



# THE GLOBAL FOOD DONATION POLICY ATLAS

## Executive Summary: Kenya

***More than enough food is produced to feed every person, yet one-third of all food is wasted. Redirecting safe, surplus food is an effective and compassionate solution, but it can be complicated because food is a heavily regulated product.***

To help address the most pressing and universal legal and policy questions surrounding food recovery and donation, the **Harvard Law School Food Law and Policy Clinic (FLPC)** and **The Global FoodBanking Network (GFN)** have partnered to create The Global Food Donation Policy Atlas. This innovative partnership maps the laws and policies affecting donations in countries across the globe. The project aims to identify and explain national laws relating to food donation, analyze the most common legal barriers to promoting greater food donation, and share best practices and recommendations for overcoming these barriers.

### **KENYA FOOD LOSS AND WASTE**

Each year, approximately 40% of the food produced in Kenya goes to waste amounting to an estimated Kshs.72 billion (USD \$654,545,448) a year. At the same time, approximately 36.5% of the population is food insecure. In 2020, Kenya faced the worst locust invasion it has experienced in 70 years, further increasing food insecurity up to 38%.

The Kenyan government has prioritized hunger reduction and food security in its national policy agenda. The Constitution provides that the government must take legislative and policy initiatives to progressively realize the right to food in Kenya. In 2011, Kenya adopted a National Food and Nutrition Security Policy to improve nutrition and the quality of food available to Kenyans. In 2017, Kenya adopted a National Food and Nutrition Security Policy Implementation Framework to implement the National Food and Nutrition Security Policy to ensure that everyone has access to affordable and nutritious food. Further, Kenya instituted Vision 2030 and the Big Four Agenda, which identify food security as a priority. Nonetheless, Kenya is yet to adopt a national law to promote food donation or prevent food loss and waste. Notwithstanding, Kenya holds initiatives to create awareness about food loss and waste and discuss the gaps in policy and implementation that are hindering progress in reducing food loss and waste. In 2017, Kenya hosted the first ever All Africa Post-Harvest Congress. In 2020, the Ministry of Agriculture, Livestock and Fisheries participated in the first International Day of Awareness of Food Loss and Waste. In addition to the government-led responses to food loss and waste, private sector actors including food banks are actively promoting food rescue and donation of surplus food to mitigate hunger and food insecurity.

#### **Kenya by the Numbers**

- Population: 53,528,000
- GDP: \$95.503 billion
- Poverty Rate: 36.1%
- Prevalence of Food Insecurity: 36.5%
- Global Food Security Index: 50.7
- FLW Estimates: 5,217,367 tons

## **KENYA FOOD DONATION POLICY HIGHLIGHTS**

**DATE LABELING:** Kenya’s date labeling scheme is set out in the Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978, the Specification of Products to Be Marked with Last Date Sale, 1988, the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations and the Labelling of Pre-packaged Foods – General Requirements under the FDSCA. The Labelling of Pre-packaged Foods – General Requirements establish a dual date labeling scheme for prepackaged foods, which distinguishes between safety-based and quality-based labels. Specifically, the Labelling of Pre-packaged Foods – General Requirements require all pre-packaged foods to feature either a “date of minimum durability” also expressed as “best before” date, or a “use-by” date also expressed as the “recommended last consumption date” or “expiration date,” depending on the type of food product.

**ACTION OPPORTUNITY:** Despite aligning with the best practice of having standard labels for quality versus safety as provided in the 2018 update to the Codex Alimentarius General Standard for the Labeling of Prepackaged Foods. None of the regulations governing date labeling in Kenya expressly permit past-date donation of food with a quality date. Kenya should amend the Labelling of Pre-packaged Foods – General Requirements under the Food, Drugs and Chemical Substances Act to explicitly permit the donation of food after the quality-based date. In addition, the government could promote education and awareness on the meaning of date labels.

## **KENYA FOOD DONATION POLICY OPPORTUNITIES**

**TAX INCENTIVES AND BARRIERS:** Kenya’s Income Tax Act (Cap. 470) does not provide any incentives for in-kind donations, such as donations of food. The Income Tax Act only allows corporate and individual donors to claim a deduction for any cash donation of income to a registered qualifying charitable organization. Further, for most commercial transactions, including the sale of food, vendors must incorporate VAT. Kenya’s VAT system provides two categories of exceptions to taxable supplies that directly impact food products, which is exempt and zero-rated supplies. Certain foods in Kenya are exempt or zero-rated, while some food products are both exempt and zero-rated.

**ACTION OPPORTUNITY:** To ensure businesses (both donors and distributors) receive proper tax incentives and sufficient information to participate in food donation, the Kenyan government should expand Kenya’s Income Tax Act’s income tax deduction to include in-kind donations to food recovery organizations. As an alternative, the government could offer tax credits for food donations made to food recovery organizations and intermediaries. In addition, Kenya should categorize food donation as a zero-rated supply under the Value Added Tax Act and provide a tax deduction for activities associated with the storage, transportation and delivery of donated food. Lastly, the Kenyan government could develop tax guidance for food donors and food recovery organizations clarifying exemptions.

**FOOD SAFETY FOR FOOD DONATIONS:** In Kenya, food safety laws are mostly contained in the Public Health Act (PHA) and the Food, Drugs, and Chemical Substances Act (FDSCA). While the PHA and FDSCA do not explicitly include food donation in its scope, existing food safety rules are broad in scope and presumably apply to food donations. However, food donations are not explicitly mentioned in law or guidance.

**ACTION OPPORTUNITY:** Kenya should amend the Food, Drugs and Chemical Substances Act (FDSCA) to feature a donation-specific chapter or draft regulations related to the FDSCA that elaborate on food safety for donations. The Kenyan government could also produce and disseminate clarifying guidance on food safety requirements relevant to donation.

**LIABILITY PROTECTION FOR FOOD DONATIONS:** Kenya does not provide explicit legal protections for food donors and food recovery organizations. Generally, claims of harm arising from goods, including food may be brought under the Competition Act and the Consumer Protection Act.

The Consumer Protection Act gives consumers authority to file claims against a supplier of goods or services pursuant to a consumer agreement. The Competition Act establishes a strict liability scheme, holding any person who engages in trade liable for any loss or injury to an individual resulting from the supply of defective goods. The Competition Act lists several defenses that may help shield food donors from liability. Nonetheless, food donors and food recovery organizations may be wary of donating food due to a fear of being held liable in case a beneficiary is harmed.

**ACTION OPPORTUNITY:** To ensure that liability concerns related to donating food do not deter potential donors, Kenya should enact national legislation that establishes clear and comprehensive liability protection for food donors and food recovery organizations, similar to protections offered in Argentina and the United States of America. In addition, Kenya could produce and disseminate clarifying guidance on whether the Competition Act and Consumer Protection Act apply to free food donations.

For more detail on how Kenya measures up against the other countries evaluated in The Global Food Donation Policy Atlas project, check out [www.atlas.foodbanking.org](http://www.atlas.foodbanking.org). For more information about the food donation legal framework in Kenya and policy recommendations for strengthening this framework, check out the Kenya Food Donation Legal Guide and the Kenya Food Donation Policy Recommendations.

## KENYA FOOD DONATION POLICY: HOW DOES IT COMPARE?

Kenya has prioritized food security in its legislative framework. However, there is a need to execute legal and policy solutions through legislation and regulatory reform to advance these agendas and position food donation as a necessary tool to success. Clarifying food safety requirements, adopting comprehensive liability protections and providing tax incentives for in-kind donations for food donors and food recovery organizations may help achieve this goal.

Food Safety for Donations	Date Labeling	Liability Protection for Food Donation	Tax Incentives	Tax Barriers	Donation Requirements or Food Waste Penalties	Government Grants and Incentives	National FLW/ Donation Law or Policy
Limited Policy	Moderate Policy	No Policy	No Policy	No	No policy	No Policy	No

For more detail on how Kenya measures up against the other countries evaluated in The Global Food Donation Policy Atlas project, check out [www.atlas.foodbanking.org](http://www.atlas.foodbanking.org). For more information about the food donation legal framework in Kenya and policy recommendations for strengthening this framework, check out the Kenya Food Donation Legal Guide and the Kenya Food Donation Policy Recommendations.

# BACKGROUND INFORMATION: MAJOR LEGAL ISSUES IMPACTING FOOD DONATION

**Food Safety for Donations:** A key barrier to food donation can be the lack of knowledge or readily available guidance regarding safety procedures for donated food. All donated food should be safe for consumption and comply with applicable food safety laws and regulations. Potential donors, however, are often uncertain as to which food safety regulations apply to donated food and the steps necessary to comply.

**Date Labeling:** Date labels affixed to food products are a major driver of food waste and an obstacle to food donation. Most food donors and food recovery organizations are appropriately cautious about donating food that may no longer be safe, but it is not always clear whether the date label accompanied by language such as “sell by,” “expires on,” or “best by” relates to food safety. In fact, date labels are generally intended to reflect freshness or quality rather than safety for the vast majority of foods.

**Liability Protection for Food Donations:** A significant barrier to food donation is the fear among donors that they will be found liable if someone becomes sick after consuming donated food. Some countries have adopted liability protections to mitigate this concern. However, many food donors and food recovery organizations are uncertain as to whether there are actions required to maintain the protection and what limits, if any, apply.

**Tax Incentives and Barriers:** Transportation and storage costs are often cited as the main expenses that manufacturers, retailers, and restaurants need to overcome to donate food. Tax incentives, including deductions and credits, can help offset these financial inputs and help make donation a more attractive, affordable option. The application of certain taxes to donated foods, such as the value-added tax (VAT), however, can also create a barrier to donation.

**Donation Requirements or Food Waste Penalties:** Some countries employ food donation requirements or impose monetary penalties for food that is sent to landfills (often known as organic waste bans or waste taxes) in order to influence business behavior and promote more sustainable food systems.

**Government Grants and Incentives:** Grants and incentive programs funded at the national or local levels offer another important resource for food donation initiatives. This is particularly true in countries where donors consider tax incentives to be insufficient to offset the costs of donation or where a lack of infrastructure limits food recovery efforts.

**National law or policy on food waste:** Adopting a national food loss and waste or food donation framework can help governments ensure policy coherence and advance food recovery efforts along the supply chain. Offering a unified and comprehensive framework may better enable governments to clarify food safety rules, standardize date labels, define liability protections for food donors and food recovery organizations, and set forth additional tax benefits to which donors may be entitled under relevant law.

## THE GLOBAL FOOD DONATION POLICY ATLAS PROJECT SUPPORT

**Project Partners:** The Global Food Donation Policy Atlas is a joint initiative of the Harvard Law School Food Law and Policy Clinic and The Global FoodBanking Network.



### Support from the Walmart Foundation:



This research was made possible through funding by the Walmart Foundation. The findings, conclusions, and recommendations are those of the Harvard Law School Food Law and Policy Clinic alone, and do not necessarily reflect the opinions of the Walmart Foundation.