

## SEAFARER SUBJECT GUIDE

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### ABANDONMENT IN KENYA

This Guide deals with the situation where seafarers are abandoned in a port in Kenya or on a Kenyan flagged vessel in a port outside Kenya. This document is not intended to be legal advice, nor does it constitute legal advice. If a seafarer is abandoned, he is strongly advised to consult a lawyer qualified to practise in Kenya.

\*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

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#### **1. When is a seafarer considered abandoned according to national case law or legislation? Is there any special legislation concerning abandoned crew?**

1.1 The applicable law relating to matters concerning seafarers in Kenya are the Constitution of 2010, the Merchant Shipping Act, the employment laws and international treaties and conventions ratified by Kenya. The principal statute relating to seafarers and other maritime matters is the Merchant Shipping Act.

1.2 The Merchant Shipping Act does not define the 'abandonment' of a seafarer. According to the International Maritime Organisation ('the IMO'), abandonment of seafarers occurs when the shipowner fails to fulfil certain fundamental obligations relating to timely repatriation and payments of outstanding remuneration and provision of basic necessities of life, *inter alia*, adequate food, accommodation and medical care. Instances where a seafarer could be abandoned include:

- (1) bankruptcy;
- (2) insolvency;
- (3) arrest by creditors; or
- (4) the detention of the ship due to unseaworthiness.

1.3 The Merchant Shipping Act places obligations upon an employer with regard to the welfare of a seafarer who is left behind in a foreign country. The Merchant Shipping Act provides that where:

- (1) 'a person employed as a seafarer in a Kenyan ship is left behind in a foreign country or is taken to such a country on being shipwrecked; or
- (2) a person who became so employed under an agreement entered into in a foreign country is left behind in Kenya or is taken to Kenya on being shipwrecked,

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- (3) the person who last employed him as a seafarer shall make such provision for his return and for his relief and maintenance until his return, and such other provisions as may be required by in such regulations as may be made by the Minister (responsible for maritime and seafarer matters) under the section.'
- 1.4 Under the Merchant Shipping Act, the provisions include the repayment of expenses incurred in bringing a shipwrecked seafarer ashore, maintaining him until he is brought ashore, and the payment of expenses arising out of the burial or cremation of a seafarer who dies before he can be returned.
- 1.5 The Merchant Shipping Act provides that the minister may make regulations for: providing for the manner in which wages due to any seafarer left behind or taken to a foreign country and any property of his left on board in a ship are to be dealt with; requiring the registrar of seafarers or proper officer to make such provision as may be prescribed; determining the place to which a seafarer is to be returned; requiring the master of any Kenyan ship to convey a person to a place determined in accordance with the regulations and for enabling the Director General (of the Kenya Maritime Authority) or proper officer to give the master directions for that purpose; the making of payments in respect of the conveyance of a seafarer in accordance with the regulations; and the keeping of records and rendering of accounts.
- 1.6 Draft regulations covering the above are being made under the Merchant Shipping Act are underway.
- 1.7 Under section 194(4) of the Merchant Shipping Act, where a seafarer left behind in a foreign country or taken to Kenya, in accordance with section 194(l), remains there after the expiry of a period of three months from the time he was left behind in such country or taken to Kenya, the person who last employed him as a seafarer shall not be liable to make provision for his return or for any matter arising after the end of that period, unless the person has, before the end of that period, been under an obligation imposed on him by regulations under section 194 of the Merchant Shipping Act to make provision with respect to the seafarer.
- 1.8 Expenses incurred by the government in the repatriation of a seafarer may be recovered from the employer of the seafarer, or if the three month period set out in section 194 (4) of the Merchant Shipping Act has expired, such costs may be recovered from the seafarer.<sup>1</sup>

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<sup>1</sup> Sections 194 (5) and 194 (6) of the Merchant Shipping Act.

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1.9 Further, in instances which may arise from abandonment, such as non-payment of wages by a shipowner, a seafarer can sue for wages in court. The Merchant Shipping Act provides that:

'...a seafarer or a person authorized on his behalf, may as soon as any wages due to him become payable, sue for them in a court having jurisdiction in the place at which service has terminated or at which he has been discharged, or at which any master or owner or other person upon whom claim is made resides.'

1.10 The Merchant Shipping Act states that the court (High Court) shall hear and determine any action, suit or proceeding instituted by or on behalf of any seafarer or apprentice for the recovery of wages where:

- (1) the owner of the ship is bankrupt;
- (2) the ship is under arrest or is sold by the authority of the court; or
- (3) a magistrate's court refers the claim to the court.

1.11 The Repatriation of Seamen Convention, to which Kenya is a party, makes provision for repatriation of a seafarer who is abandoned. The Convention states that:

'(1) any seaman who is landed during the term of his engagement or on its expiration shall be entitled to be taken back to his own country, or to the port which he was engaged, or to the port at which the voyage commenced as shall be determined by national law, which shall contain the provisions necessary for dealing with the matter, including provisions to determine who shall bear the charge of repatriation.'

1.12 Under the Convention, a seaman shall be deemed to have been duly repatriated if he has been provided with suitable employment on board a vessel proceeding to one of the destinations prescribed according to paragraph 3 (1); and under article 3(3), a seaman shall be deemed to have been repatriated if he is landed in a country to which he belongs, or at the port at which he was engaged, or at a neighbouring port, or at the port at which the voyage commenced.

1.13 According to the Repatriation of Seamen Convention, the conditions under which a foreign seaman engaged in a country other than his own has the right to be repatriated shall be provided by the national law, or in the absence of such legal provisions, in the articles of agreement.

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1.14 Under the Repatriation of Seamen Convention, the expenses of repatriation shall not be charged to the seaman if he has been left behind by reason of injury sustained in the service of the vessel, shipwreck, illness not due to his own wilful act or default, or discharge for any cause for which he cannot be held to be responsible.

1.15 Under the Repatriation of Seamen Convention, the expenses of repatriation shall include the transport charges, the accommodation and the food of the seaman during the journey. They also include the maintenance of the seaman up to the time fixed for his departure. When a seaman is repatriated as a member of a crew, he is entitled to remuneration for work done during the voyage.

### **2. What is the immigration status of abandoned seafarers?**

2.1 The Kenya Citizenship and Immigration Act provides that no person who is not a citizen of Kenya shall enter Kenya unless he is in possession of a valid entry permit or a valid pass.

2.2 The Seafarers Identity Documents Convention of 2003 (to which Kenya is a signatory), states that any seafarer who holds a valid seafarer's identity document issued in accordance with the provisions of this convention by a member for which the convention is in force shall be recognized as a seafarer within the meaning of the convention unless clear grounds exist for doubting the authenticity of the seafarer's identity document.

2.3 A foreign seafarer would therefore be recognized under Kenyan law as a seafarer provided he holds valid seafarer identity documentation under the Seafarers Identity Documents Convention.

### **3. Can an abandoned seafarer get shore leave?**

3.1 According to the Seafarers Identity Documents Convention, each member state for which the Convention is in force is required, at the shortest possible time and unless clear grounds exist for doubting the authenticity of the seafarers' identity document, to permit the entry into the territory of a seafarer holding a valid seafarer's identity document, when entry is requested for temporary shore leave when the ship is in port. Such entry shall be allowed provided that the formalities on arrival of the ship have been fulfilled and the competent authorities have no reason to refuse the seafarer permission to come ashore on grounds of public health, public safety, public order or national security.

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- 3.2 The Seafarers Identity Documents Convention provides that for the purposes of shore leave, seafarers shall not be required to hold a visa, and that any member state which is not in a position to fully implement this requirement should ensure that its laws and regulations or practice provide arrangements that are substantially equivalent.
- 3.3 Further, the Seafarers Identity Documents Convention requires member states to permit the entry into the territory of a seafarer holding a valid seafarer's' identity document supplemented by a passport, when entry is required for:
- (1) joining his ship or transferring to another ship;
  - (2) passing in transit to join his ship in another country or for repatriation; or
  - (3) any other purpose approved by the authorities of the member state.
- 3.4 From the above, it appears that a seafarer, provided that he holds the requisite identification documents, would be allowed shore leave.

### **4. Is abandonment of seafarers considered a crime?**

- 4.1 Section 194 of the Merchant Shipping Act provides that regulations made under the section may make a contravention of any provision thereof an offence. Regulations have not been made, and it is therefore unclear whether breach of the provisions of section 194 by an employer would be considered an offence.
- 4.2 However, as previously discussed, an abandoned seafarer would be in a position to bring a claim in court of abandonment for breach of the seafarer's rights under the Constitution (fair labour practices and fundamental rights and freedoms), the Merchant Shipping Act and the various labour laws and conventions.

### **5. What entities and/or persons may be involved with or assist an abandoned crew?**

- 5.1 Various entities and/or persons may be involved with or assist an abandoned crew.
- 5.2 Lawyers

See FIND ASSISTANCE on the SRI app which can be downloaded from the home page of the SRI website at [www.seafarersrights.org](http://www.seafarersrights.org)

- 5.2.1 In addition, reference may be made to the Guide on Using Lawyers and Fact File available on the SRI app and at

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[https://www.seafarersrights.org/seafarers\\_subjects/using\\_lawyers/](https://www.seafarersrights.org/seafarers_subjects/using_lawyers/)

### 5.3 ITF Inspectors and union officials

See FIND ASSISTANCE on the SRI app which can be downloaded from the home page of the SRI website at [www.seafarersrights.org](http://www.seafarersrights.org)

### 5.4 Welfare agencies

See FIND ASSISTANCE on the SRI app which can be downloaded from the home page of the SRI website at [www.seafarersrights.org](http://www.seafarersrights.org)

### 5.5 Governments and Embassies

Additionally the seafarer may need to access government official websites, including lists of embassies, to find an appropriate contact.