraboschi & Ortiz, 2008).

CARICOM and EAC are in the same stage of a common market. However, despite the challenges discussed above, CARICOM appears to have gradual implementation of free movement of workers in the community in terms of categories of workers involved. Having started with university graduates only other categories of workers were recognized gradually targeting at attaining free movement of workers to all categories. Such achievement is commendable despite the fact that CARICOM is far behind as compared to achievements recorded by the EU. This is different from the EAC which has never amended the categories of workers involved since its coming to force in 2010. In addition, CARICOM recorded notable achievements in social security protection which deserves brief discussion as summarized below.

4. 3.1 CARICOM Social Security Experience in Free Movement of Workers

Protection of social security rights for workers exercising their rights to free movement of workers was established through mutual agreement between partner states. In order to address the same, the Social Security (CARICOM Agreement on Social Security) Order was established.[477]

The agreement covers insured persons who have been subjected to different legislations of one or more contracting parties as well as to their dependents or survivors. The scope of the agreement is confined to long term benefits (Pensions) covering invalidity pensions, disability pensions, old age retirement pensions, survivors' pensions and death benefits in the form of pension."[478] This leaves a challenge to be attended on short-term social security benefits coverage to workers exercising their right to free movement in the community.

Short term benefits include among others funeral grant, maternity benefit, employment injury and social health insurance benefit. This simply implies that the respective workers are not protected with the mentioned benefits and contingencies. This might be an area to be improved in the future. Besides this observation, the CARICOM social security agreement is seen as a catalyst in facilitating implementations of the right to free movement of workers within the CARICOM single market realm (Caribbean Community, *Social Security in CARICOM*, Caribbean Community Secretariat, 2010).

The stated social security order enables coordination of social security programmes between partner states with respect to payments for long term benefits (i.e. invalidity pensions, disability pension, old age or retirement pensions and death benefits.). Basing on this agreement, insured persons are legally eligible to receive the said benefits through one or more social security schemes within partner states. The issue of determination of applicable law is dealt with at the

[477] National Insurance and Social Security (CARICOM Agreement on Social Security Order, 1997.
[478] Articles 2 and 3. *Ibid*.

material time in which the insured person applies with respect to applicable legislation of one contracting party.[479]

This affects determination of benefits to be paid in which article 16 of the treaty provides that "where an insured person has been subject successively or alternatively to the applicable legislation of two or more contracting parties and has satisfied the condition for a benefit in the jurisdiction of any of those contracting parties, such Caribbean community insured person or the survivals of that person as the case may be shall be entitled to the benefit in accordance with the applicable legislation of each of the contracting parties concerned."[480] However, totalisation of contribution periods also applies where Article 16 is not applied in the determination of benefit payments.

The achievements attained by CARICOM in managing to establish the Social Security (CARICOM Agreement on social security) Order is to be admired by the EAC. The respective order resembles the EU Social Security Police discussed before. This is a step ahead towards effective social security protection in a common market. Such achievements led to successes in attaining transferability of social security credits in the course of free movement within the Community. As far as social security protection is concerned, CARICOM offers a good lesson to the EAC on social security protection in the course of exercising the right to free movement of workers in a common market.

In spite of the fact that CARICOM had made significant progress in protection of social security rights through portability of pension rights, there are various challenges ahead. The arrangement caters for long term benefits (Pensions) only with no consideration of short term benefits as discussed above. Also, the number of benefits involved is below the minimum standard stipulated by ILO as it

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[479] National Insurance and Social Security (CARICOM) Agreement on Social Security Order, 1997, Article 6.

[480] National Insurance and Social Security (CARICOM Agreement on Social Security Order. *Loc.cit*.

excludes the short term benefits. There is a need also to develop a common framework in which portability of all benefits can be facilitated.

Despite these shortcomings, the EAC still has something to learn as there is no coordination of social security rights of any kind across borders in the community. The discussion above has analyzed the EU and CARICOM experience on social security coverage in the course of exercising right to free movement of workers in the common market. Though the best experience is vividly demonstrated in the EU, the achievement attained in CARICOM cannot be ignored. Article 10(3) (d)[481] of the EAC common market protocol evidences that free movement of workers goes hand in hand with social security protection. Social security is a right not privilege as provided by the EAC common market Protocol. The following part briefly gives discussion on how the right to free movement of workers is implemented in other African REI.

4.4 Free Movement of Workers in ECOWAS

The Economic Community of West African states (ECOWAS) is established under Article 2 with ultimate goal of establishing an economic Community in the region.[482] The community aims at promoting co-operation and integration which leads to the establishment of an economic union in West Africa to attain the goal of raising standards of living of its people and maintain economic stability among member states.[483]

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[481] Protocol on the Establishment of the East African Community Common Market, *Op. cit.*

[482] Revised Treaty of the Economic Community of West African States (ECOWAS). This Treaty was signed in Lagos on 28 May 1975 by founding countries of Benin, Bukinafaso, Cape Verde, Cote D'ivoire, Gambia, Ghana, Guinea, Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. See also profile: Economic Community of West Africa. (ECOWAS. See also profile: Economic Community of West African states (ECOWAS), Retrieve April 11, 2016 from the Wide Web: www.geneva- Academy.ch/RULAC/pdf-state/ECOWAS profile.pdf. The idea of establishing the West African Community goes back to 1964 as formulated by William Tubman then President of Liberia with the Agreement signed in February 1965 involving Cote d'voire, Guinea, Liberia and Sierra Leone. However, the organization broke later. The organization was re- established of ECOWAS on 28 May 1975 with respective Protocols launching ECOWAS signed on 5 November 1977 in Lome, Togo.

[483] *Ibid*. Article 3.

Despite the fact that the community has an objective of establishing a common market with intention of elimination of obstacles to free movement of person, goods, services and capital with recognition of right of residence and establishment, the freedom of free movement of labour in which there is free movement of workers is not well stated.[484]

The Protocol relating to the free movement of person, residence and right of establishment confers the right to enter, reside and establish in the territory of member states to community citizens.[485] However, this right is also restricted as Article 4 states that member states shall reserve the right to refuse admission into their territory any community citizen who comes within the category of in admissible immigrants under its laws.[486]

Though not stated in the protocol, it is understood that, "the protocol allows community residents to settle, seek employment and engage in income-earning employment in any member state" (Chauffour & Maur, 2011). However, this right is neither stipulated in the treaty nor in the respective protocol hence not well implemented. With this observation, the EAC having in place the protocol on the establishment of the EAC common market which specifically addresses the aspect of free movement of workers is in a step ahead the ECOWAS. However it is relevant to involve ECOWAS in this study as it offers a specific lesson in the aspect of migration policy in the community as briefly observed below.

In January 2015 a notable progress was achieved where the community managed to develop from a free trade area to a customs union. This is an important stage to

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484 Revised Treaty of the Economic Community of West African States (ECOWAS). *Op. cit*. Article 3(2) (d).

485 Protocol A/P.1/5/79 Relating Free Movement of Persons, Residences and Establishment. Article 2(1) As per Article 2(3), The right of entry, residence and establishment is established in three faces namely Phase – right of entry and abolition of visa, phase 11- right of residence and phase 1I1-right of establishment.

486 *Ibid*. This is contrary to Article 59(1), Revised Treaty of the Economic Community of West African States (ECOWAS), which states that in citizens of the community shall have of entry, residence and Establishment and member states undertake to recognize these rights of community citizens in their Territories in accordance with the provisions of the protocols relating to Article 59(2) calls upon Partner to adopt necessary measures to ensure that community citizens enjoy "fully" rights of entry, Residence and establishment.

the stage of establishing a common Market. It is noted that “ECOWAS is only in the early days of its customs union. Steps are in place for the transition to a common market as soon as the Common External Tariff (CET) is adopted and implemented by all (Tuffour, Balchin & Mendez-Parra, 2016). It is also stated that “despite early provisions on the free movement of persons, implementation has been slow-hampered, in particular, by efforts of young member states to affirm their sovereignty” (Chauffour & Maur, 2011).

A step forward was also made in January 2008 when ECOWAS managed to adopt a common migration approach which resembles to that of the European model. This plan has two phases mainly developing a legal framework and developing a regional migration action plan.[487] This is a remarkable achievement to be learnt by the EAC. The EAC requires an effective immigration policy to be transposed to all partner states. In order for citizens to benefit from seeking and carrying out employment, workers should obtain an ECOWAS residence card or residence permit. It is witnessed that, this condition can be difficult to fulfill as the application for residence card may be rejected at the issuing authorities (Herman, Krajewski & Terhechte, 2014).

As observed from the above discussion, the status of ECOWAS with respect to free movement of workers as related to EU and CARICOM is far behind. ECOWAS has a lot to learn from these REI’s on implementation of the right to free movement of workers with social security protection.

However, establishment of the ECOWAS migration policy which resembles the EU labour migration model offers a specific lesson to the EAC. For effective implementation of free movement of workers, the EAC requires establishment of an effective labour migration policy.

[487] *Ibid*.

4.5 Free Movement of Workers in SADC

The Southern Africa Development Community (SADC) is established under article 2 of the SADC treaty with its Headquarters at Gaborone in the republic of Botswana.[488] While the treaty is silent on the establishment of a common market where free movement of worker could be anchored, one of its objectives is to promote and maximize productive employment and utilization of resources of the region.[489] Also article 5 (2) (d) provides that one of the objectives of the community involve to "develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, good and services, and the people of the region generally, among member states"[490]

As noted above, there is no clear mention of establishment of a common market in the region. Matters of labour migration were discussed in 1993 on the agenda of SADC (Blanspain & Tiraboschi, 2008). This led to the establishment of a protocol on the facilitation of Movement of persons.[491]

The overall objective of the protocol is to develop policies aimed at the progressive elimination of obstacles to the movement of persons within the community. It was considered relevant to involve SADC in this study despite the fact that the respective community has not yet established a protocol on the common market where the right to free movement of workers is implemented. SADC has specific established policies which are very important in facilitation of implementation of the right to free movement of workers in a common market. Before discussing respective policies, a foundation has also been put despite various challenges

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[488] Consolidated Text of the Treaty of the Southern African Development Community As Amended. Member countries include the Republic of Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. See also, Wengel, J., (1980). *Allocation of Industry in the Andean Common Market* (Vol. 11), Massachusetts: Springer. p. 12. SADC came to an existence as a result of an organization of front line states (involving Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zimbabwe, Zambia and Tanzania in order to resist the dominance of South Africa in the Region. This organization was transformed into a development community in August 1992.

[489] *Ibid*. Article 5.

[490] *Ibid*.

[491] Protocol on the Facilitation of Movement of Persons, Southern African Development Community, August 2005.

experience. Articles 7, calls upon partner state to ensure that all relevant national laws, statutory rules and regulations are harmonised to the respective protocol.[492] Member states are also required so harmonise their laws and administrative practices to enable citizens to enter the territory of another partner state for the maximum of ninety days per year for visitors.[493] People who are interested in residing at any partner state should secure a residence permit from relevant authorities.[494] However, this plan failed "due to objection of south Africa, Namibia and Botswana. This was caused by fear by those countries to experience a flood of migrants" (Blanspain, & Tiraboschi, 2008).

One of the achievements attained in the region is the establishment of the SADC labour Migration Policy. The respective policy focuses on aligning the regime with international labour migration regime.[495] Another notable achievement was the enactment of the Protocol on Employment and Labour.[496]

Among the general objectives of the respective protocol is to provide member state with strategic direction and guidelines for the harmonisation of employment and labour, as well as social security policies and legislations.[497] Article 19 provides for labour migration for migrant workers. Such achievements provide lessons for the EAC specifically on establishment of labour migration policy and establishment of protocol on employment and labour enactment.

Despite the fact that there are challenges encountered in the enforcement of discussed above policies, the presence of the labour migration policy and the protocol on employment and labour is a step ahead of which the EAC is lacking. The EAC demands specific policies governing employment and immigration for effective implementation of free movement of workers in the community. Yet, the

[492] Protocol on the Facilitation of Movement of Persons, Southern African Development Community. *Op. cit.*
[493] Article 13.
[494] *Ibid*.
[495] Labour Migration Policy, Southern African Development Community (SADC). Section 3.3 outlines the Specific objectives of the Protocol.
[496] Protocol on Employment and Labour, South African Development Community, May 2013.
[497] *Ibid*. Article 3.

EAC ought to gain specific experiences from other REI's for effective implementation of the right to free movement of workers in the community.

4.6 Free Movement of Workers in COMESA

The Common Market for Eastern and Southern Africa (COMESA) was established under article 1 of the COMESA treaty[498] with the vision of establishing the PTA as a step towards the creation of a common market and finally an economic community. The respective treaty was signed on 5th November, 1993 in Kampala (Uganda) and ratified in 1994 one year later.[499]

The respective common market has an objective of attaining sustainable growth and development of the member states by promoting a balanced and harmonious development of its production and marketing structures.[500] The market has the specific undertaking of removing obstacles to the free movement of labour, persons and services, right of establishment for investors and right of residence within the common market.[501]

Also, the common market aims at having co-operation in social and cultural affairs involving the fields of employment and working conditions, labour laws, vocational training and the eradication of adult illiteracy, cultural and sporting exchanges, the prevention of occupation accidents and disease, the provision of facilities for disabled and enhancing the right of association and collective bargaining between employers and workers.[502]

[498] COMESA Treaty, January, 1992.

[499] Member Countries include Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Malawi, Madagascar, Libya, Zimbabwe, Zambia, Uganda, Swaziland, Sudan, Seychelles, Rwanda and Mauritius.

[500] COMESA Treaty, Article 3. See also Khandelwal, P. COMESA and SADC prospects and challenge for regional trade integration, IMF working paper, wp/04/227 policy Development and Review Department, international monetary Fund December 2004. COMESA was established to replace former Preferential Trade Area (PTA) which had existed since 1982. The PTA was re-established in October 2000.

[501] *Ibid*. Article 4(6) (e).

[502] *Ibid*. Article 143.

COMESA has recorded little progress due to lack of common agreement in common External Tariff (CET) hence failure to establish effective customs union which is a step towards creation of a common market. COMESA has plans for eventual formation of a common market and a monetary area, but those plans are in the distant future (Khandewal, 2004).[503] Despite outlined above plans, COMESA is still in the common market stage with very little achievement in the implementation of a common market. COMESA is deliberately included in this study in order to appreciate the effect of non performance of partner states obligations and little enforcement at the regional level.

Effective implementation of free movement of workers obliges partner states to honor their obligations hence fulfill their commitments in good faith with proper enforcement at the community level. As far as free movement of workers is concerned, the region managed to enact a protocol on free movement of labour and persons, services, right of establishment and residence.[504] In this regard, member states agreed to develop common market mechanisms to enable free movement of citizens to take up offer of employment basing on prevailing condition as national workers among partner states.[505]

In the implementation of the right to free movement of workers, the member states agreed to progressively remove within six years, all restrictions to movement of workers within the common market which entails the abolition of any discrimination based on the nationality between workers of the member states as regards employment, remuneration and other conditions of employment.[506] The right to free movement of workers is guaranteed subject to limitations on the basis of public policy, public security or public health.

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[503] The region faces a stiff challenge of restrictive trade regimes. Member States manifest protection among themselves.

[504] Protocol on the Free Movement of Persons, Labour services, Right of Establishment and Residence
COMESA, adopted at Kinshasa, the Democratic of Congo on 29th June 1998.

[505] *Ibid*. Article 2. Partner states agreed to remove all barriers to the free movement of persons labour, services and right of establishment and residence.

[506] *Ibid*. Article 9.

Member states also agreed within six years of signing the protocol to remove restrictions to immigration to allow free movement of workers without the need for visa within the common market.[507] Despite the fact that COMESA has a clear vision of creation of an effective PTA, CU and full implementation of a common market, there are various challenges behind this motive. A long period of time since the agreed transition period of six years has passed without implementation of free movement of workers in the region. The same is only practiced to skilled labour in the region. It is also said that, member countries experience "strong differences in their economic and social backgrounds, while the region in general is characterized by low growth rates and political instability" (Papadopoulos, 2010).

Apart from the above observations, COMESA has a lot to learn from the EU and CARICOM together with other discussed REI notably ECOWAS and SADC. In the other hand, the EAC has demonstrated greater achievements as compared to COMESA. The EAC should appreciate that partner states failure to fulfill their agreements and obligations and ineffective enforcement at the community level result to retardation of a common market in economic integration. It has been discussed that the EU provides the best experience in implementation of the right to free movement of workers in a common market.

4.7 Conclusion

This Chapter analysed how free movement of workers is implemented in other economic communities mainly the EU and CARICOM. African economic blocs notably ECOWAS, SADC and COMESA have been discussed. This has also been demonstrated from the EU and CARICOM on how the right to free movement of workers in the common market can be achieved. Harmonisation and coordination of respective partner states policies and laws was the first and foremost aspect dealt with in order to eliminate diversity in employment, labour, social security

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[507] *Ibid*. Article 5.

and immigration policies and laws. Also, binding regulations, directives, recommendations and decisions were necessary tools used to achieve the desired goals.

Various policies like harmonisation policy, labour migration policy, social policy, social security policy, education policy and other related policies were formulated at the regional level and absorbed in the partner states policies and laws. Those policies provide specific guidance on how to handle specific issues in the common market. The enforcement of community law was given priority for community interests which resulted to partner stated economic and social development as justified by economic theories. This eliminated resistance and discrimination in treatment of partner states workers in the community. Inspite of the fact that African economic communities offer very little experience in success in the success of implementation of the right to free movement of workers, SADC recorded a notable achievement in formulating the SADC labour migration policy and the protocol on employment and labour. Other achievements and challenges were also discussed for effective development of the common market.

The following chapter deals with presentation of research findings which form crucial part in this study.

CHAPTER FIVE

RESEARCH FINDINGS

5.1 Introduction

This chapter presents the findings of this study. The study was primarily meant to examine the employment laws and policies in relation to immigration and social security laws and policies of the EAC partner states in a view to determining how such laws and policies facilitate the effective implementation of the right to free movement of workers in the EAC common market. Specifically, the study aimed at determining: how the employment laws and policies of the selected partner states of the EAC enhance the implementation of the right to free movement of workers in the EAC, the implication of the immigration laws and policies of the EAC partner states on free movement of workers in the EAC, the manner in which the social security laws of the EAC partner states are aligned with free movement of workers in the EAC, and to determine the best practices which the EAC partner states may learn from the EU, CARICOM, ECOWAS, SADC and COMESA on the implementation of the right to free movement of workers in the EAC common market. The key inspiration was to determine whether there is effective implementation of the right to free movement of workers in the EAC and, if not why and, what should the EAC partner states learn from other selected economic integrations notably the EU, CARICOM, ECOWAS, SADC and COMESA on the implementation of the right to free movement of workers in a common market.

The study involved mainly three countries: Kenya, Uganda and Tanzania which are the founding partner states of the EAC. Even though the focus was on the three founding partner states of the EAC, the study was still vast for conducting field study and be able to get field data within reasonable time and cost. For such reason, the study was more doctrinal than non- doctrinal. Therefore, the main method of data collection employed was documentary review under which relevant primary and secondary documents from Kenya, Tanzania, Uganda and other selected countries in selected economic integrations were reviewed and analysed through content analysis technique. However, field study by way of face to face and telephone interviews was conducted in only mainland Tanzania between November 2016 and November 2017 in order to acquire practical information to complement documentary data. Like documentary review, interviews involved collection of qualitative data and therefore were analyzed qualitatively.

The study came up with two major findings:-

a) The implementation of the right to free movement of workers in the EAC is ineffective or partial due to diversity of employment laws and policies among the EAC partner states which restrain free movement of workers in the EAC, incompatibility of social security laws in the EAC partner states frustrates implementation of the right to free movement of workers and presence of variations in the EAC partner states immigration laws and policies which hinder implementation of the right to free movement of workers in the EAC.

b) The EU is the most successful economic integration which has several best practices that EAC may learn in the implementation of the right to free movement of workers. Among the best practices that EAC can learn from the EU are: proper coordination and harmonization of employment, immigration, and social security laws and policies, enactment of various regulations and policies governing the right to free movement of workers mainly employment policy, education policy, labour migration policy, social security policy, harmonization policy and effective enforcement of partner states agreements and obligations using directives, decisions and recommendations.

In this chapter, the discussion of the above two major findings are organised under two major items: one; constraints in the implementation of the right to free movement of workers in the EAC and, two; the best practices that EAC may learn from the EU. This chapter is therefore organised into four major sections. The first section provides the introduction, the second section examines the constraints in the implementation of the right to free movement of workers in the EAC, the third section presents the best practices that EAC may learn from the EU, and the fourth section provides the conclusion of the chapter.

5.2 Constraints in the Implementation of the Right to free Movement of Workers in the EAC

The implementation of the right to free movement of workers in the EAC is ineffective or partial as it has been noted in the introduction to this chapter. Findings from the study show that the right to free movement of workers is only implemented in selected highly skilled workers basing on the partner state's domestic labour market requirements as discussed in chapter three. Article 10 (1) of the EAC common market protocol guarantees the right to free movement of workers who are citizens of the EAC Partner States without discrimination of workers of other partner states based on their nationalities in relation to employment, remuneration and other conditions of work and employment.[508] This concept entails that the general public is of the opinion that all citizens of the community are free to utilize the opportunity offered. However, article 10(13) provides that the implementation of free movement of workers is in accordance with free movement of workers Regulations provided in Annex II of the protocol.[509] In this Annex, EAC countries[510] selected their own categories of skilled workers who are committed to be involved in free movement of workers. All partner states committed to implement the same in 2010 except Tanzania which committed to fully implement the agreed categories by 2015. In brief, partner states committed directors, chief executives, managers and other professionals.[511]

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[508] Protocol on the Establishment of the East African Community Common Market, *Op. cit.*
[509] The East African Community Common Market (Free Movement of Workers) Regulations, Annex 11.
[510] Tanzania, Kenya, Uganda, Rwanda and Burundi.
[511] *Ibid.*

All categories involved in the free movement are highly skilled and skilled workers as discussed in part 3.2.2. If that is the case, what is the place for normal citizens who are semi-skilled and unskilled?. In this view point, one can still reason as to whether it is the free movement for highly skilled workers or free movement of workers as advocated by article 10(1) of the protocol.[512] If the spirit portrayed in the stated article is maintained, what about other categories of highly skilled, skilled and unskilled workers not committed in the schedule, are they not part of the workers and citizens of the common market? With this observation, the right to free movement of workers in the EAC common market is not practical and difficult to implement.

Despite achievement made in the implementation of the right to free movement of workers focusing on skilled workers, basing on the spirit of article 10 (1) stated above, there are various constraints noted. Among such constraints involve diversity in employment laws and policies among partner states, variations of immigration laws and policies in the EAC partner states and incompatibility of social security laws in the EAC partner states. Each of this constraint is examined hereinafter.

5.2.1 Diversity of employment laws and policies among the EAC Partner States

This part aimed at discussing the first research question focusing on how the employment law and policies of the EAC partner states enhance the implementation of the right to free movement of workers as envisaged under the protocol on the establishment of the EAC common market. The detailed discussion of employment and labour laws of the EAC partner states have been made in Chapter Three. It was noted that EAC partner states implement employment and labour matters basing on their domestic constitutions and legislative enactments. In this respect, only salient provisions are discussed in this chapter focusing on their impact to implementation of free movement of workers in the EAC.

[512] Protocol on the Establishment of the East African Community Common Market. *Op.cit.*

The collected data reveal that there are variations in employment laws and policies in the EAC partner states hence inhibit free movement of workers in the EAC. The researcher was interested to find out as to why existence of such variations between member states.

92.8% of the respondents through face to face and telephone interviews showed their concern that partner states are suspicious in losing jobs to non nationals hence tend to protect their domestic labour market through restrictive employment laws and policies. 7.2% of the respondents argued that it is very difficult to keep the doors full opened even for the committed categories of workers in Annex II[513] as this remains to be the domain for national interests hence domestic labour market protection.

5.2.1.1 Employment Law and Policy in Tanzania

The analysis of the Tanzania Employment Policy and conditions imposed in employment of non citizens shows difficulties in implementation of free movement of workers in the community. One of the policy statement maintained in the Tanzania employment policy[514] states that "for the purposes of addressing scarce and critical skills gaps demanded by emerging investments, the government in collaboration with the private sector and other stakeholders will establish mechanism to provide employment permits only to foreigners with appropriate skills and technical expertise that is not readily available in Tanzania." In emphasis for the same, the policy further provides that, "Employers shall be required to put in place and implement mechanisms for ensuring skills transfer from foreign workers to local workers and shall limit the duration of stay of the foreign workers in the country."[515]

[513] The East African Community Common Market (Free Movement of Workers) Regulations. *Op. cit.*
[514] 2008. p. 26.
[515] Tanzania Employment Policy, 2008.

The above Employment Policy does not take into consideration the categories of workers in which Tanzania committed itself in Annex II of the protocol discussed earlier in chapter two.[516] In this view point, foreign workers including EAC citizens are admitted in Tanzania to fill the existing skill gaps and their stay is limited soon after technology transfer. The matter in question here is, after successful technology transfer, does it imply that there will be no more common market in the EAC?. Hence, there was need to examine laws and policies governing employment in Tanzania and other founding members.

The law which governs employment of non citizens in **Tanzania** is The Non-Citizens (Employment Regulation) Act.[517] The objective of the Act is meant to regulate and realign the regime for employment matters in Tanzania mainland.[518] This legislation does not provide on how free movement of workers in the EAC can be implemented in its objectives and provisions. The Commissioner for Labour (in the Ministry of Labour, Employment, Youth & Disability) has been given mandate to receive, process and issue work permits class B which entitles a foreigner to work in Tanzania. The Director for Immigration Services is empowered only to issue the residence permit after work permit have been issued by the Labour Commissioner. Section 11(2) emphasizes that "The Labour Commissioner shall before approving an application for a work permit, satisfy himself that all possible efforts have been explored to obtain a local expert."[519] The same position is maintained in section 36 (10) of the Zanzibar Employment Act.[520] Section 40 (1) emphasizes the same that the Commissioner has power to refuse to issue work permit where the applicant is a mere employee and the Commissioner is satisfied that such position may be filled by a citizen. With this legal stand point,

[516] The East African Community Common Market (Free Movement of Workers) Regulations. *Loc. cit.*
[517] The Non- Citizens (Employment Regulation) Act, *Op. cit*.
[518] *Ibid*. Preamble.
[519] *Ibid*. The same position is maintained in section 36(i) by the Zanzibar Employment Act, 2005. Section 40 (i) emphasizes the same that the commissioner has power to refuse to issue work Permit where the applicant is a mere employer and the commissioner is satisfied that such position May be filled by a citizen.
[520] 2005.

it is difficult to implement free movement of workers in the EAC as foreigners are admitted only when there is skills gap to be addressed.

Furthermore, even after approving work permits basing on the conditions stated above, an employer intending to employ a non-citizen is required to prepare a succession plan of the non-citizens knowledge to the citizens during the employment of such foreigner. This is intended to ensure that all vacancies are filled by Tanzanians. In the same spirit, section 12(1), (4) states that, "… the total period of validity of the first grant and its renewals shall not, in any case, exceed five years."[521] This influences free movement of workers by limiting employment tenure of a foreigner to the maximum of 5 years. The Protocol does not provide any limit for stay of migrant workers but grant the right of residence and establishment in the host state for employment purposes.

Documentary review conducted through examination of **Kenya** employment and labour laws show that the newly enacted employment and labour laws include the Employment Act,[522] the Labour Institutions Act,[523] the Work Injury Benefit Act,[524] Kenya Constitution, 2010 and the Industrial Courts Act.[525] It is very unfortunate that none of the above legislations provide for implementation of free movement of workers in their objectives and provisions. Detailed analysis was made in Chapter three, however the brief discussion below revealed how Kenya like Tanzania harbors employment and labour laws which restrain implementation of the right to free movement of workers in the EAC.

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[521] 2005. The same position is maintained by the Zanzibar employment Act, 2005 in which in any case the total period of foreign employee to work in Zanzibar should not exceed 4 years. See Sections 37 (2).

[522] Act No.14 of 2007.

[523] Act No. 15 of 2007.

[524] 2007.

[525] Act No. 20 of 2011.

5.2.1.2 Employment Law and Policy in Kenya

The Kenya National Employment Authority Act[526] portrays the government employment policy with affirmative action to take measures designed to employ only Kenyans in all levels of employment regardless of their work experience.[527]Furthermore, its objectives do not take in consideration for the right to free movement of workers in the EAC. Section 37(1) of the Act states that, "the state shall, through the authority, encourage private and public institutions to employ Kenyans in all positions including positions of leadership and management."[528] In order to achieve the same, the state provides incentives to reward any private institution which employs Kenyans regardless of their years of work experience.[529] This policy is also reflected in immigration constraints discussed in research question number two where the Kenya Citizenship and immigration Regulations[530] discriminates non Kenyans from employment if aged below 35 years and applicants with no assured annual income of at least $24,000 or its equivalent in Kenyan Shillings. This position implies that foreigners are admitted only to fill skills which are not readily available in the domestic labour market. With these restrictions, the right to free movement of workers in the EAC becomes very difficult to implement though the protocol guarantee for the right to free movement of workers as stated above.

5.2.1.3 Employment Law and Policy in Uganda

An analysis of documentary review of Uganda policy on employment and labour laws shows that unemployment is reported as the major challenge in the National Employment Policy hence deliberate restrictions in the employment of non-

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[526] Act No 3 of 2016.
[527] The National Employment Authority Act No. 3 of 2016. Section 37 (3).
[528] *Ibid*.
[529] The National Employment Authority Act. Section 37(3). *Op. cit.* This Act of Parliament established the National Employment Authority to enhance employment promotion interventions to promote access to employment for youth. This bill was signed by president Uhuru Kenyatta on 2 December 2016.
[530] The Kenya Citizenship and Immigration Regulations, Legal notice No. 64, *Op. cit*.

citizens.[531] The Uganda Employment Act[532] provides power to the Minister responsible for employment to make regulations in order to limit the range of jobs open to migrant workers.[533] In a move to implement the same, the government introduced the condition on hiring non- citizens that employers employing foreigners should "show proof that no Ugandan matches the skills of the expatriate staff" (Butagira, 2016). Employers are required to have succession plan in order to transfer skills to citizens. Issuance of work permits period is also limited to one year stay in the country.[534] This is against the EAC common market protocol requirement.

For clarity, it is relevant to have a brief discussion on comparative analysis for the diversity of the above discussed partner states labour laws and policies and their effect on free movement of workers.

5.2.1.4 Comparative Analysis of the effect of labour laws and policies in Tanzania, Kenya and Uganda on free movement of workers

After having discussed the employment and labour laws and policies from Tanzania, Kenya and Uganda as selected EAC countries, it is salient to see the law and practice concerning the above noted restrictive provisions in the respective countries. Face to face and telephone interviews with the Director (employment division), Commissioner (labour division) and Head of department (work permits section) and the Principal Legal Officer under the Ministry of Labour, Employment, Youth and persons with Disability in Tanzania testified that work permit issuance is according to law, and that the stated provisions are strictly applied and guides the employment of non-citizens in Tanzania. This also includes

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[531] The Uganda National Employment Policy, April 2011. Thus, Uganda as for Tanzania and Kenya and the rest of the EAC countries, the employment policy and labour laws encounter the same restrictions to free movement of workers in the EAC.

[532] 2006.

[533] Uganda Employment Act. Section 6(5). *Op. cit*. The same provision in emphasized under section 97(c).

[534] The Non-Citizens (Employment Regulation) Act, Section 12. *Op. cit*.

conditions in granting work permits and limit of stay to foreigners as stipulated by the respective law.

The documentary review conducted with the assistance of the Head of department (Statistics) under the Commissioner General of Immigration Services suggests strict adherence to limiting work permits provisions in order to protect the domestic labour market. This happens despite the fact that the Labour Commissioner ought to make consideration to regional and bilateral agreements which the United Republic of Tanzania is a signatory.[535] Also, article 10(2)[536] of the EAC common market protocol calls upon partner states to ensure that there is "non discrimination of the workers of the other partner states, based on their nationalities, in relation to employment, remuneration and other conditions of work and employment." This tendency is against the non discrimination principle as provided in the common market discussed earlier. Tanzania as a partner state to the EAC has an obligation to harmonise its employment and labour laws and policies to conform to the EAC treaty and the respective protocol requirement.

The need of the study necessitated to examine the trend of work permits provision in East Africa especially in Tanzania, Kenya and Uganda as founders of the community during coming to force of the EAC common market protocol i.e. 2010 – 2016 in order to examine the impact of the common market establishment to free movement of workers in the region. This target was achieved through documentary review at the Immigration Department Services in Dar es Salaam and the EAC headquarter in Arusha together with face to face and telephone interviews with partner states High Commissioner officers in Dar es Salaam. Table 5.1 and 5.2 below show the results for Tanzania.

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[535] *Ibid*. Section 11 (5).

[536] Protocol on the Establishment of the East African Community Common Market, *Op. cit*. This is re-emphasized in Regulation 12 and 13 of the East African Community Common Market (Free movement of Workers) Regulations, *Op. cit*. on equal treatment in employment and access to employment opportunities.

Table 5.1 Tanzania Work Permit Granted by Nationality 2010 – 2016

Nationality	2010/11			2011/12			2012/13			2013/14			2015/16		
	M	F	Total	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Burundians	6	0	6	2	1	3	2	0	2	2	2	4	4	1	5
Kenyans	125	39	164	95	33	128	304	63	367	108	42	150	130	71	201
Rwandese	4	0	4	6	2	8	8	1	9	4	2	6	5	3	8
Ugandans	22	4	26	26	9	35	37	6	43	26	8	34	28	14	42
Total	157	43	200	129	45	174	351	70	421	140	54	194	167	89	256

Source: Documentary review from the Ministry of Labour, Youth, Employment and Disability

The above table shows that Tanzania admitted 122 work permits from Burundi, Kenya, Rwanda and Uganda in 2009/10 (not displayed in the table), 200 work permits in 2010/11, 174 work permits in 2011/12, 421 work permits in 2012/13, 194 work permits in 2014/15 and 256 work permits during 2015/16. During the whole period between 2009/10 to 2015/16 a total of 1,367 work permits were issued to the respective partner states. This trend does not show continuous increase in the number of work permits issued from one year to another during the above period under review. Such increase would have implied the continual development towards full implementation of the right to free movement of workers in the EAC as offered by the respective protocol.

During the same period there were a good number of rejections of work permits in Tanzania. See Table 5.2 below. Same data can be displayed showing work permits rejection by education level during the same period as summarized in **Appendix 4.**

Table 5.2 Tanzania Work Permit Rejected by Nationality 2010 – 2016

Nationality	2011/12			2012/13			2013/14			2014/15			2015/16		
	M	F	Total	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Burundians	0	0	0	2	1	3	0	0	0	5	1	6	6	2	8
Kenyans	60	17	77	90	20	110	33	10	43	168	53	221	240	78	318
Rwandese	0	0	0	1	2	3	0	0	o	4	6	1	7	3	10
Ugandans	8	4	12	11	3	14	5	4	9	15	6	21	28	8	36
Total	68	21	89	104	26	130	33	20	53	194	61	255	281	91	372

Source: Documentary review from the Ministry of Labour, Youth, Employment and Disability

The above data in Table 5.2 above shows that there were a good number of rejections of work permits between 2010 and 2016. For the period between 2009/10 and 2015/16 Tanzania rejected 929 work permits from Burundi, Kenya, Rwanda and Uganda. Generally, the number of work permits rejections kept on increasing from one financial year to another. The number of work permits rejected as compared to the number of work permits issued represents 40.49%.

The above increase in rejections of work permits in Tanzania during the period under review (2009/10 – 2015/16) is associated with conditions outlined in the Non-Citizens (Employment Regulations) Act No 1 of 2015 discussed above. Before the Labour Commissioner approves a work permit is required to make sure that efforts to obtain a local expert have failed. Also, employers should prepare a succession plan by showing transfer of skills from foreigners to citizens in order to ensure that all vacancies are filled by Tanzanians. This is also supported by face to face interviews conducted during the period under research.

During the period between 2010 and 2016 **Kenya** as a partner state also implemented free movement of workers in which various work permits were issued as shown in the table below.

Table 5.3 Kenya Work Permit Granted by Nationality 2010 – 2016

Nationality	2010/11			2011/12			2012/13			2014/15			2015/16		
	M	F	Total	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Burundians	5	3	8	1	5	6	0	2	2	1	1	2	3	4	7
Tanzania	33	21	54	53	29	82	39	27	66	56	18	74	57	12	69
Rwandese	16	4	20	11	4	15	11	5	16	10	0	10	8	6	14
Ugandans	9	5	14	6	2	8	17	8	25	15	3	18	9	2	11
Total	63	33	96	71	40	111	67	42	109	82	22	104	77	24	101

Source: Field Research data from EAC Headquarter at Arusha

The table 5.3 above portrays that for the period under review, 597 work permits were issued to workers from Burundi, Tanzania, Rwanda and Uganda. As compared to Tanzania, the number is lower by 770 work permits issued.

During the same period between 2009/10 and 2015/16 various work permits applications were rejected as observed in the table below.

Table 5.4 Kenya Work Permit Rejected by Nationality 2010 – 2016

Nationality	2010/11			2011/12			2012/13			2014/15			2015/16		
	M	F	Total	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Burundians	3	0	3	5	1	6	7	4	11	12	2	14	11	5	16
Tanzania	13	18	31	32	13	45	141	15	156	76	28	104	124	60	184
Rwandese	1	0	1	8	0	8	11	2	13	2	10	12	15	9	24
Ugandans	18	3	21	26	6	32	19	8	27	22	18	40	48	13	61
Total	35	21	56	71	20	91	178	29	207	112	58	170	198	87	285

Source: Field Research data from EAC Headquarter at Arusha

As observed from the table 5.4 above, Kenya rejected 838 work permits applied during the period under review. This number represents 58.39% as compared to work permits issued. Such massive rejections of work permits can be easily linked to conditions imposed by the Kenya employment laws and policy. The Kenya National Employment Authority Act No 3 of 2016 puts forward an affirmative action to employ only Kenyans in all levels of employment regardless of work experience. Also, the Kenya Citizenship and Immigration Regulations[537] prevent non Kenyans from employment if aged below 35 years and applicants with no assured annual income of at least USD 24,000 or its equivalent in Kenyan shillings. With this domestic labour market protection stand, it is difficult to implement the right to free movement of workers in the EAC.

Furthermore, in **Uganda** various work permits were processed during the period between 2010 and 2016 as displayed in the table below.

Table 5.5 Uganda Work Permit Granted by Nationality 2010 – 2016

Nationality	2010/11			2011/12			2012/13			2014/15			2015/16		
	M	F	Total	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Burundians	5	0	5	11	2	13	3	7	10	18	8	26	29	5	34
Kenyans	48	4	52	23	25	48	22	13	35	18	11	29	23	8	31
Rwandese	2	4	6	3	0	3	2	8	10	1	4	5	7	1	8
Tanzania	12	31	43	52	12	64	38	19	58	28	21	49	28	10	38
Total	67	39	106	89	39	128	65	47	112	65	44	109	107	24	131

Source: Field Research data from EAC Headquarter at Arusha

Table 5.5 above shows that, Uganda processed and issued 671 work permits between 2009/10 (not displayed on the table) and 2015/16. Generally the number

[537] The Kenya Citizenship and Immigration Regulations. Section 20 (4). *Op. cit.*

of work permits issuance increased in 2015/16 as compared to financial years 2009/10 and 2010/11.

Between 2009/10 and 2015/16 there were a number of work permits applications which were rejected as summarized in the table blow.

Table 5.6 Uganda Work Permit Rejected by Nationality between 2010 – 2016

Nationality	2010/11			2011/12			2012/13			2014/15			2015/16		
	M	F	Total	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Burundians	0	0	0	6	1	7	8	3	11	6	8	14	13	7	20
Kenyans	8	3	11	7	11	18	42	10	52	51	17	68	66	23	89
Rwandese	0	2	2	0	1	1	4	4	8	8	3	11	12	2	14
Tanzania	15	4	19	25	13	38	29	12	41	48	19	67	76	29	105
Total	23	9	32	38	26	64	83	29	112	113	47	160	157	61	228

Source: Field Research data from EAC Headquarter at Arusha

The data above in table 5.6 shows that 612 work permits applications were rejected in Uganda between 2009/10 and 2015/16. This represents 47.7% as compared to the number of work permits issued. Such high number of work permits rejections is the result of application of strict employment laws and policy. The Uganda Employment Act, 2016 discussed above gives powers to the minister responsible for employment to use all possible means to limit the range of jobs open to migrant workers. In order to employ a foreigner, relevant authorities are required to make sure that no Ugandan who matches the skills of the expatriate staff.

Face to face interviews with the Uganda High Commissioner in Dar es Salaam portrayed that priority for employment opportunities is given to Uganda citizens due to scarcity of jobs in the country. The Uganda government had to intervene by enacting restrictive laws aiming at domestic labour market protection.

Face to face interview with the Kenya High Commissioner in Dar es Salaam testified that in order to address the unemployment crisis in the country, private and public institutions are encouraged and given incentives to employ Kenyans especially the youth. The researcher was interested to see the law and practice for age limitation in employment and the guarantee of assurance of USD 24,000 to migrant workers. The respondent further evidenced that in order to be eligible in work permit provision, the applicant should be not less than 35 years and should have an assurance of annual income of not less than $ 24,000 as the respective law stipulates. The respondent confirmed that this regulation is in force and strictly applied in order to provide employment for youth which have proved to be the national problem.

The above measures aimed at domestic labour market protection by partner states are against article 10(1) which guarantees free movement of workers in East Africa especially for committed categories of workers in Annex II.[538] In addition it is against the fundamental principles of non discrimination as enshrined under article 10(2) of the Protocol. This led to a conclusion that partner states employment and labour policies and laws do not reflect the right to free movement of workers as targeted by the EAC Common Market Protocol to facilitate the implementation of the right to free movement of workers in the EAC.

The researcher was also eager to find out the period used in processing work permits in the EAC. It is very unfortunate that there were no records available showing the processing period per application at the EAC and partner states levels. However, 92.3% (61 out of 66 respondents) through face to face interviews with Directors, Commissioners and Principal officers from the Ministry of Labour, Employment, Youth and persons with Disability, Ministry of Foreign Affairs and East African Community and the Immigration Services in Dar es Salaam Tanzania and the EAC head quarter in Arusha showed their concern that there is delay in processing of work permits. The average processing period as per interviews

[538] Protocol on the Establishment of the East African Community Common Market, *Op. cit*.

conducted is three to six months. This is likely due to strict conditions to be observed in work permits issuance as discussed earlier. The Protocol requires the competent authority to issue a work permit within thirty days of application for a work permit for an initial period of up to two years renewable upon application by the applicant.[539]

The influence of social security rights on the implementation of the right to free movement of workers in a common market has been discussed in chapter three. It should be cemented that variations of the same between partner states have adverse effect on free movement of workers in a common market as briefly discussed below.

5.2.2 Incompatibility of Social Security Laws in the EAC Partner States

The first research question, as it was provided previously in this chapter, also focused on how social security schemes setup in the EAC partner states are compatible with the implementation of the right to free movement of workers in the EAC common market.

Findings which involved examination of Tanzania, Kenya and Uganda social security laws confirmed that there is no exportability of social security credits and aggregation of insurance periods between one partner states to another. This affects short term and long term social security benefits to workers who are intending to enjoy the right to free movement of workers in the name of the common market. The research findings depicts that besides other restrictive employment and immigration conditions discussed above, incompatibility of social security schemes is capable of rendering free movement of workers in the EAC ineffective. This is due to risk and uncertainty pertaining to short term and long term benefits (pensions) in the course of free movement within the community.

[539] The East African Community Common Market (Free movement of Workers Regulations), *Op. cit*.

5.2.2.1 Social Security Law in Tanzania

Examination of the Tanzania social security laws reveal that the country posses a unique framework of social security due to the fact that it is a union government comprising Tanzania mainland and Zanzibar. This issue was well discussed in chapter three. Social security is a non-union matter hence separate arrangement of social security systems (i.e Tanzania Mainland and Zanzibar).

According to article 4 of the Tanzania Constitution,[540] state authority in the United Republic of Tanzania is executed by two organs of power notably the Government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar.[541] Thus, the said article and schedule 1 of the Constitution of the United Republic of Tanzania of 1977, labour and social security affairs are non-union matters. In this case, the Zanzibar social Security Fund (ZSSF) under the Zanzibar Social Security Act[542] coordinates the Public and Private sector employers and self employed persons. The Fund provides a number of long and short term benefits like old age, survival, and invalidity pensions together with maternity and medical care benefits.[543] The contribution rates of the Fund are 5% by employees and 10% by employers making total of 15%. These contribution rates are quite different from diversified contributions from Tanzania mainland in the form of 10% by 10% employees and employers respectively and 5% employees and employers respectively making a total of 20% contributions.

Besides lacking exportability and aggregation of social security credits of insured persons, Tanzania has an extensive framework of social security laws. The Constitution provides that "the state authority shall make appropriate provisions for the realization of person's right to work, to self education and social welfare at times of old age, sickness or disability and in other cases of incapacity…" [544]

[540] The Constitution of the Republic of Tanzania. *Op. cit*.
[541] *Ibid*. Free movement of workers is a union matter. This provides difficulties on how to enforce compliance in the Revolutionary Government of Zanzibar.
[542] No. 2 of 2005.
[543] *Ibid*. Section 26(1).
[544] The Constitution of the United Republic of Tanzania. *Op. cit*.

despite this clear Constitutional provision, social security cannot be well justified as it is not enforceable by any court of law.[545]

Furthermore, Tanzania adopted the National social security policy in 2003. The objective of social security policy in Tanzania is "to provide benefits in the event of the individual's earning, power permanently ceasing, being interrupted, being unable to avoid poverty or being exercised only at an acceptable social cost."[546] The Policy aims at addressing various challenges in the social security domain for the benefits of all Tanzanians.

Examination of social security laws reveal that apart from small coverage, social security in Tanzania takes the form of mandatory schemes, social assistance schemes and private savings in the category of formal and informal security systems. There is reformation of social security regimes in Tanzania.[547] This lead to an enactment of the Public Service Social Security Fund Act (PSSSF),[548] which merges the pre existed Funds PPF, LAPF, GEPF and PSPF. In line with these recent changes, the newly established scheme provides coverage to public servants. NSSF survived the above social security reforms in Tanzania in which it has been conferred exclusive jurisdiction to provide social security coverage to private and informal sectors in the country. This gears to the determination by the government that all Tanzanians ultimately should have social security protection and minimise operation costs.

However, just before the current social security regime change, the formal social security system in Tanzania had seven schemes involving the NSSF under the National Social Security Fund Act.[549] NSSF was previously designed for private sector, non pensionable parastatal and government employees and self employed

[545] *Ibid*. Article 7(2).
[546] The United Republic of Tanzania, The National Social Security Policy, Ministry of Labour, Youth Development and Sports, January 2003. p. 4.
[547] The Public Service Social Security Fund Act, Special Bill Supplement, 19th October, 2017.
[548] Act No 2 of 2018.
[549] Act No. 28 of 1997.

person, the PSPF under the Public Service Retirement Benefit Act[550] was formally aimed for central government pensionable employees, the PPF under the Parastatal Pension Act[551] originally meant for employees in public sector or parastatals, The LAPF under the Local Authorities Provident Fund Act[552] previously set for employees belonging to local governments and NHIF under the National Health Insurance Fund Act[553] previously meant for insurance health coverage to central government pensionable employees and the Political Retirement Benefits Act[554] for employees identified in political matters and the Workers Compensation Fund under Workers' Compensation Act.[555]

The schemes mentioned above have been offering long term benefits and pension scheme mainly involving old age pension, survival pension and invalidity pension. Short term benefits mainly involve funeral grant, maternity, employment injury and social health Insurance. The mentioned short and long term benefits are also maintained in the two major schemes transformed (NSSF and PSSSF).

Documentary review identified that Tanzania offers minimum standard benefits recognized by ILO instrument under social Security (Minimum standards) Convention.[556] This was well discussed in Chapter three. The Tanzania Social Security Policy acknowledges that there is lack of mechanism for portability of benefit rights in Tanzania and beyond,[557] thus it aims at harmonising social security schemes in the country so as to eliminate fragmentation and rationalize contribution rates and benefit structure."[558] This target has not yet been attained, however the research reveals that actuarial evaluation of these scheme have been made with assistance from ILO on how best to attain this target.

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[550] Act N0. 2 of 1999.
[551] Act No. 14 of 1978.
[552] Act No. 9 of 2006.
[553] Act No. 8 of 1999.
[554] Act No. 3 of 1999.
[555] 2008.
[556] Act No. 102 of June 1952.
[557] Social Security Policy, *Op. cit*. p. 8.
[558] *Ibid*. p. 12.

Furthermore, analysis of social security laws reveal that there is no social security benefits transferability within social security schemes within Tanzania mainland serve for long term benefits only. This was well discussed in Chapter three. To make it worse, there is no social security transferability between Tanzania and the rest of the East African states. One wonders as to how free movement of workers will be achieved with such inconsistence. This study has found that the general situation in social security patterns in East Africa is different from one partner state to another with no coordination in social security across borders. The summary for other partner states is briefly discussed below.

5.2.2.2 Social Security Law in Kenya

Besides the Kenya's social security incompatibility with other member states, documentary review has shown that Kenya has no formal social security policy as compared to Tanzania and Rwanda. In the absence of the same, Kenya's newly established constitution enshrines National values and governance principles involving human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.[559] The basic article which provides social security in an explicit manner as a form of economic and social rights is article 43(1).

Apart from constitutional social security framework, there are various laws governing various schemes. The National Social Security Fund under the National Social security Fund Act[560] covers all employees working in private sector organizations which employ more than five workers. The Fund administers various benefits like age, survivors, invalidity and withdrawal benefits together with emigration grant.[561] The Fund has various limitations as it operates as a provident Fund with no long term benefits in the sense of pension arrangements this leaves retired, disabled and survival beneficiaries susceptible to various economic and social contingencies. This renders transferability of long term social security

559 The Constitution of the Republic of Kenya. *Op. cit*. Article 10(2) (b).
560 1965.
561 *Ibid*. Sections 19-24.

benefits to other partner states quite impossible due to non existence of such scheme arrangement in the country.

Worse still, the said Fund offers very limited benefits far beyond the nine minimum benefits prescribed by ILO convention No. 102 as discussed under Chapter three. Another social security scheme is the National Health Insurance Fund under the National Hospital Insurance Fund Act.[562] The Fund covers employed persons who earn salaries and self employed persons.[563] The Fund covers limited number of people with small geographical coverage. In another arrangement, the Pensions Act[564] is the scheme which provides grants to public services officers who are employed by the Government of Kenya. The Act has various limitations as stipulated that pension is not a right hence not guaranteed.[565] Other limitations are as discussed under sections 14-19 of the respective Act.

In addition to Kenya Social Security schemes, the Retirement Benefit Benefits Authority Act[566] establishes the Retirement Benefits Authority (RBA) which regulates and supervises retirement benefit schemes in sector wise, hence other schemes discussed should be registered under it.[567] RBA is similar to the Social Security (Regulatory Authority) Act No. 8 of 2008 for Tanzania discussed before. The Kenya Social Security framework is different from that of Tanzania but a bit similar with that of Uganda as summarized below.

5.2.2.3 Social Security Law in Uganda

Uganda social security scheme also is not compatible with other partner states as for Tanzania and Kenya, documentary review has shown. Hence, there is no accommodation for transferability of social security with other partner states. I was also found that Uganda has no social security policy. However, the Constitution

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[562] No. 9 of 1998.
[563] *Ibid*. Section 15.
[564] Cap 189.
[565] Cap 189. Section 5.
[566] Act No 3 of 1999.
[567] *Ibid*. Section 22.

provides a framework for social security. The National objectives and directive principles of State Policy stipulated in the Constitution enshrines social security elements like protection of the aged, general social and economic objectives and medical services provisions as advocated in its the preamble. Substantively, it is only article 254 which guarantees pensions to public officers.[568] This provision is questionable specifically in relation to private sector and other groups as they are left without constitutional coverage.

Apart from the above Constitutional framework, there are other national law statutes governing social security in private and public sectors as discussed before, however the following is the brief summary for analysis purposes. The National Social Security Fund (NSSF) established under the National Social Security Fund Act[569] covers all employees in private sector by entity or organizations employing five employees or more. Basing on this limitation, eligible employees and employers are not registered with NSSF hence very small coverage in the country as firms employing less than five employees comprises majority in the country. NSSF provides five benefits namely Age benefit, Withdrawal benefit, Invalidity benefit, Emigration grant and Survivors benefit.[570]

The Uganda NSSF regime does not meet the minimum benefits provisions provided by ILO in terms of number of benefits covered and quality of benefits provided as discussed earlier in chapter three. The basic limitation is that NSSF operates as a Provident Fund and not as pension scheme. NSSF provides lump sum payments at old age. This is similar to social security schemes in Kenya as discussed before. Lump sum payments deprive recipients with pension payment hence defeat social security purpose and principles guided by ILO social security standards. As per sections 11 and 12 workers contribute 5% and employers 10% making a total of 15% of monthly salary.

568 The Constitution of the Republic of Uganda. Article 84. *Op. cit*.
569 1985.
570 *Ibid*. Sections 20-24.

In addition, observation of Uganda social security law portrays that in public sector, there is the Public Service Pension scheme (PSPS) under Pension Act.[571] This service scheme covers public servants in central and local governments. Apart from PSPS there are also other scheme covering the public sector. The Parliamentary Pensions Act[572] covers all members of parliaments with contribution rate of 15% employees and 30% government making a total of 45% of monthly salary. The Judicature Act[573] provides coverage for Judges of the High Court, Justice of the Court of Appeal and the Supreme Court upon completion of one year service or if exceeding according to pensions Act as per section 46 of the Act.[574] The Uganda peoples' Defense Force (UPDF) Act[575] and the Policy Act[576] also covers officers and non officer servants and police officers respectively.

Generally, PSPS does not cover all public servants as other servants are excluded. Another limitation besides coverage involves limitations of benefits provided. The pensions/benefits provided are limited in number and do not meet the ILO minimum standards discussed in Chapter three. Benefits like health provision, education and invalidity are excluded in the arrangement. Apart from administrative setbacks, pensions are provided in lump sum basis with no monthly pensions hence violation of internationally recognized social security principles recognized under ILO.

Like Kenya, the Uganda Retirement Benefits Regulatory Authority Act[577] establishes the Uganda Retirement Benefits Regulatory Authority. The objective of the Authority is "to supervise and regulate the establishment, management and operation of retirement benefits schemes and to protect the interest of members and beneficiaries of retirement benefits schemes in Uganda."[578] In a nutshell, this

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[571] Act No 9 0f 2008.
[572] Act No. 6 of 2007.
[573] Cap 13 of 1996.
[574] The Judicature Act. *Op. cit*.
[575] Act No 7 of 2005.
[576] Cap 303.
[577] Act No. 15 of 2011.
[578] *Ibid*. Section 4.

Authority has a long way to go to ensure that Uganda Social Security Schemes provide sufficient short term and long term benefits (Pension arrangements involving initial lump sum payment and monthly pension) basing on ILO minimum standards. The incompatibility of social security laws between partner states can be vividly examined as briefly discussed below.

5.2.3.4 Comparative analysis of the effect of social security laws of Tanzania, Kenya and Uganda on free movement of workers

Analysis of social security laws show that EAC partner states operate social security arrangements in varied social security law platform. Despite the fact that Tanzania operates social security benefits involving wide coverage in terms of the benefits as recognized by ILO minimum standards, there is no transferability of social security benefit credits between or among the existing schemes, which means there is no harmonisation within the schemes themselves in Tanzania mainland and in a worse situation in consideration of different social security schemes operating in the Revolutionary Government of Zanzibar. **Kenya** and **Uganda** operates social security schemes under Provident Fund (Lump sum payment at retirement) unlike Tanzania which has met ILO minimum standards in offering short term and long term benefits (involving initial lump sum and monthly payments).

The rest of the EAC countries have long way to go to meet the Minimum International Standards as stipulated by ILO discussed before. The research findings reveal that incompatibility of social security schemes in the EAC frustrates free movement of workers in the community. Face to face interviews with Principal Officers from the Tanzania Social Security Regulatory Authority (SSRA) hinted that there is a close connection between working and social security protection such that social security is part and parcel of labour rights. Such connection was well discussed under chapter three. Absence of social security coverage during the course of free movement within the community discourages effective free movement of workers in the EAC. The same view was maintained by the Director for social security division and Director for employment division and the Commissioner for labour division from the Ministry of Labour, Employment, Youth and persons with Disability and other respondents.

Face to face interview conducted with directors and commissioners at the **Tanzania** the Ministry of Labour, Employment, Youth and Disability and SSRA in Dar es Salaam shows that Tanzania and the rest of EAC partner states social security schemes are not compatible with each other to facilitate free movement of workers in the EAC. This is because there is no exportability of social security credits between one partner state and another in the course of free movement within the Community.

Face to face interview with the Principal legal officer at the EAC headquarter in Arusha reveal that there is no any a social security regulation or directive issued by the Council as envisaged under section 10 (4) of the Protocol.[579] Partner states still maintain different social security schemes with different social security benefits, varied coverage, different benefit qualification requirement, different contribution rates and different level of social security development basing on ILO standards. All this affect transferability of benefits not only within respective schemes but also between partner states.

The crucial need is the transferability of social security credits between states which is a must in order to have effective free movement of workers in the bloc. Moving freely between partner states without transferability of social security credits (involving duration of contribution and amount) is like going to an unknown journey for a worker. This results to losing social security credits which disqualifies a worker for long term or short term benefits. This aspect was fully discussed in Chapter three. This makes free movement of workers automatically difficult to be conceived and undesirable to potential workers and difficult to implement besides the challenge of harmonisation of labour and immigration policies and laws discussed in Chapter three. Successive economic communities

[579] The Uganda Retirement Benefits Regulatory Authority Act. *Op. cit.*

like the EU and CARICOM have notable advancement in the common market and effective free movement of workers hence specific arrangements involved in social security credits transferability hence effective free movement of workers in the respective countries as discussed in chapter four.

The Protocol recognizes the need to coordinate and harmonize social security policies to promote and protect decent work and improve the living conditions of the citizens of the partner states for the development of the common market."[580] In this case, the free movement of workers entitles a worker to enjoy the rights and benefits embedded in social security package as provided to workers of the host partner states.[581] Thus, partner states are given obligations to review and harmonise their National Social Security policies, laws and systems for effective free movement of workers in the community.[582] However, every partner state has unique social security regime which is different from other partner state.

Immigration laws and policies have positive or negative effects on the implementation of the right to free movement of workers in a common market as discussed in chapter three. However, a brief summary of the same is relevant in order to examine how respective laws inhibit the implementation of the right to free movement of workers in the EAC.

5.2.3 Variations of Immigration laws and Policies in the EAC Partner States

The first research question further focused on examining the implication of immigration laws and policies of the EAC partner states on the implementation of the right to free movement in the EAC common market. Chapter three discussed the influence of immigration laws and policies on free movement of workers in a common market. Thus, there is interaction between labour laws and immigration

580 Protocol on the Establishment of the East African Community Common Market, Article 39(1). *Op. cit*.

581 *Ibid*. Article 10(3) (f).

582 *Ibid*. Article 12(2).

laws of partner states on implementation of the right to free movement of workers in the community. This can be justified in the discussion below.

5.2.3.1 Immigration Law and Policy in Tanzania

The Non Citizen (Employment Regulation) Act[583] and the Immigration Act[584] governs immigration matters in Tanzania. Examination of immigration procedures presupposes that application for work permit should be made before entering Tanzania by the respective employer by submitting the required application forms and other documents with necessary fees payment to the Labour Commissioner under the Ministry of Labour, Youth, Employment and Persons with Disabilities. The work permit entitles a foreigner to work but not to reside in Tanzania hence the requirement for the foreigner to apply for residence permit issued by the Director of Immigration Services under the Ministry of Home affairs.[585] Under the immigration law of Tanzania no person is allowed to enter from any place outside Tanzania unless in possession of a valid passport and a residence permit.[586]

Under section 20 (1)[587] of the respective law, a worker who is in possession of a work permit should secure a residence permit for employment purposes. The Director of immigration services is required to satisfy himself that the applicant posses' qualifications or skills necessary for such employment and that his employment will be of benefit to Tanzania.[588] In order to fulfill such requirements, the Director is empowered in his own motion to vary the conditions and the period of validity of residence permits. Such conditions are the same conditions imposed during application of work permits in which work permits are issued for skills not available in Tanzania for domestic labour market protection. As a result, there

[583] Non – citizen (Employment Regulation) Act. Section 10 (1). *Op. cit*. However before the enactment of this Act, the Labour Commissioner's role was to advise the Director of immigration services who had powers to Issue work permits.
[584] The Tanzania Immigration Act. *Op. cit.*
[585] The Tanzania Immigration Act. *Op. cit.*
[586] *Ibid*.
[587] *Ibid*.
[588] The Tanzania Immigration Act. *Op. cit.* Section 20 (1).

were rejections of work permits at the rate of 40.49% between 2010 and 2016.[589] This leads to discussion of other partner states as summarised below.

5.2.3.2 Immigration Law and Policy in Kenya

It has been discussed in chapter three that the Kenya Citizenship and Immigration Act [590] together with the Kenya Citizenship and Immigration Regulations [591] govern matters relating to immigration together with the Kenya citizens and Foreign Nationals management Act[592] However, specific provisions can be cited to vindicate how the Kenya immigration laws curtail other partner states workers' employment opportunities in Kenya. It is the government of Kenya policy that entry permits are issued to non citizens with skills not available in the domestic labour market.[593] Employers are also given conditions that effective training programmes are undertaken to produce trained citizens for the entry work permits so issued in a given period of time. This policy is reflected in the National Employment Authority Act[594] with deliberate motive that, "the government shall take affirmative action measures and actions designed to promote the employment of Kenyans in management and other levels of employment regardless of their years of experience."[595]

Further observation of immigration law shows that in order to implement the policy of domestic market protection, the Kenya immigration regulations has provided strict conditions to the Director responsible for work permit and residence permit issuance. Section 20(4) of the regulations provides that, "the Director shall not issue a class 'K' residence permit to any person unless that person has proven that he or she has funds or has in his or her own right and at his or her full and free disposition and assured annual income of at least twenty four

589 See Table 6.2.
590 The Kenya Citizenship and Immigration Act, *Op. cit*.
591 The Kenya Citizenship and Immigration Regulations, *Op. cit*.
592 The Kenya Citizens and Foreign Nationals Management Act, *Op. cit.*
593 The Kenya Citizens and Foreign Nationals Management Act, *Loc. cit.*
594 National Employment Authority Act, No.3 of 2016.
595 *Ibid*. Section 37(3).

thousand US dollars or its equivalent in Kenya shillings."[596] This is equivalent to almost Tsh 62,400,000 per annum with an average of Tsh 5,200,000 per month. In real sense, this monthly salary is earned by Directors, Commissioners, managers and other people who are highly skilled and not by the normal citizens looking for employment. This condition goes hand in hand with age restriction in which persons with 35 years or less are not eligible for work permits acquisition. This is direct discriminations to other partner states. The immigration regulations outline conditions for issuance of class K (ordinary residents) employment permit underneath as follows, a person who: (a) is not less than thirty five years of age, (b) has an assured annual income prescribed (USD 24,000), (c) whose presence in Kenya will be of benefit to Kenya and (d) not to be employed in any income activity without a permit of the relevant class.[597]

Elaborating more on restrictions stipulated by immigration laws, the Kenya Immigration Minister once argued that the above regulations mark a major market policy change in the country. Thus, restrict foreigners aged 35 years or less and any person with at least USD 24,000 annual income from being issued with work permits.[598] The said advocated 'major market policy change' is imposed by the government of Kenya in the presence of the EAC common market obligations agreed to. This is against article 10(2) which enshrines the principle of non discrimination of workers of other partner states basing on their nationalities in connection to employment remuneration or other conditions of employment. Also, section 24 restricts work permit duration for a period not exceeding five years from the date of issue or renewal as the case may be.[599] Limitation of work permit duration is also maintained by other partner states as discussed above which is against the protocol which has no limit in period for work permit possession. As a result of strict application of immigration conditions there were massive rejections

[596] The Kenya Citizenship and Immigration Regulations, Section 20 (4). *Op. cit.*
[597] The Kenya Citizenship and Immigration Regulations. *Op. cit*.
[598] Business Daily News, Friday, December 2, 2016 "Kenya locks out young and low paid foreigners." Retrieved from World Wide Web: www.business daily Africa.com/corporate-News/Kenya-locks-out- young-and-low- paid- foreign- workers.
[599] The Kenya citizenship and Immigration Regulations legal. *Op. cit*.

of work permits applications at the rate of 58.39% between 2010 and 2016 as discussed earlier.[600] This raises curiosity in the influence of immigration laws and policies on the implementation of the right to free movement of workers in the last EAC founding partner state.

5.2.3.3 Immigration Law and Policy in Uganda

The Uganda immigration laws and procedures were also discussed in the chapter three. However, the following brief account can be made. The examination of immigration laws show that under the Uganda Citizenship and Immigration Control Act,[601] a person who is not a citizen of Uganda is prohibited from being employed unless in possession of valid work permit in the sense of an entry permit, certificate of permanent residence or special pass.[602]

Section 6 (5) of the Uganda Immigration Act states that," it shall be lawful for the Minister, by regulations to limit the range of jobs open to migrant workers."[603] In emphasis, section 97 of the same Act empowers the Minister responsible to make regulations which provide limitations of the range of jobs open to migrant workers.[604] This is due to the implementation of National Employment Policy which aims at promotion of youth employment and protection of domestic labour market.[605] The labour Advisory Board is given powers to review and monitor the status of migrant labour in order to attain the stated goal.[606]

Literature reveal that in July, 2012 the government reiterated its policy by stating that employers are not allowed to employ foreigners unless they provide proof that there are no Ugandans with skills required in filling the vacant position (Butagira, 2012). As discussed earlier in other partner states, restrictive immigration conditions are maintained by all member states. Such restrictive immigration

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[600] See table 6.4.
[601] The Uganda Citizenship and Immigration control Act. *Op. cit.*
[602] The Uganda Citizenship and Immigration control Act, (Chapter 66), 2009. Section 59(i)
[603] Employment Act, 2006.
[604] *Ibid*.
[605] National Employment Policy, April 2011.
[606] Uganda Employment Regulations, 2011.

conditions are unfavorable for effective free movement of workers in the community and contribute to delay and rejection of work permits. The rejection was at the rate of 47.7% between 2010 and 2016 as highlighted earlier.[607] The above discussion on immigration laws and policies from EAC founders was also supported by face to face interviews. The effect of variations of immigration laws and policies between the stated partner states can be appreciated as discussed below.

5.2.3.4 Comparative analysis of the effect of immigration laws and policies of Tanzania, Kenya and Uganda on free movement of workers

The face to face interviews with the Commissioner for border management control division, the Commissioner for passports, citizenship and nationality division and the Senior Operations Officer for permit section, there are specific guidelines which should be used for all foreigners aspiring for resident permit acquisition in Tanzania. Procedures require that, foreigners intending to work in Tanzania must possess work permit and resident permit respectively. Respondents confirmed that procedures for acquiring work permits and resident permits are strictly adhered to involving the requirement that there should be no Tanzanian to occupy the vacant position in order to employ a non Tanzanian.

Face to face interviews with Principal Officers from the **Uganda** High Commissioner in Dar es Salaam provided that it is against the immigration laws to work in Uganda without a valid residence permit. All procedures must be followed during work permit and residence permit application to relevant authorities. The respondent confirmed that conditions for non citizens' employment are strictly applied according to outlined procedures as discussed above. This further invite more challenges to full implementation of the right to free movement of workers in Uganda.

[607] See Table 6.6.

Face to face interview with the **Kenya** High Commissioner in Dar es Salaam inquired specifically on conditions imposed by immigration law for employment of non citizens on age limitation (not less than 35 years) and assurance of annual income (not less than USD 24,000). The respondent clarified that such limitations are vividly outlined in the Kenya Citizenship and Immigration law hence form part of Kenya immigration laws and practically applied during work permit application consideration.

In addition, examination of member states immigration laws and procedures shows that all partner states maintain variations in work permits and residence permit classes and procedures. For example, **Tanzania** has five categories of work permits which are different from other partner states.[608] These classes are: Class A (issued to foreign Investors), Class B. (issued to foreigners employed in prescribed professions mainly medical and health care professionals, expert in oil and gas, teachers and university lectures in science and mathematics fields), Class C (issued to foreigners who are employed in Tanzania in other professions apart from those prescribed by the Act and Regulations), Class D (issued to foreigners employed in religious and charitable issues) and Class E (issued to refugees).

The above application for work permit calls for non- refundable fees depending on class of work permit, example, USD 1000 (class A), USD 500 (class B), USD 1000 (class C), and USD 500 (class D). [609]

Upon payment and approval of the work permit fees as outlined above foreigners must also pay the residence fee according to three specified residence fees which are: Class A – Investors USD 3050, Class B – Employees USD 2050 and Class C – Dependants, Retiree, students USD 650.[610]

Examination of immigration laws shows that work permits classification is different from residence permits though used together and sometimes

[608] Non – Citizen (Employment Regulation) Act, Section 13(1). *Op. cit.*
[609] Non – Citizen (Employment Regulation) Act. *Ibid.* Sixth schedule.
[610] The Tanzania Immigration Act. *Op. cit.*

interchangeably referred to. Class A residence permit is provided to foreign investors, class B to foreigners employed in Tanzania and class C for any applicant who does not qualify for Class A or B residence permits. For a foreign worker to work in Tanzania should have in possession of USD 500 (work permit fees) + USD 2050 (Residence fees).[611] USD 2550 is equivalent to Tsh. 6,757,500. This sum of money is very high for a mere worker seeking to be employed in Tanzania hence distorts the spirit of free movement of workers as guaranteed in Article 10 (1) of the Protocol.

It is evidenced that issuance of work permits which qualifies the applicant for an application of residence permits is governed by the following restrictive conditions: a foreigner must have appropriate skills not readily available in Tanzania, assurance that all possible efforts have been explored to obtain a local expert, employers intending to employ a non-citizen preparation of a succession plan of the non-citizens knowledge to the citizens during employment of a foreigner and that validity of the first grant and its renewals not to exceed five years.[612]

As noted earlier, **Kenya** like other partner states maintain a different work/resident permit structure. The following are permit classes according to immigration regulations. These classes are: Class A (for prospecting and mining), Class B (for Agriculture and animal husbandry), Class C (for prescribed profession), Class D (for employment by a specific employer, the government of Kenya or authority under the control of the government or other international organizations), Class F (for specific manufacturing), Class G (for specific trade, business or consultancy), Class I (for approved religious or charitable activities), Class K (Ordinary residents relevant for employment purposes) and Class M (for refugees).

Uganda also maintain different regime of work and residence permits as compared to other partner states. Classes of entry permits are Class A (for government and

[611] Non – citizen (Employment Regulation) Act, Sixth schedule. *Op.cit.*
[612] Non – citizen (Employment Regulation) Act. section 11 (2). *Op. cit.*

diplomatic service), Class A2 (for Government contracts), Class B (for Agriculturalists), Class C (for Miners), Class D (for business and trade), Class E (for manufactures), Class F (for professionals) and Class G: for employees.[613]

All respondents during the face to face interview were asked to give their comments on the impact of work permit procedures to effective free movement of workers in the community. Participants shared their views that immigration rules and procedures need to be coordinated. 100% of the respondents (61 out of 61 respondents) advised through face to face interviews and unstructured questionnaires that for effective free movement of workers in East Africa, harmonisation of work permit classes and procedures need to be worked upon. This will allow proper alignment with the EAC common market requirement hence easy entry at partner states borders. The study reveals that all partner states operate immigration procedures basing on their domestic laws with no alignment to the requirement of the EAC common market protocol.

The Protocol requires that work permits and procedures to be harmonised within the community. Regulations 6 (9)[614] states that "the work permit or a special pass issued under these regulations shall be issued in accordance with the harmonized classification of work permit and forms, fees and procedures as may be approved by the Council." Basing on the same, work permit and residence permit, fees structures need to be harmonised in all partner states in order to have uniformity across the bloc for each class. This goes together with reviewing the application forms and required supporting documents for achieving uniform and simplified documentation requirements.

The researcher also inquired as to whether there is any directive issued so far by the Council providing guidance on work permits and procedures. Face to face interviews with the Director of planning and infrastructure, Head of department involving labour and immigration, and the Principal legal officer at the EAC

[613] Uganda Employment Regulations. *Op. cit*.
[614] The East African Community Common Market (Free movement of Workers) Regulations. *Op. cit.*

headquarters in Arusha evidenced that there is no any directive or regulations which have been issued by the Council pertaining work permit and forms, fees and procedures. As a result partner states maintain different work permit classes, forms, fees and procedures. This calls for review of partner states immigration laws and policies for effective amendment of relevant provisions and procedures. This aims at attaining uniformity in the above aspect hence facilitate the implementation of the right to free movement of workers as per protocol requirement.

Free movement of workers in the EAC is not left without justified limitations. It is important to discuss briefly these justifies limitations and their procedures as member states are likely to curtail free movement of workers in disguise. The Protocol provides that, "the free movement of workers shall be subject to limitations imposed by the host partner state on ground of public policy, public security or public health."[615] The said provision stands only when a partner states imposing such limitation notify other partner states accordingly.[616] After successive interviews with Directors and Commissioners of Immigration Services and the Ministry of Labour together with the East African community and the Ministry of Foreign affairs and EAC Affairs, the findings reveal that no such notifications basing on public policy, public security or public health have ever been communicated between partner states ever since the common market protocol came into force in 2010. In Tanzania, the Director for Immigration Services is empowered to revoke work permits issued by the Labour Commissioner basing on public policy, public security or public health upon proper notification to other partner states and proof for existence of the same.

Face to face interviews with Commissioners and Head of department (law review section) of the Law Reform Commission of Tanzania were of the view that protection of domestic labour market can be justified basing on public policy,

[615] Protocol on the Establishment of the East African Community Common Market. Article 10(11). *Op.cit*
[616] *Ibid*. Article 10(12).

public security and public health. This necessitated for the researcher to have documentary review from the EU experience as other partner states might have the same notion. Limitations are common in other economic communities. An example can be drawn from the EU where, Article 45 (4)[617] of the Treaty justifies limitation on free movement of workers basing on public policy, public security and public health. Literature review provides that the concept of public security and public policy are more less the same such that public security may be invoked in place of public security.

Caution is required as partner states may misuse the same to justify their limitations for the right to free movement of workers in the common market for economic ends. In the EU the scope of application, is only determined by the EU law and the ECJ. Article 27 of the provided Directive allows member states to restrict free movement on grounds of public policy, public security or public health. However, such limitations should not be imposed to serve for economic ends.[618] Article 27 (2) states that, "the personal conduct of the individual concerned must present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." Justifications should rely on the particulars of the case and should not base on considerations of general prevention aiming at restriction to free movement of workers.[619]

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[617] Consolidated Version of the Treaty on the Functioning of the European Union, October 2012.

[618] Directive 2004/38 of the European Parliament and of the council, official Journal of the European Union, L 158/77 of 29 April 2004. Directive 64/221 defined the scope of public policy, public security and public health. However this, Directive was replaced by Directive 2004/38. This directive incorporates various principles approved by the ECJ in its restrictive interpretation of these terms and various procedures to be followed in case of individuals faced with limitations of community rights. See also. European Commission online Journal on Free Movement of workers within the European Union ISSN: 1831-922 No. 5 January 2013. p.3 Free movement of workers might be discouraged by partner states during economic hardship. Such tendency should be discouraged. This is due to the fact that limitations basing on public policy, public security or public health cannot be invoked to meet economic ends. Journal No.1

[619] *Ibid*. In the case of *Rheorghe Jipa* [2008] ECR 1 – 5157. The court reasoned that Jipa's personal conduct should constitute a genuine, present and sufficiently serious threat endangering the fundamental interests of society. The Court held that these conditions were not met.

The ECJ has always taken a strict interpretation in its decisions involving limitation basing on public policy, public security and public health. Such caution is taken basing on the fact that partner states can use such exception to discriminate people who are genuinely eligible to exercise their free movement right and use such limitations as a tool to serve economic ends which is prohibited in the common market (Horspool, 2006).[620] In the case of **Olivery**,[621] the Court held that decision must base on a case by case basis in order to establish personal conduct which can amount to a present threat to public policy. In another case of **R v. Bouchereau**,[622] the Court held that, previous criminal convictions alone were relevant only so far as they manifest a present or future to act in a manner contrary to public policy or public security. Concerning procedures in the host state, in **Roger's Case**,[623] the Court observed that administrative requirements on work or residence permit should not be used as justification for expulsion of an individual.

Due to strict conditions outlined above in issuance of work permits and residence permits observed, it is obvious that this results to delays and rejections of work and residence permits issuance as demonstrated by field data.[624] It is very unfortunate that the Labour Commissioner and the Director of Immigration Services do not maintain records on processing period for every work permit and residence permit processed. Thus, difficult to evaluate statistically on delays of work permits issued. However, face to face interviews conducted with various respondents at the

[620] Strictness by the ECJ in interpreting limitations basing on public policy, public security and public health contributed greatly in secondary legislation EU development. This contributed in repealing the Directive 64/221 and enactment of Directive 2004/38. Such strict interpretation is aimed at protecting individuals faced with limitations in exercising their Community rights.
[621] *Oliver v. United States* [1984] 466. In another case of Van Duyn v. Home office, 4.1 74, [1974] the Court stated that UK government had to examine whether Miss Van Duyn's conduct affected public policy. Such assessment has to base exclusively on personal conduct of the concerned individual.
[622] [1977]. See also *R v. Secretary of State for Home Affairs, ex P. Maria* Santillo [1980] in which the Court repeatedly stressed that past criminal convictions should only be taken into account in so far as they are basing on personal conduct of an individual. Such conduct should cause present danger. The present rather than the past conduct should be reviewed. In another case of Mrs. Calfa, the Court reasoned that Greek rules based on automatic expulsion measures to personal conduct of an individual on the ground of public policy was contrary to Directive 64/221/ECC.
[623] *Royer v. Belgium* [1976] 75.
[624] See Table 6.1 to Table 6.6.

Ministry of Labour, Employment, Youth and Disability and the Immigration department services under the Ministry of Home Affairs showed their concern that there is delay in issuance of work and residence permits with an average of three to six months.

In order to discern existing gaps in the implementation of free movement of workers in the EAC it is salient to examine how this right has been facilitated in other economic communities. Implementation of the right to free movement of workers in other economic communities was discussed in chapter four. However, it is relevant to appreciate briefly how the right to free movement of workers has been facilitated in other successive economic communities specifically the EU.

5.3 Best Practices from the EU

In order to discover existing gaps in effective implementation of the right to free movement of workers in the EAC, implementation of the right to free movement of workers in other REI was examined notably the EU, CARICOM, ECOWAS, SADC and COMESA. This is in response with research question number two. An analysis for the respective economic community was made in Chapter four. The findings reveal that the EU represents the best practices in the implementation of the right to free movement of workers. The best practices under EU employment and labour laws, EU common migration laws and policies and the EU social security laws and policies as briefly discussed below.

5.3.1 EU Employment and Labour Laws

Free movement of workers is one of the four pillars in the EU common market. Way back from 1952 the Treaty establishing the European Coal and Steel Community (ECSC)[625] introduced for the first time the idea of free movement of workers involving coal and steel sectors only in the EU common market. The respective market involved six countries notably France, Germany, Belgium, Italy, the Netherlands and Luxemburg. The ECSC aimed at pooling together the coal and

[625] Treaty Establishing the European Cool and Steel Community (ECSC), 1952.

steel resources hence eliminating barriers for workers in the respective sectors. The success of the ECSC led to the formation of the European Economic Community (EEC) in 1958 aiming at strengthening the common market between them as strengthened by the Rome Treaty[626] which provided for the free movement of workers in all categories without selection and other freedoms and rights in the single market (Toader & Florea, 2011).

For effective facilitation of implementation of the right to free movement of workers in the Community, some measures were deliberately taken offering citizens the right to move to any member state to look for employment opportunities freely, right to reside and remain after having been employed, mutual recognition of academic qualifications, international transferability of social security rights, rules of family reunification and right to remain for establishment after employment. It is worth to be noted that labour law belongs to the field of EU social policy in the EU. All matters pertaining employment are safeguarded in this area like working standards, health and safety, and other conditions of employment. Previously, social policy was left at the jurisdiction of the member states by the 1957 EEC Treaty.

The European Social Policy was introduced by the single European Act in 1986 and re-affirmed in the EU Treaty reforms negotiated between members in 1990s (Falker, et al, 2005). The Maastricht Treaty [627] widened social policy extension to cover among others, working conditions non discrimination between men and women and employment opportunities involving equal treatment among workers. This led to establishment of the Employment Policy Charter. More worth of emphasis is the wide coverage of the EU social policy to involve issues pertaining free movement of workers and general principles of non- discrimination (Falker et al, 2005).

[626] Treaty of Rome, *Op. cit.*
[627] Treaty on European Union, the Maastricht Treaty, February 1992.

The right to free movement of workers has been maintained in all Treaties thereafter like the Treaty on the European Union which was signed in Maastricht on 7th February, 1992 and which came to force on 1st November 1993.[628] This right is enshrined under article 45[629] (ex article 39 EC). Free movement of workers has been developed through various secondary laws like the regulation (EEC) No. 1612/68,[630] Directive 2004/38,[631] Directive 2005/36 (EC)[632] and various case law highlighted earlier. The ECJ played a crucial role in developing case law which gradually opened the room for EU members to freely enter any of partner state to look for employment, work and reside without any direct or indirect discrimination (Toader & Florea, 2011). In the case of **Ninni Orasche**,[633] the Court stressed that the respective person must carry on an activity of economic value which is genuine and effective. This includes small scale activities which can be viewed as marginal and accessory. Once those conditions exist, other factors as duration of work, limited working hours and low income are not relevant in order to involve all kinds and categories of workers as far as possible.

Partner states employment and labour laws were coordinated and harmonized to facilitate free movement of workers in the Community. A point worth of emphasis in the EU is that there is no selection of categories of workers as it is for selected

[628] Maastricht Treaty on European Union, 7 February 1992. EU Treaties have been amended on various occasions to fulfill various purposes. More members were admitted at different times as acceded in the Community. Example in 1973, (Denmark, Ireland and United kingdoms) in 1981 (Greece, in 1986 (Spain and Portugal), in 1995 (Australia, Finland and Sweden).
[629] Consolidated version of the Treaty on the Functioning of the European Union (TFEU), *Op. cit*.
[630] Regulation (EFC) No. 1612/68 of the Council of 15 October 1968 on free movement for workers Within the Community (OJC 257, 19.10.1968).
[631] Directive 2004/38 amending Regulation (EEC) No. 1612/68 and repealing Directive 64/221/ECC, 68/360 (EEC), 72/194 (EEC) and 73/148 (EEC).
[632] Directive 2005/36(EC) on the European Parliament and of Council of 7 September ,2005 on the Recognition of Professional Qualifications (OJL 255.309.2005).
[633] *Franca Ninni-Orasche v. Bundesminister* [2003] ECR 13187. See also the decision in the case of R. H. *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741 in which the court cemented that low income does not limit a person to be considered a worker and denied the right of free movement in the Community. This which was confirmed in the case of *Michael Trojani v. Centre public daide sociale de Bruxelles* [2004] ECR 1-7573, the Court constantly held that benefit in kind are also remunerations hence justifies free movement of such a workers only if such work is genuine and effective.

skilled categories for East Africa as discussed above. All the work force in the Community has right to move for employment in the bloc.

Article 45 enshrines, "the abolition of any discrimination based on nationality between workers of member states as regards employment, remuneration and other condition of work and employment" (OECD, 2012). [634] In order to make free movement of workers a reality, article 45(2) embraces transferability of social security rights.

The EU social policy also assisted harmonisation of partner states employment and labour law in a distinct way, hence considered important in the EU common market development. Generally, social policy is concerned with employment matters touching daily life and wellbeing of workers, this guarantees protection against social risks in employment relationship like unemployment, sickness, old age and other connected aspects in the wellbeing of a worker (Anderson, 2015).

The basis of the EU social policy is articles 117-128 of the Treaty of Rome.[635] Despite this stipulation, such development has been slow and inconsistent. The Commission intervention was necessary in order to have uniformity and speed up implementation with proper enforcement.[636] The EU social policy assisted to the great extent in harmonizing employment laws in the Community which was very necessary in free movement of workers implementation.

Other important enacted policies were EU employment policy, EU Education policy and other related policies. Apart from establishing effective harmonisation policy at the community and partner states level, various methods were used in

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[634]When dealing with the right to free movement of migrant workers,' safeguarding the guarantee of uniform application of Community law through the bloc is important. This guarantees elimination of direct and indirect discrimination which might exist in the legal and administrative procedures existing in member states.

[635] Treaty of Rome, *Op. cit*.

[636] Articles 2 and 3 of the Treaty of Rome, 1992 outlines social goals and objectives involving economic and social development with increasing employment opportunities. See also Shaw, J. (2000). *Social Policy in an Evolving European Union*, Portland: Hart Publishing. 5.

harmonisation of policies and laws related to employment, labor and immigration laws.

Various regulations were issued by the Council in order to lay down detailed and specific ways on general objectives and principles enshrined in treaties on free movement of workers. Article 189 of the treaty stipulates that regulations have general applications and are binding and have direct application to all member states (Worley, 1974). Regulations have direct effect that create obligation to partner states and create rights to individual. Due to their generality, regulations have to be simplified into Directives, Decisions and specific Recommendations. It is evidenced that directives have been used as major tool in building the EU Common Market hence effective free movement of workers in the bloc (Duina, 1999).

In order to eliminate various, barriers to free movement of workers in employment, immigration, gender equality, national discrimination and other workers rights, various directives were enacted at the community level. In other view point, decisions were also used in harmonisation and enforcement of EU law. It is maintained that, "a decision may be addressed either to member state or to individual, it binds only the addressee, and binds in its entirely, that is to say, there is no discretion in the way it is to be carried out" (Worley, 1974).

In a nutshell, effective harmonisation of labour and immigration was necessary, hence elimination of restrictions and all discrimination in free movement of workers in the community. All labour, immigration and social security policies and laws were well harmonised entirely in the community. This can be vindicated as briefly discussed below.

5.3.2 EU Common Migration Laws and Policies

In an effective common market, migration is "inherently a relationship concept" as it affects not only the right to free movement of workers but also persons at large (Koshowski, 2000). Partner states had to agree on rules and norms governing decision making procedures in migration matters. The EU migration policy concept was formally articulated in the Treaty of Rome and maintained in the single European Act (SEA) in 1996. It was further re-affirmed and codified in the Treaty establishing European Union (TEU) in the EU citizenship provisions.

Migration policy ensures common migration regime within the community and adopted at partner states level. The target was "elimination of member state discrimination against EU national…" (Joppke, 1998). This became the favorable ground for free movement of workers in the EU. Member states maintained free movement across their boarders for the sake of the EU common market. It is evidenced that, "EU member states have been willing to give up their sovereignty with respect to free movement of their own nationals" (Koshowski, (2000). This invited various arguments and different pointst for non EU member states. Formulation of effective labour and migration policies and laws in all areas inhibiting free movement of workers in the community is a salient feature with this respect (CEPS, 2008). Establishing a harmonized labour migration regime is a crucial requirement in order to attain free movement of workers in the Community. Practically, this is not an easy work as partner states showed "fierce strategy of resistance in relation to any sign of communication or liberalization in this field at the international level."[637] Hence, it was necessary to establish the general immigration regime at the community level to be followed by all partner states, hence formation of immigration policy. This guaranteed free movement of workers without restrictions.

Due to maintenance of states sovereignty, partner states retain different policies and laws on immigration hence negative impact on free movement of workers as per respective protocol requirement. It is high time for the EAC to agree on common immigration policy to safe guard free movement of workers in the community. Once the regional migration policy is established, partner states migration policies have to conform to the regional migration policy especially in

[637] *Ibid.*

immigration matters. This also implies in other aspects of free movement of workers as discussed below.

5.3.3 EU Social Security Laws and Policies

As discussed in Chapter three, social security is part and parcel of package embodied in labour rights. This is also maintained under article 10 (3) (f) of the protocol that workers have right to “enjoy the rights and benefits of social security as accorded to the workers of the host partner state” (CEPS, 2008). Previously in the late 1950s in the EU, Social Security was left at the domain of partner states sovereignty.

This led to loss of social security rights for workers who enjoyed the right of free movement of workers within the community. Despite this situation, article 42[638] had laid a foundation by empowering the Council to adopt necessary measures in order to secure social security rights.

Literature shows that in order to achieve the stated goal, the Council adopted the regulation No.3 and No.4 [639] which inaugurated a coordinated mechanism in order to prevent loss of social security rights as a result of exercising the right to free movement of workers in the EU. The two stated regulations were replaced in 1971 by regulations No. 1408/71 which provided rights migrant workers should enjoy in the exercise of free movement and regulations No. 574/72 which provided for administrative rules for the implementation for the respective rights. It is provided that, “the two regulations aimed to promote freedom of movement by co-coordinating the national social security systems in such a way that beneficiaries enjoy constant social security protection (Van der Mei, 2003). Amendments were made in respective regulations as discussed in Chapter four parts 4.9.4 to cater for the identified gaps.

[638] Treaty for the Establishment of the East African Community, *Op. cit*.
[639] Regulations of the European Parliament and of the Council on the Coordination of Social Security Systems.

Since then, a number of social security regulations and directives were adopted in order to co-ordinate partner states social security policies and laws for effective free movement of workers and their families. Transferability of social security credits was possible between partner states within the EU. Documentary review evidences that development attained in the field of social security in the EU is far yet to be achieved in the EAC. Despite the fact that article 12(4) of the protocol provides that the Council shall provide regulation and directives on the same the journey is far yet to be realized.

5.4 Conclusion

This Chapter has analysed data presentation and analysis together with discussion of research findings in relation to research objectives and research questions. The study findings correspond to empirical evidence driven by the theory of economic integration, the comparative advantage theory and the labour theory of value and economies of scale discussed in chapter two. Law is an important instrument in the success and effectiveness of economic integration. Common labour, immigration and social security law regimes coupled with proper enforcement is important for the success of not only free movement of workers but also the common market at large. It is the researcher's due anticipation that the findings of the study at hand will add on the scanty literature on the EAC Common Market specifically on free movement of workers and provide the basis for future research projects.

After having presented all the previous chapters, chapter six deals with summary, conclusion and recommendation

CHAPTER SIX

SUMMARY, CONCLUSION, AND RECOMMENDATIONS

6.1 Introduction

This study examined the implementation of the right to free movement of workers in the EAC with focus on Tanzania, Kenya and Uganda as founders of the EAC. The implementation of the right to free movement of workers envisaged under the EAC Treaty and the EAC common market protocol were examined in relation to domestic employment, immigration and social security laws and policies of the EAC partner states in a view to determining how they facilitate free movement of workers in the EAC common market. The idea was to determine whether there is effective implementation of the right to free movement of workers in the EAC and, if not, to find out what can the EAC partner states do to make the said right a reality by picking some good practices from selected economic integrations especially the EU, CARICOM, ECOWAS, SADC and COMESA.

The study had one general objective and two specific objectives. The general objective of this study was to examine the law and policies of the EAC partner states related to the implementation of the right to free movement of workers in the EAC in order to determine their implication on the implementation of the said right as guaranteed under the protocol on the establishment of the EAC common market, and propose some best practices from selected economic integrations for effective implementation of the said right in the EAC.

The specific objectives of the study were to analyse the national employment, social security and immigration laws and policies of the selected EAC partner states and determine how they enhance the implementation of the right to free movement of workers under the Protocol on the Establishment of the EAC Common Market and to find out the best practices which the EAC partner states may learn from selected economic integrations (i.e. EU, CARICOM, ECOWAS, SADC and COMESA) on the implementation of the right to free movement of workers in the EAC common market.

The study was further guided by two research questions. The first research question was, how do the employment laws and policies of the EAC partner states enhance the implementation of the right to free movement of workers envisaged under the protocol on the establishment of the EAC common market? This research question also aimed at examining the social security laws setups of the EAC partner states and their compatibility with the right to free movement of workers in the EAC common market. Furthermore, the first research question also aimed at exploring the implication of the immigration laws and policies of the EAC partner states on free movement of workers in the EAC common market. The second research question was, what lessons the EAC can learn from the EU, CARICOM, ECOWAS, SADC and COMESA on the implementation of the right to free movement of workers in a common market?.

All the two research questions were formulated with a view to finding out whether there is effective implementation of the right to free movement of workers in the EAC and, if not, to find out what can the EAC partner states do to make the said right a reality by picking some good practices from selected economic integrations especially the EU, CARICOM, ECOWAS, SADC and COMESA. Data was collected through documentary review and face to face interviews. The obtained data were analysed through qualitative technique. This chapter is therefore meant to provide a summary of key findings, conclusion of the study and recommendations. The chapter is organised into four sections. The first section provides the introduction, the second section provides the summary of findings, the third section provides the conclusion of the study and the fourth section provides the recommendations.

6.2 Summary of the Main Findings

This study came up with two major findings:

First, the implementation of the right to free movement of workers in the EAC is ineffective or partial because of diversity of employment laws and policies among the EAC partner states which restrain free movement of workers in the EAC, variations in the EAC partner states immigration laws and policies which hinder implementation of free movement of workers in the EAC, incompatibility of social security laws in the EAC partner states which frustrates free movement of workers in the EAC, and lack of political will and desire to protect domestic labour markets. **Second**, the EU is the most successful economic integration which has several best practices that EAC may learn in the implementation of the right to free movement of workers. The best practices that EAC partner states ought to learn from the EU are: proper coordination and harmonization of employment, immigration, and social security laws and policies, enactment of various regulations and policies governing the right to free movement of workers notably harmonisation policy, employment policy, education policy, labour migration policy and social security policy, and effective enforcement of partner states agreements and obligations using effective directives, decisions and recommendations.

6.3 Conclusion and Recommendations

The EAC common market protocol guarantee the right to free movement of workers who are citizens of the other partner states within their territories without any discrimination based on their nationalities, employment, remuneration and other conditions of work and employment. By free movement of workers, the protocol entitles a worker to apply for employment and accept offers of employment made at any partner state and move freely within the Community for employment purposes. The right to free movement of workers further entitles a worker to enjoy the right and benefits of social security protection as accorded to workers of the host member state.

The EAC common market protocol imposes on EAC partner states the obligations to coordinate their employment, immigration and social security laws and policies in the community to enable the implementation of the right to free movement of workers accorded under the EAC common market protocol. Notwithstanding such obligations, literature seemed to suggest that the employment, immigration and socio security laws and policies of the EAC partner states are unfavorable to effective implementation of the right to free movement of workers in the EAC common market. This study was therefore conducted in order to examine how the said employment, immigration and social security laws and policies of the EAC partner states are compatible with and supportive of the right to free movement of workers in the EAC common market and come up with proposition on how to make the envisaged right to free movement of workers in the EAC common market a reality.

In conducting the study, efforts were made to review all primary and secondary documents. Face to face interviews were also conducted though in Mainland Tanzania only in order to get practical information on the implementation of the right to free movement of workers in the three founding partner states of the EAC.

The data obtained through both documentary review and interviews show that there are some areas of compliance where the right to free movement of workers is implemented in the EAC. The areas under which the right to free movement of workers is implemented involve selected highly and skilled works selected by partner states while protecting their domestic labour market.

Despite the few areas of compliance, study findings also show that the EAC partner states have almost failed to harmonise their employment, migration and social security laws and policies to facilitate effective implementation of the right to free movement of workers in the EAC. The failure of the EAC partner states to harmonise their employment, immigration and social security laws and policies is evidenced by diversity in employment laws and policies among partner states which restrain free movement of workers in the EAC, variation in the EAC partner states immigration laws which hinders implementation of free movement of workers in the EAC and incompatibility of social security schemes in the EAC partner states which frustrates free movement of workers in the EAC. The EAC partner states still maintain state centric approaches as opposed to institutional approach to the common market in order to protect their domestic labour markets. This study concludes that the implementation of the right to free movement of workers in the EAC is partial and therefore ineffective. Effective implementation of the right to free movement of workers in the community demands total elimination of restrictions on movement of workers and discrimination in treatment of workers with respect to employment, social security, housing and other related aspects in every partner state which are yet in place among the EAC partner states.

6.4 Recommendations

6.4.1 Political will and Commitment in the EAC Partner States Obligations

It is recommended that partner states should recall their obligations and commitments[640] in establishing the EAC common market hence effectively harmonise their employment, labour, social security and immigration policies and laws. This will guarantee for the implementation of the right to free movement of workers who are citizen of the EAC bloc as enshrined under article 10(1)[641] of the protocol hence eradicate all discrimination basing on nationality in employment, remuneration, social security and other labour standards. Domestic protection of partner states labour market through immigration control and discriminative labour policies and laws should be avoided for the success of the EAC Common Market.

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[640] Protocol on the establishment of the East Africa Community Common Market, Article 5,10,11,12,13,and 39. *Op. cit.*

[641] *Ibid*.

Partner states should perform their obligations in good faith[642] ("*PACTASUNT SERVANDA MAXIM*") and acknowledge that every treaty in force is binding upon member states and they should interpret the EAC treaty and the EAC common market protocol in the context and light of the objective and purpose stated. In so doing, partner states ought to return to aims and aspirations which prompted for establishment of the EAC common market and the community at large.

6.4.2 Formulation of the EAC Harmonization Policy and Other Policies

Diversity in labour policies and laws in East Africa pose a great challenge to harmonisation of the targeted policies and laws in the community as also discussed in the presentation of findings. Harmonisation of labour and immigration policies and laws will prove to be difficult without specific guidance at the regional level.

It is recommended that the Council of Ministers should formulate the EAC harmonisation policy. The respective policy will provide specific guidance in the harmonization of laws generally in the community by serving as focal and reference point in all aspects pertaining to harmonisation of laws in the common market besides labour and immigration laws. This was the approach taken in the EU which explains the success in the harmonisation of laws and the common market at large.

In the like manner, there are also fundamental policies which should be formulated at the regional level. Prominent ones are employment policy, immigration policy, social security policy and education policy. These policies will break down barriers existing in national policies in the respective fields. Regional policies in those fields should be absorbed in the respective partner states policies and laws. This will create common labour and migration regimes in the EAC hence effective harmonisation of laws for effective free movement of workers and the Common Market at large.

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[642] United Nations, Vienna Convention on the Law of Treaties, Article 26 and 31. *Op. cit.*

6.4.3 Amendment of the EAC Common Market Protocol

It is further recommended that the Protocol on the EAC common market should be amended. The EAC common market protocol provides that, "the partner states hereby guarantee the free movement of workers who are citizens of other partner states."[643] This implies that free movement of workers is a right for all workers in the Community. Contrary to this literal meaning, the free movement of workers is in accordance with Annex II of the East African Community Common Market (Free Movement of Workers) Regulations) which is very selective. Critical observations of Annex 11 and research finding reveal that the Protocol provides mobility of workers to highly skilled professionals as listed under Annex II.

Even for the skilled labour there are various restrictions and limitations as discussed in chapter three and chapter five. If that is the case, what about the semi skilled and unskilled labour as revealed above. Free movement of workers is not guaranteed even for committed categories of workers in Annex 11 due to conditions imposed in work permits acquisition. Amendment should be made to accommodate the stated categories of workers progressively. As noted in chapter five, even before the establishment of the EAC common market, there was free movement of workers for highly and semi skilled workers in East Africa. In that sense, the present common market seems to bring nothing new unless it is amended to reflect the spirit of Article 10 of the EAC common market protocol discussed above.

Due to the real practice manifested above, general public does not feel the presence of the Common Market as it appears on papers and not in practical application. According to Annex 11 of the EAC common market protocol, partner states committed to fully implement the Annex in different dates. However the deadline was in December 2015. Practically, there is no such full implementation of the

[643] Treaty for the Establishment of the East African Community. *Op. cit*.

same as this depends on partner states opinion basing on domestic market protection even for the committed categories of workers.

6.4.4 Maintenance of Institutionalism approach by the EAC Partner States

As it was demonstrated by the research findings, partner states maintain state centric approach while at the same time aspiring to build the common market. Work permits are approved on the condition that all possible efforts have been explored to secure a local expert. Even after granting the respective work permit, a successive plan should be in place to train local employees to take duties of non citizen experts. All partner state limit residence permit for foreign workers for not more than four or five years. This is not the spirit of the EAC common market portrayed in article 10 (1) of the Protocol. All these aim at domestic labour market protection for their national interests hence maintenance of their sovereignty. The Principles of the common market should be adhered to by partner states especially the non discrimination principle. It is recommended that partner states should maintain institutionalism approach as opposed to state centric approach. Even in the EU there were such tendencies before 1970s as discussed before. The focus in this case is why partner states cease to be sovereign and merge their domestic markets. This is for their common interests basing on economic theories as discussed before for their common development.

Article 10(9) states that "the national laws and administrative procedures of a partner state shall not apply where the principal aim or effect is to deny citizens of other partner states the employment that have been offered."[644] As provided by the Protocol, free movement of workers is subject to limitations imposed by the host partner state basing on grounds of public policy, public security or public health. However, a partner state imposing such limitations should notify other partner states instantly.[645] The research findings reveal that no limitation has ever been notified by any partner state on the ground of public policy, public security or

[644] Protocol on the Establishment of the East African Community Common Market. *Op.cit*.
[645] *Ibid.*

public health. Protection of domestic labour market is neither justified under public policy nor public security and public health as this is taken in case to case basis as per individual application. Article 31 of Vienna convention states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”[646]

6.4.5 Adherence to the EAC Directives and Recommendations

It is generally agreed that directives are very important tools for harmonisation in economic integration. They articulate principles outline in treaties and protocol into binding words. As discussed earlier, directives, decisions and recommendations have been used successfully to build the European common market. Article 16 states that regulations, directives and decisions of the Council are binding to all partner states.[647] It is recommended that directives and decisions provided by the Council should be realistic and attainable with specific time frame for implementation. As discussed earlier, the research revealed that a number of directives and decisions were provided without clear marked deadlines in which partner states, EAC organs and institutions were expected to implement. Furthermore, a good number of decisions and directives were found repetitive. The Council should provide realistic and attainable decisions and directives with clear deadline framework which simplify absorption by partner states into useful law and facilitates follow up and monitoring of implementation by EAC organs.

6.4.6 Formulation of the EAC Social Security Policy

It was discussed earlier that social security is part and parcel of aspects in labour law. Various studies have justified that social security is a right acknowledged under international, regional and national instruments (Barya, 2011). Through various provisions it has been justified that the EAC common market protocol recognizes and appreciates the relevance of social security in free movement of

[646] United Nations, Vienna Convention on the Law of Treaties. *Op.cit*.
[647] Treaty for the Establishment of the East African Community. *Op. cit*.

workers in East Africa. The analysis has shown that harmonisation of social security policies and laws in East Africa are far yet to be achieved. People who are currently enjoying the right to free movement of workers in the community are not able to transfer their social security benefit credits from one partner state to another.

This encourages premature withdrawal of social security benefit credits before a worker moves to another partner state or total loss of the same if existing scheme do not allow withdrawal. With this tendency, a worker cannot qualify for long term benefits in the form of pension arrangement during old age which considers period of contribution to the respective Fund and age.

Non transferability of social security credits in the course of free movement within the community discourages free movement of workers as workers are not willing to lose their social security benefit credits while moving from one partner state to another for employment purposes. It is recommended that coordination of social security schemes and other related principles should be adopted to allow transferability of social security credit between social security schemes existing in the community. This will secure social security credits earned by a worker in other partner state for short term benefits and pension arrangements. Definitely, this will encourage free movement of workers in East Africa. It is recommended that coordination of social security policies and laws should be hastened in order to achieve the desired target.

6.4.7 Effective Negotiation and Decision Making by the EAC Partner States

Negotiation and decision making is very important in economic integration. The Summit is the supreme decision making body of the EAC community which comprises the heads of government of the EAC partner states. Article 12(3)[648] of the treaty provides that the decisions of the summit shall be by consensus. Due to

[648] Treaty for the Establishment of the East African Community. *Op. cit.*

its supremacy, the Summit is empowered to discus all motions submitted to it by the Council and any other matter for the benefit of the community.

In other hand, the Council is the policy organ of the community which consist the minister responsible for EAC affairs, and such other minister as may be determined by the partner states and the Attorney General of each partner state.[649] Under Article 14, the Council is empowered to make policy decision for efficient and harmonious functioning and development of the community. In this case, the Council is empowered to make regulations, issue directives, take decisions, make recommendations and give necessary opinions. In the course of negotiation and decision making, the Council is bound to use consensus decision mode.[650] However, the protocol on decision making outlines matters which are to be decided by consensus mode and others to be determined by simple majority.

It is recommended that consent of all member states before a standard model is adopted for effective harmonisation of law and enforcement of the same is important. Regulations, directives, decisions and recommendations are for the benefit of the community. It is salient that, “when considering proposals affecting both individual and collective labour law, member states face national pressures from trade unions, and employers organizations making them sensitive to regulations at community level which may tip the industrial relation balance (Kenner, 2003). Involvement of people in negotiation and decision making is important. It is obvious that the EU dealt first with social matters first by having the social policy, social charter and workers in which labour law is part of it. It is at the national level where social standards are considered and discussed.

In the EU, the common market had to evolve into a genuine community, a community “with a human face” which would be able to command the loyalty of its citizens, strong enough to resist the centrifugal forces of nationalism and

[649] Treaty for the Establishment of the East African Community. *Op. cit.*
[650] *Ibid*.

sectional pressures."[651] This only occurs with the participation of all social partners like trade unions, national parliaments, employers' organizations and all social partners. This result to quality of life and standard of living improvement hence no upstream phase pressure during implementation and enforcement of community law. People see the relevance and support the common market. This might have been ignored during the foundations of the EAC integration which led to the establishment of the EAC common market.

[651] Kenner, J., (2003). *Loc. cit*.

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APPENDICES

Appendix 1

Table 6.1. Summary of respondents consulted during the study.

S/N	CATEGORY OF RESPONDENTS	INFORMATION REQUIRED
1	Department of Immigration Services – Tanzania	- Conditions in issuing work and residence permits -Coordination and harmonization of migration laws -Statistics of work permits issuance, rejections and appeal procedures -Harmonisation of work permit classes, fees and procedures. Etc.
2	East African Community (EAC)	- Obligations given to partner states in FMW -Coordination and harmonization of laws and challenges -Lessons from other economic communities -Procedures in Free Movement of Workers and their challenges. Etc.
3	Ministry of Labour, Employment, Youth &Disability	-Access to employment opportunities in the EAC and challenges involved -Conditions in issuing WP -Statistics in issuance and rejections of WP -Processing of WP and their duration. Etc.
4	Law Reform Commission – Tanzania	-Coordination and harmonization of employment, immigration and social security laws and policies - Diversity of the stated laws and their effects in FMW. Etc.

5	Ministry of Foreign affairs and EAC	-Why delay in implementation of the right to FMW in the EAC, challenges involved - Effects of diversity of related laws in FMW. Etc.
6	Ministry of Education, Science & Tech.	-Recognition of academic and professional qualifications ,challenges involved -Harmonisation of curricular, examinations and certification in the EAC. Etc.
8	Social Security Regulatory Authority. (SSRA)	-Coordination of social security laws in the EAC and challenges involved. Etc.
10	ATE	-FMW in the EAC and their challenges -FMW pertaining unskilled and semi-skilled workers in the EAC. Etc.
11	Kenya Embassy	-Factors affecting FMW in the EAC -Views on effective implementation of FMW in the EAC. Etc.
12	Uganda Embassy	-Factors affecting FMW in the EAC -Views on effective implementation of FMW in the EAC. Etc.

Appendix 2

Reviewed Primary and Secondary Documents

Primary Documents:

East African Community Treaty & Protocols

Treaty for the Establishment of the East African Community (as amended on 14th December and August, 2007).

Protocol on the Establishment of the East African Community Common Market, November 2009.

Protocol on the Establishment of the East African Community Customs Union, 2005.

TANZANIA

The Constitution of the United Republic of Tanzania, 1977, Cap. 2, R.E. 2002.

Government Employees Pension Fund Act, Act No.8 of 2013.

The Employment and Labour Relations Act, No.6 of 2004.

The Immigration Act, No.7 of 1995.

The Labour Institutions Act, No. 7 of 2004.

The National Employment Promotion Services Act, Cap. 243 R.E 2002.

The National Social Security Fund Act, Cap. 222 R.E 2018.

The Non - Citizens (Employment Regulation) Act, No.1 of 2015.

The Tanzania Investment Act, Cap. 38 R.E 2002.

KENYA

The Constitution of the Republic of Kenya, 2010.

Kenya National Social Security Fund, Act No. 45 of 2013.

Kenya Pension Act, Chapter 189, R. E. 2009.

The Employment Act, Cap. 226, R.E.2012.

The Kenya Citizens and Immigration Act, Act No.12 of 2011.

The Kenya Citizenship and Foreign Nationals Management Act, Act No.31 of 2011.

The Kenya Citizenship and Immigration Act, Act No. 12 of 2011.

The Labour Institutions Act, 2007.

UGANDA

The Constitution of the Republic of Uganda, 1995 (as amended in 2006).

The Employment Act, No 6 of 2006.

The Uganda Citizenship and Immigration Control Amendment Act, No 5 of 2009.

Uganda National Social Security Fund Act, No 8 of 1985.

Secondary Documents:

The Kenya Citizenship and Immigration Regulations, Legal Notice No 64, 2012.

The Employment Regulations, 2011.

Uganda Citizenship and Immigration Control Regulations, 2004.

Uganda Citizenship and Immigration Control Regulations, 2004.

Uganda Employment Regulation, 2011.

The Kenya Citizenship and Immigration Regulations, Legal Notice No 64, 2012.

Uganda Citizenship and Immigration Control Regulation, 2004.

Appendix 3

AN INTERVIEW GUIDE: EAC HQ- ARUSHA/IMMIGRATION SERVISES/MINISTRY OF LABOUR/LAW REFORM COMMISSION OF TANZANIA/SSRA/PARTNER STATES EMBASSIES IN DAR ES SALAAM AND ATE

1. What obligations are given to partner states in order to facilitate the implementation of for free movement of workers in the EAC?

2. What legal factors do affect full harmonization of labor and immigration laws and policies in EAC?

3. How does diversity in labor and migration law regimes affect full harmonization of the same in EAC?

4. Are there legal challenges affecting full harmonization of laws and implementation of free movement of workers at large in the EAC?

5. How far the EAC partner states have harmonized their labor and migration laws, policies and programmes to facilitate the implementation of free movement of workers within the community?

6. How far the EAC partner states have mutually recognized the academic and professional qualifications granted, experience obtained, requirements met, licenses or certification granted in other EAC partner states?

7. How far the EAC partner states harmonized their curricula examinations, standards, certifications and accreditation of educational and training institutions?

8. How far this has been done in vocational institutions and other colleges?

9. Is there any annexes concluded by partners states on harmonization and mutual recognition of academic and professional qualifications

i. how far have partner states complied

10. How far the EAC partner states have undertaken to review and harmonize their national social security policies, laws and systems? What about transferability of social security benefits?

11. What obligations are given to Tanzania as partner state in order to attain the implementation of free movement of workers in the EAC? Art 8, 76, 104. (Treaty), Art 5, 10, 11, 12(Protocol).

12. How far has Tanzania harmonized its labour and migration laws, policies and programmes to facilitate for the Free Movement of Workers in East Africa?
    i. What about harmonization of work permits, forms, fees and procedures?

13. What legal factors do affects full harmonization of labour and migration laws and policies in the EAC?

14. How far has Tanzania mutually recognized the academic and professional qualifications granted, experience obtained, requirements met, licenses or certification granted in other partner states?- **Statistics**.

15. How far Tanzania has harmonized curricula examinations, standards, certification and accreditation of educational and training institutions with the rest of EAC partner states?

16. How far this has been done in vocational institutions and colleges?

17. How far has Tanzania gone to review and harmonize social security laws, policies and system as per EAC requirement? What about transferability of social security benefits?

18. Are there any regulations, directives, decisions and recommendations issued by the Council on harmonization of labour, immigration laws, policies and programmes in East Africa?

19. Are there other directives, decisions and recommendations issued in order to facilitate free movement of workers in East Africa?

20. How does the Ministry collaborate with the EAC Secretariat and partner states to undertake man power surveys in order to determine available skills and gaps in the labour market within the Community?

21. Does the Ministry develop and maintain database to facilitate monitoring of the Community labour market?

22. Has Tanzania fully implemented its schedules agreed for implementation of free movement of workers categories as per Regulation 15 of Annex 11 of the Protocol?

23. What conditions should be fulfilled by citizens of other EAC Partner states in order to enter and search for work opportunities in Tanzania?

24. What conditions and procedures the EAC citizens should fulfill in order to secure a work/residence permit in Tanzania? How much does it cost?

25. How long does it take to secure a work permit? (**Annual statistics)** 2005-2010 and 2010-2016.

26. What is the life span of a work permit in Tanzania? Renewable?

27. Number of work permit/residence permit applications received from other partner state citizens. From 2005- 2010 and 2010- 2016. (**Annual statistics**)

28. Number of work permit/residence permit applications granted to other EAC partner state countries. From 2005- 2010 and 2010- 2016. (**Annual statistics**)

29. Number of EAC work permits/residence permit applications denied. From 2005- 2010 and 2010- 2016. Reasons for denial. **(Annual statistics)**

30. Number of complaints lodged by other EAC partner states on work permits and other matters between 2005-2010 and 210-1016. **(Annual statistics)**

31. Number of appeals lodged (work/residence permits) from 2005- 2010 and from 2010- 2016 by other EAC partner states. **(Annual statistics)**

32. Is there any directive and regulations issued by the Council on harmonization of labor policies, laws and programs? (art12(3))

    i. How far have partner states complied.

33. Are there other directives and regulations given by the Council to facilitate implementation of free movement of labor in the EAC?

34. How does the secretariat collaborate with partner states to undertake man power surveys to determine available skills and gaps in the labor markets within the community?

35. Does the secretariat develop and maintain any database to facilitate monitoring of the EAC labor market?

36. Does the secretariat undertake regular baseline surveys on labor market in the EAC?
37. How does the Council collaborate with the Secretariat in monitoring the community labor market (Regulation 14- direct baseline survey, submission of regular reports by the council on implementation of Regulation 14)
38. What about schedules for implementation of the right to free movement of workers as per Regulation 15? Have they fully been implemented? Timeout?
39. Is there harmonized classification of work permit and forms, fees and procedures approval by the EAC council?
    i. Where are the classes, forms and procedures?
40. Any rejections of work permits and delays in the EAC countries? Statistics.
41. What obligations are given to Tanzania as partner state in order to attain the implementation of the right to free movement of workers in the EAC?
42. How far has Tanzania harmonized its labour and migration laws, policies and programmes to facilitate for the Free Movement of Workers in East Africa?
    i. What about harmonization of work permits, forms, fees and procedures?
43. What legal factors do affects full harmonization of labour and migration laws and policies in EA?
44. Are there non legal challenges affecting full harmonization of laws in the EAC bloc?
45. What conditions should be fulfilled by citizens of other EAC Partner states in order to enter and search for work opportunities in Tanzania?

46. Is there free access to any EAC citizen to enter and look for employment opportunities in Tanzania?

    i. If no, what conditions must be fulfilled.

47. What conditions one should meet in order to move to another partner state to look for employment in any EAC partner state?

48. What conditions dependents should fulfill in order to accompany a worker and reside in the EAC partner state?

49. Is there any initial right of residence while a worker looks for employment? How long

50. What conditions the EAC partner state worker should fulfill to secure a residence permit?

51. Are there harmonized classes of work permits used in East Africa?. What classes of work permits used in Tanzania

52. What conditions and procedures the EAC citizens should fulfill in order to secure a work permit in Tanzania? How much does it cost?

53. Annex 11 is generally for skilled workers. What about other categories of skilled labour, semi skilled and unskilled labour.

54. Are EAC citizens free to access job opportunities available in Tanzania?

55. Number of employment contracts concluded by citizen of partner state as provided in the schedule for the free movement of workers of Annex two.

56. Are there any regulations, directives, decisions and recommendations issued by the Council on harmonization of labor, migration, laws policies, and programmes? (Art12 (3))- **Evidence**

57. List of regulations, directives, decisions and recommendations on free movement of workers issued by the Council.

    i. How far have partner states complied.

58. How far has the EAC partner states mutually recognized the academic and professional qualifications granted, experience obtained, requirements met, licenses or certification granted in other partner states?**- Statistics**.

59. Any regulations, directives, decisions and recommendations issued by the EAC Council dealing with harmonization of social security in East Africa

Appendix 4

Table 6.7 Tanzania Work Permits Grant by Education Level between 2010 – 2016

	2010/11			2011/12			2014/15			2015/16		
Occupation	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Directors and Executives	35	5	40	26	5	31	48	20	68	64	28	92
Financial Managers	7	1	8	5	1	6	23	8	31	9	6	15
Project managers	12	4	16	7	1	8	8	4	12	36	8	44
Production and Operations Managers	21	3	24	6	1	7	19	5	24	48	10	58
Sales and Marketing Managers	4	3	7	3	2	5	2	6	8	2	4	6
Research and development managers	2	0	2	6	3	9	4	1	5	5	2	7
ICT service managers	1	0	1	0	0	0	2	0	2	2	0	2
Other Managers	3	2	5	8	1	9	3	2	5	8	2	10
Managing Supervisors	10	1	11	16	2	18	7	3	10	5	1	6
Engineers	1	2	3	5	0	5	3	0	3	3	0	3
Geologists	3	3	6	0	0	0	4	0	4	4	0	4
Life science professionals	2	0	2	1	0	1	6	1	7	2	0	2
Technicians	8	2	10	9	1	10	1	0	1	2	0	2
Building architects and designers	0	0	0	0	0	0	2	0	2	1	0	1
Products and garments designers	2	0	2	0	0	0	0	1	1	0	0	0

Town and traffic planners	3	1	4	0	0	0	0	0	0	0	0	0
Cartographers and surveyors	2	0	2	0	0	0	0	0	0		0	0
Graphic and multimedia designers	7	7	14	0	0	0	0	0	0	2	1	3
Medical and health professionals	4	0	4	1	1	2	2	1	3	0	0	0
Teachers/Lecturers	11	5	16	21	20	41	5	3	8	0	0	0
Translators, interpreters and other linguists	1	0	1	1	0	1	0	0	0	0	0	0

Occupation	2010/11			2011/12			2014/15			2015/16		
Directors and Executives	M	F	Total	M	F	Total	M	F	Total	M	F	Total
Accountants and auditors	2	1	3	3	0	3	0	0	0	1	0	1
Quality Controllers	3	1	4	0	0	0	0	0	0	0	0	0
Procurement and logistics professionals	4	0	4	0	0	0	0	0	0	0	0	0
Systems analysts	1	0	1	1	0	1	0	0	0	0	0	0
Software developers	0	0	0	0	0	0	0	0	0	0	0	0
Web and Multimedia developers	3	1	4	0	0	0	0	0	0	0	0	0
Applications programmers	0	0	0	0	0	0	0	0		0	0	0
Database designers and administrators	0	0	0	0	0	0	0	0	0	2	0	2
Systems administrators	1	0	1	0	1	1	0	0	0	0		0
Clearing and forwarding agents	0	0	0	0	0	0	0	0	0	0	0	0
Cooks and chefs	0	0	0	3	0	3	0	0	0	0	0	0
Building crafts related workers	0	0	0	0	0	0	0	0	0	0	0	0
Metal crafts and related workers	0	0	0	0	0	0	0	0	0	0	0	0
Machinery mechanics and repairers	0	0	0	0	0	0	0	0	0	1	0	1
Printing trades workers	0	0	0	0	0	0	0	0	0	0	0	0

Electrical equipment installers and repairers	0	0	0	0	0	0	0	0	0	0	0	0
Electronics and telecommunications installers and repairs	0	0	0	0	0	0	0	0	0	0	0	0
Food processing and related trades workers	0	0	0	0	0	0	0	0	0	0	0	0
Garment and related trades workers	0	0	0	0	0	0	0	0	0	0	0	0

Occupation	2010/11			2011/12			2014/15			2015/16	
Directors and Executives	M	F	Total	M	F	Total	M	F	Total	F	Total
Metal processing and finishing plant machine operators	0	0	0	0	0	0	0	0	0	0	0
Other stationary plant and machine operators	0	0	0	1	0	1	0	0	0	0	0
Mobile plant and machine operators	0	0	0	0	0	0	0	0	0	0	0
Pilots	2	0	2	2	1	3	0	0	0	0	0
Others	0	0	0	1	1	2	0	0	0	0	1
Researchers and Consultants	2	1	3	1	1	2	0	0	0	0	4
Other Professionals	0	0	0	2	3	5	0	0	0	1	2

Total	157	43	200	129	45	174	139	55	194	89	256	

Appendix 5

Table 6.8 Tanzania Work Permit Grant by Education level between 2010 - 2016

Education	2010/11			2011/12			2012/13			2014/15		2015/16		
Level	M	F	Total	M	F	Total	M	F	M	F	Total	M	F	Total
Work experience	5	1	6	1	0	1	13	1						
Certificate	22	3	25	17	6	23	57	11	0	0	0	0	0	0
Diploma	39	13	52	21	5	26	71	15	1	0	1	0	0	0
Advanced diploma	3	1	4	2	1	3	9	1	15	5	20	1	0	1
Degree	74	21	95	65	25	90	171	31	54	14	68	28	11	39
Postgraduate	7	0	7	2	1	3	3	1	39	9	48	72	38	110
Masters	7	4	11	19	5	24	26	10	37	15	52	77	21	98
PhD	0	0	0	2	2	4	1	0	4	1	5	6	2	8
Total	157	43	200	129	45	174	351	70	150	44	194	184	72	256

Appendix 6

Table 6.9 Tanzania Work Permit rejected by Occupation between 2010 - 2016

	2010/11			2011/12			2012/13			2013/14		2015/16		
Occupation	M	F	Total	M	F	Total	M	F	Total	F	Total	M	F	Total
Directors and Executives	14	4	18	19	6	25	4	3	7	9	51	59	19	78
Financial Managers	3	3	6	2	1	3	2	1	3	6	28	38	12	50
Project managers	5	1	6	5	1	6	4	0	4	18	61	60	7	67
Production and Operations Managers	9	1	10	9	1	10	3	0	3	20	72	39	13	52
Sales and Marketing Managers	5	1	6	8	3	11	3	0	3	3	25	35	28	63
Research and development managers	0	0	0	5	3	8	0	0	0	0	4	10	1	11
ICT service managers	1	0	1	5	0	5	1	0	1	0	3	14	6	20
Other Managers	6	1	7	12	3	15	8	0	8	2	10	22	4	26
Managing Supervisors	1	0	1	12	2	14	5	0	5	0	1	2	0	2
Engineers	3	0	3	2	0	2	1	0	1	0	0	1	0	1
Geologists	1	3	4	0	0	0	0	0	0	0	0	0	0	0
Life science professionals	1	0	1	1	0	1	1	0	1	0	0	1	0	1
Technicians	5	1	6	4	0	4	6	1	7	0	0	0	0	0
Building architects and designers	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Products and garments designers	1	0	1	0	0	0	0	0	0	0	0	0	0	0
Town and traffic planners	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cartographers and surveyors	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Graphic and multimedia designers	0	0	0	2	0	2	0	1	1	0	0	0	0	0
Medical and health professionals	0	0	0	1	0	1	1	0	1	0	0	1	0	1
Teachers/Lecturers	1	0	1	4	0	4	3	3	6	0	0	0	0	0

Occupation	2010/11			2011/12			2012/13			2015/15		2015/16		
Directors and Executives	M	F	Total	M	F	Total	M	F	Total	F	Total	M	F	Total
Translators, interpreters and other linguists	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Accountants and auditors	1	1	2	0	0	0	2	0	2	0	0	0	0	0
Quality Controllers	2	0	2	1	0	1	0	0	0	0	0	0	0	0
Procurement and logistics professionals	1	0	1	3	1	4	2	0	2	0	0	0	0	0
Systems analysts	2	0	2	0	0	0	0	1	1	0	0	0	0	0
Software developers	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Web and Multimedia developers	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Applications programmers	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Database designers and administrators	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Systems administrators	1	0	1	1	0	1	2	0	2	0	0	0	0	0
Clearing and forwarding agents	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cooks and chefs	0	0	0	1	0	1	1	0	1	0	0	0	0	0

Building crafts related workers	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Metal crafts and related workers	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery mechanics and repairers	0	0	0	1	0	1	0	1	1	0	0	0	0	0
Printing trades workers	1	0	1	0	0	0	0	0	0	0	0	0	0	0
Electrical equipment installers and repairers	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Electronics and telecommunications installers and repairs	1	0	1	0	0	0	0	0	0	0	0	0	0	0
Food processing and related trades workers	0	0	0	1	0	1	0	0	0	0	0	0	0	0
Garment and related trades workers	0	0	0	0	0	0	1	0	1	0	0	0	0	0
Occupation	2010/11			2011/12			2012/13			2015/15		2015/16		
Directors and Executives	M	F	Total	M	F	Total	M	F	Total	F	Total	M	F	Total

Mining and mineral processing plant machine operators	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Metal processing and finishing plant machine operators	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other stationary plant and machine operators	0	1	1	0	0	0	0	0	0	0	0	0	0	0
Mobile plant and machine operators	0	0	0	1	0	1	0	0	0	0	0	0	0	0
Pilots	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Others	0	1	1	4	3	7	1	2	3	0	0	0	0	0
Researchers and Consultants	3	0	3	0	0	0	1	0	1	0	0	0	0	0
Other Professionals	0	3	3	0	2	2	0	1	1	0	0	0	0	0
Total	**68**	**21**	**89**	**104**	**26**	**130**	**52**	**14**	**66**	**58**	**255**	**282**	**90**	**372**

Appendix 7

Table 6.10 Tanzania Work Permits rejected by Education level between 2010 - 2016

Education Level	2010/11			2011/12			2013/14			2014/15		2015/16		
	M	F	Total	M	F	Total	M	F	Total	F	Total	M	F	Total
Certificate	17	4	21	16	4	20	10	5	15	0	0	0	0	0
Diploma	15	3	18	20	2	22	10	1	11	0	1	0	0	0
Advanced diploma	2	0	2	4	1	5	0	0	0	0	3	3	0	3
Degree	27	11	38	44	17	61	25	6	31	13	53	84	23	107
Postgraduate	1	2	3	1	0	1	0	0	0	26	91	87	12	99
Masters	3	1	4	10	2	12	5	1	6	31	105	99	59	158
PhD	0	0	0	2	0	2	0	0	0	0	2	4	1	5
Total	68	21	89	104	26	130	52	14	66	70	255	277	95	372