



THE GLOBAL
FOOD DONATION
POLICY ATLAS

KENYA

KENYA

LEGAL GUIDE

FOOD DONATION
LAW AND POLICY

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About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws on food donation to help address food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe to help practitioners understand national laws relating to food donation, compare laws across countries and regions, analyze legal questions and barriers to donation, and share best practices and recommendations for overcoming these barriers. The project is a collaboration between the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN). To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit atlas.foodbanking.org.

About the Harvard Law School Food Law and Policy Clinic

FLPC serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods; supporting sustainable food production and food systems; and reducing waste of healthy, wholesome food. For more information, visit chlpi.org/food-law-and-policy.



About The Global FoodBanking Network

The Global FoodBanking Network supports community-driven solutions to alleviate hunger in more than 40 countries. While millions struggle to access enough safe and nutritious food, nearly a third of all food produced is lost or wasted. GFN is changing that. GFN believes food banks directed by local leaders are key to achieving Zero Hunger and building resilient food systems. For more information, visit www.foodbanking.org.



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INTRODUCTION

Purpose of this guide

Food loss and waste is one of the greatest food system challenges that we face today. An estimated one-third of food produced globally is ultimately lost or wasted along the supply chain.¹ This amounts to approximately 1.3 billion tons of food each year that ends up in landfills.² At the same time, current data indicate that between 720 and 811 million people were hungry in 2020³ and that more than 2 billion people were unable to regularly access safe, nutritious food in 2019.⁴ Thoughtful public policies can help address these troubling trends and augment food system resilience, aiding in food recovery for social benefit and mitigating the environmental costs of excess production and loss.

Food loss and waste occurs at every stage of the supply chain and generates significant social, environmental, and economic costs: food that is ultimately lost or wasted has a huge carbon footprint of 3.3 gigatons,⁵ using roughly 28% of agricultural land⁶ and accounting for 8%, or 70 billion tons of total global greenhouse gas emissions.⁷ Collectively, this damage costs approximately Kshs.89 trillion, or USD 750 billion per year.⁸ Meanwhile, more than 820 million people are undernourished and one in nine is food insecure.⁹ The international community has sought to address this paradox and mobilize the reduction of food waste, especially through Sustainable Development Goal (SDG) 12.3 within the framework of the 2030 Agenda for Sustainable Development.¹⁰

In many countries, food donation is a popular and logical solution to redirect safe, surplus food destined for landfills into the hands of those who need it most. Most food donations are facilitated through food banks or other charitable, nongovernmental organizations that recover surplus, wholesome food and redirect it to local beneficiary agencies (such as soup kitchens, shelters, and community pantries) to feed low-income, food-insecure persons. As food insecurity, food loss, and food waste continue to rise, new and innovative models of food recovery have emerged around the world.

However, some uncertainty surrounds the laws and policies most relevant to food donation. To help address the most pressing questions, 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.¹¹ This innovative partnership maps the laws and policies affecting donations in several countries around the world. 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.

This Legal Guide focuses on Kenya, where approximately 36.5% of the population is food insecure,¹² and about 40% of food of the food produced is wasted.¹³ FLPC and GFN, in collaboration with partners in Kenya,¹⁴ have developed this resource to help food donors, food banks, and other intermediary organizations (hereinafter collectively referred to as “food recovery organizations”) understand the relevant legal frameworks that impact food waste and donation efforts in Kenya. This Legal Guide also serves as a resource for those in other countries who are looking to inform their own food donation laws and policies.

After providing initial commentary on food loss, waste and recovery in Kenya, this Legal Guide provides an overview of the legal frameworks most relevant to food donation at the national and local levels. The subsequent sections look more closely at the laws generally applicable to food donation: food safety laws and regulations, date labeling laws, “Good Samaritan” or liability protection laws, tax incentives for food donation and/or tax policy disincentives, and waste diversion laws that penalize food waste or require recovery. The extent to which Kenya has developed and subsequently implemented these legal frameworks compared to other countries may vary.

State of food insecurity, food loss, waste, and recovery in Kenya

Policies to promote food donation gain new importance when a country is battling issues of both food waste and food insecurity among greater socio-economic challenges. Kenya has one of the fastest growing economies in Sub-Saharan Africa,¹⁵ yet approximately 36.5% of the population is food insecure¹⁶ and an estimated 36.1% of the population lives in poverty.¹⁷ In 2020, Kenya faced the worst locust invasion it has experienced in 70 years,¹⁸ further increasing food insecurity up to 38%.¹⁹

The COVID-19 pandemic further negatively impacted this trend. To curb the spread of the coronavirus, the Kenyan government instituted lockdown measures²⁰ which impacted the income of many community members²¹ and exacerbated food insecurity.²² The true extent of the COVID-19 pandemic on food security in Kenya is not yet known.

Kenya by the numbers²³

Population 53,528,000	Prevalence of Food Insecurity 36.5%	World Bank Classification Lower middle income
Median Age 20 years	Food Security Index 50.7	Human Development Index 0.579
GDP (US\$) \$95.503 billion	GINI Index 40.8	FLW Estimates 5,217, 367 tons
Poverty Rate 36.1%	Food Sustainability Index 50.7%	

Kenya has adopted interventions to reduce hunger and promote food security. Notably, Kenya provides for the right to food under the Constitution of the Republic of Kenya.²⁴ The Constitution further states that the government must take legislative and policy initiatives to progressively realize the right to food in Kenya.²⁵ In 2011, Kenya adopted a National Food and Nutrition Security Policy to improve nutrition and the quality of food available to Kenyans.²⁶ The Policy provides for the right to food, and acknowledges that a lot of food is lost at the post-harvest level, and commits to initiating measures to address post-harvest losses.²⁷ 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, and to inform policy actions and programs to promote food security.²⁸ The Implementation Framework also identifies interventions to address post-harvest losses, which include promoting appropriate post-harvest handling of produce.²⁹ Further, the government of Kenya instituted Vision 2030 and the Big Four Agenda.³⁰ The Big Four Agenda relates to Kenya's Vision 2030, the development blueprint aimed at propelling Kenya to a middle income status by 2030, which prioritizes food security, among other issues.³¹ Under The Big Four Agenda, the Kenyan government aims to achieve 100% of food security by 2022³² through enhancing small holder productivity, reducing the cost of food, and enhancing large-scale production.³³

At the same time, Kenya wastes about 40% of the food produced, amounting to an estimated Ksh.72 billion (USD \$654,545,448) a year.³⁴ Most of the food loss and waste occurs at the post-harvest level of production.³⁵ Improper storage of food is the main source of food loss.³⁶ Kenya has an arid and semi-arid climate, which accelerates the rate at which produce may wilt or rot if not properly stored or cooled after harvest.³⁷ Moreover, buyers may also avoid purchasing produce that is not aesthetically pleasing, leaving produce to rot.³⁸ At the household level, an estimated 5,217, 367 tons of food is wasted annually.³⁹ However, Kenya's food loss index has steadily decreased from 1,744 metric tons in 2017 to 1,531 in 2018 to 1,446 metric tons in 2019.⁴⁰ High rates

of food waste indicate that Kenya, like much of the world, is falling behind its commitment to cut food waste in half by 2030 under the United Nations' SDG 12.3.⁴¹ Nevertheless, 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 with the theme “Reducing Postharvest Food Losses: Sustainable Solutions for Africa.” Several approaches to reduce postharvest losses were considered, ranging from postharvest handling and technologies for perishable commodities, grains, and livestock products, to best policy and practices in postharvest management.⁴² Furthermore, in 2020, the Ministry of Agriculture, Livestock and Fisheries participated in the first International Day of Awareness of Food Loss and Waste.⁴³

In addition to the government-led policy responses to food loss and waste, private-sector actors, including food banks, are actively promoting the rescue and donation of surplus food to mitigate hunger and food insecurity. Platter of Compassion Food Banking Kenya (hereinafter Food Banking Kenya) plays a critical role in the collection and delivery of donated and rescued food to communities in need.⁴⁴ Food Banking Kenya comprises of 20 food banks and 15 beneficiary organizations.⁴⁵ Food Banking Kenya makes an impact through various programs, such as the Agricultural Recovery Programme and the Emergency Outreach Programme, which collects and distributes wholesome surplus food to vulnerable groups and communities.⁴⁶ Food Banking Kenya's impact further increased during the COVID-19 pandemic, during which the organization distributed more than 6 million meals to communities in need.⁴⁷

As Kenya seeks long-term solutions to food loss and waste and food insecurity, relevant actors must recognize and understand the laws that apply to food donation. The remaining sections of this Legal Guide provide an overview of Kenya's food donation legal framework and address the issues most likely to arise for food donors, food recovery organizations, policymakers, and other interested stakeholders.

OVERVIEW OF KENYA'S RELEVANT LEGAL FRAMEWORK

Kenya's laws impacting food loss, waste, recovery, and donation are predominantly adopted at the national level, where the Constitution of the Republic of Kenya is the primary and supreme source of law, taking precedence over all other forms of law, written and unwritten.⁴⁸ Hierarchically below the Constitution are statutes, judicial precedent (case law), and customary law. The Constitution also establishes a two-tier government system where power is distributed between the national and county governments.⁴⁹

The national level of government has both an executive and legislative branch. The executive branch includes the president, deputy president, and the cabinet.⁵⁰ Legislative power is held by the Parliament, which includes the Senate and National Assembly.⁵¹ The Parliament makes laws that have national application.⁵² The Constitution of Kenya also establishes and grants legislative power to 47 counties.⁵³ At the county level, legislative assemblies enact laws that are applicable only in the respective counties.⁵⁴ The Constitution also distributes functions between the national government and county governments and allows some functions to concurrently fall under the jurisdictions of both governments.⁵⁵ On matters related to food, Parliament and the county legislative assemblies have concurrent jurisdiction on issues related to agriculture, public health, and the environment.⁵⁶

In August 2010, Kenya adopted a new constitution that established a two-tier government system where power is distributed between the national and county governments.⁵⁷ Before 2010, Kenya was divided into eight administrative provinces⁵⁸ headed by provincial commissioners, which were further subdivided into districts headed by district commissioners.⁵⁹ In addition, the Local Government Act provided for 175 councils comprised of county councils, municipal councils, town councils, and city councils, for which the Ministry of Local Government was responsible for.⁶⁰ In several places, this Legal Guide references legislation that was passed before 2010, which uses the older terms such as districts, councils, and municipal councils.

Food, Drugs and Chemical Substances Act

While several national frameworks regulate food products in Kenya, most food safety and date labeling requirements relevant to food donation are set forth in the Food, Drugs and Chemical Substances Act (FDSCA).⁶¹ The FDSCA prohibits the sale of unwholesome, poisonous, or adulterated food, or food that consists in whole or in part of any rotten or diseased matter.⁶² The FDSCA does not explicitly reference food donation. However, the FDSCA defines “sell” to include the act of conveying or distributing to another “for any consideration whatsoever.”⁶³ Further, the FDSCA broadly applies to food, which it defines as “any article manufactured, sold or represented for use as food or drink for human consumption. ...”⁶⁴ Therefore, as discussed later in this Legal Guide, the FDSCA and the regulations on food safety and date labeling contained therein are presumed applicable to food that is offered for sale and food donated free of charge.

To ensure compliance with its provisions therein, the FDSCA establishes a 10-member Public Health (Standards) Board,⁶⁵ appointed by the minister of health.⁶⁶ The Board must include the director of medical services, the chief public health officer, and representatives of the government.⁶⁷ The minister of health is also charged with drafting regulations to further implement the FDSCA.⁶⁸ The minister of health may draft regulations regarding food labeling, packaging, sale, and use of ingredients, storage, composition, and sanitation of food items and facilities.⁶⁹ However, the minister of health can only draft these regulations after consulting the Public Health (Standards) Board.⁷⁰ In addition, the FDSCA gives municipal councils authority to enforce the Act.⁷¹

Pursuant to its delegated authority, the Ministry of Health enacted several regulations. The Food, Drugs and Chemical Substances (Food Hygiene) Regulations⁷² prescribe rules regarding sanitary requirements in the production, processing, and handling of food, including the maintenance of premises.⁷³ The Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations⁷⁴ and the Specification of Products to Be Marked with Last Date Sale, 1988 regulates the labeling of pre-packaged food products.⁷⁵ The Specification of Products to Be Marked with Last Date Sale, 1988 requires certain categories of pre-packaged foods to bear a “date-marking showing the last day, month and year in which the product may be sold; and the proper storage conditions” and lists those food products.⁷⁶

As discussed later, in this Legal Guide, these regulations, like the FDSCA itself, do not feature donation-specific sections or explicitly reference food donation. Nevertheless, the provisions contained therein have practical impacts on food recovery and food donation efforts.

Public Health Act

The Public Health Act (PHA) regulates among others, meat, dairy, and other food products.⁷⁷ The PHA does not explicitly reference food donation. However, it broadly applies to “any food,” that is, “any article used for food ... and any article intended to enter into or be used in the preparation of such food.”⁷⁸ Like the FDSCA, the PHA is presumed applicable to food that is offered for sale and food donated free of charge.

Regarding enforcement, the PHA establishes a Central Board of Health consisting of six individuals, including the director of medical services, who advises the minister of health on public health issues.⁷⁹ The PHA also establishes district health management boards that oversee the running of government-run health institutions.⁸⁰ Further, the minister of health has powers to investigate concerns of public health.⁸¹ During investigations, the PHA allows access to all necessary documents, witnesses, and information.⁸² Further, if a municipal council fails to investigate public health concerns, the minister of health may order the council to complete an investigation.⁸³

As discussed later in this Legal Guide, the PHA itself does not feature donation-specific sections or explicitly reference food donation. Nevertheless, the provisions contained therein have practical impacts on food recovery and food donation efforts.

Other national laws

In addition to the aforementioned legal frameworks, other national laws directly or impliedly impact food recovery and food donation in Kenya. For example, the Standards Act establishes the Kenya Bureau of Standards (KEBS), charged with developing and enforcing standards related to industry and commerce.⁸⁴ Accordingly, KEBS enforces the Labelling of Pre-packaged Foods – General Requirements, which establishes date marking requirements for pre-packaged foods.⁸⁵ Other relevant laws include the Competition Act and Consumer Protection Act, which establishes the controlling liability scheme to which food donors and food recovery organizations are subject in the event that a beneficiary is harmed.⁸⁶ Additionally, the Income Tax Act (Cap. 470) and Value Added Tax Act (No. 35 of 2013), which govern the national tax system, the Meat Control (Transport of Meat) Regulations under the Meat Control Act, which specify the standards to be observed in the storage and transportation of meat,⁸⁷ and the Environmental Management and Coordination Act, which governs waste management generally,⁸⁸ are relevant to food donation and are discussed later in this Legal Guide.⁸⁹

County Law

Legislative assemblies in counties can also pass laws that may impact food loss, waste, and recovery within the confines of relevant national laws.⁹⁰ Kenya is divided into 47 counties⁹¹ and counties have the power to enact their own county laws on certain matters, including public health, agriculture, and the environment, as long as the laws are in consonance with the Constitution of the Republic of Kenya.⁹² For example, Mombasa County enacted the Mombasa County Environmental Health and Sanitation Act, which among others prescribes requirements regarding food safety.⁹³

To date, no legislation or regulation at the county level addresses food donation directly. However, there are national frameworks that impose regulatory responsibility on county and local authorities. For example, as mentioned previously, under the FDSCA, municipal councils have authority to enforce the FDSCA.⁹⁴ Further, the PHA establishes district health management boards, which oversee the running of government-run health institutions under the PHA.⁹⁵

LEGAL ISSUES RELEVANT TO FOOD DONATION

Food Safety for Donations

In many countries, a key barrier to the donation of surplus food is the lack of knowledge or readily available guidance regarding safety procedures for food donation. All donated food should be safe for consumption and comply with applicable food safety laws and regulations. Potential donors, however, are often uncertain about which food safety regulations apply to donated food as opposed to purchased food and about the steps necessary to safely donate food in compliance with applicable regulations. As a result, safe, surplus food that could have been redirected to populations in need is instead destined for landfills. While Kenya has established national food safety standards, relevant laws and regulations do not directly address food safety rules for food donation. Food safety laws in Kenya are mostly contained in the Public Health Act (PHA) and the Food, Drugs and Chemical Substances Act (FDSCA).

The PHA prohibits any person from selling or having in their possession any food that is adulterated or food that is unfit for use.⁹⁶ The PHA defines food as “any article used for food or drink ... and any article intended to enter into or be used in the preparation of such food.”⁹⁷ The PHA also regulates the buildings and facilities

where food is handled,⁹⁸ which would presumably include food banks. Facilities where food is stored must be rat-proof.⁹⁹ The PHA also prohibits individuals from sleeping or living in kitchens or food storage spaces for food.¹⁰⁰ While the PHA does not explicitly reference food donation, a broad interpretation of the Act suggests that it would apply to donated food and to the facilities that handle and distribute donated food.

In addition, the Food, Drugs and Chemical Substances Act (FDCSA), which is applicable as an addition to and not in derogation of the PHA, includes provisions to prevent of adulteration of food, drugs, and chemical substances.¹⁰¹ Of relevance to food donation, the FDCSA prohibits the sale of unwholesome, poisonous, or adulterated food, or food that consists in whole or in part of any rotten or diseased matter.¹⁰² The FDCSA defines *sell* broadly as to “offer, advertise, keep, expose, transmit, convey, deliver or prepare for sale or exchange, dispose of for any consideration whatsoever.”¹⁰³ The FDCSA broadly applies to all food, which it defines as “any article manufactured, sold or *represented* for use as food or drink for human consumption.”¹⁰⁴ While, the FDCSA does not explicitly reference food donation, the Act appears to apply to all food, whether the food is sold or donated free of charge.

The FDCSA also gives the minister of health power to develop regulations that elaborate on and further explain the provisions of the Act to facilitate its effective implementation.¹⁰⁵ Of relevance to food donation, the Food, Drugs and Chemical Substances (Food Hygiene) Regulations (hereinafter, the Food Hygiene Regulations)¹⁰⁶ enumerates hygiene requirements for the preparation and handling of food, including the maintenance of premises with food.¹⁰⁷ The Food Hygiene Regulations prohibit the use of premises for selling, preparing, packaging, storing, or displaying for sale any food unless one possess a license.¹⁰⁸ A broad interpretation implies that the Food Hygiene Regulations also apply to food banks that operate in physical locations where food is received, processed, and distributed.¹⁰⁹

In addition, the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations require all prepackaged food to contain an affixed label before sale.¹¹⁰ Food labels must contain the trade name and a declaration of net weight, among others.¹¹¹ The Food Labelling Regulations explicitly prohibit the sale of food that does not adhere to the labeling requirements. As previously mentioned, the FDCSA defines sale and food broadly to include food that is sold and or donated free of charge.¹¹² No guidance elaborates on whether food can be donated if there is a labeling flaw that prevents its sale but does not impact its safety. As a result, food offered for donation should meet all labeling requirements.

Date labeling

Date labels affixed to food products are a major driver of food waste and an obstacle to food donation. As the previous section explains, most food donors and food recovery organizations are appropriately cautious about donating food that meets safety standards, but it is not always clear which standards relate to food safety. While fresh produce like fruits and vegetables will appear visibly spoiled when they are no longer safe to consume, it can be more difficult to gauge when this is the case for packaged foods. Many donors interpret date labels affixed to such food products as indicators of safety and will therefore throw away food once the “expiration date” passes, and intermediaries may refuse to accept donated food after this date, deeming the food product unfit for human consumption.

Despite this interpretation, for the vast majority of foods, date labels indicate freshness or quality rather than food safety. Manufacturers use a variety of quality-based methods to determine the time frame for date label dates, all of which are intended to reflect when the food will be at its “peak quality.”¹¹³ Nevertheless, global trends indicate that consumers generally confuse date labels as indicators of safety rather than quality. In the United Kingdom, for example, researchers found that consumers discarded about 22% of food that they could have eaten due to confusion over date labeling.¹¹⁴ Similarly, 84% of Americans report that they throw away food after the expiration date passes due to safety concerns, even if there is a minimal risk of foodborne illness at that time.¹¹⁵

Food donors and food recovery organizations may encounter similar challenges when attempting to discern the appropriate meaning and application of date labels in Kenya. Kenya’s date labeling scheme is set out in the Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978;¹¹⁶ the Specification of Products to Be Marked with Last Date Sale, 1988;¹¹⁷ the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations;¹¹⁸ and the Labelling of Pre-packaged Foods – General Requirements¹¹⁹ under the FDCA.

The Food, Drugs and Chemical Substances (Food Hygiene) Regulations require any person who owns, operates, or is in charge of a food plant to indicate “prominently a date-marking, showing the last day, month and year . . . the product may be sold.”¹²⁰ Pursuant to this, the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations require that all foods feature an expiry date, which is defined as the “last day, month and year.”¹²¹ The Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations further explicitly prohibit the sale of any foodstuffs past the expiry date.¹²² The Specification of Products to Be Marked with Last Date Sale, 1988 requires certain categories of pre-packaged foods to bear a “date-marking showing the last day, month and year in which the product may be sold.”¹²³ Food products that must bear a date marking include dairy, most prepackaged food, and canned and bottled drinks.¹²⁴

In 2014, Kenya adopted the Labelling of Pre-packaged Foods – General Requirements (hereinafter, the General Requirements). The General Requirements established a dual date labeling scheme for prepackaged foods, that distinguishes between safety-based and quality-based labels.¹²⁵ Specifically, the 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.¹²⁶ The General Requirements require manufacturers to affix a “date of expiry” or “use by” date on all food products considered to be high risk.¹²⁷ The General Requirements do not consider food past this date to be marketable.¹²⁸ Further, the General Requirements require manufacturers to affix a “best before” date for foods that may be safe to consume after the date.¹²⁹ Although they do not explicitly state whether food is allowed to be donated after the “best before” date, the General Requirements state that food is “marketable” and may be “perfectly satisfactory” after that date.¹³⁰ The General Requirements also lists several types of food that are exempt from the requirement to indicate a “best before” date. This includes fresh fruits and vegetables, certain confectionary products, and chewing gum.¹³¹ The General Requirements; the Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978; the Specification of Products to Be Marked with Last Date Sale, 1988; and the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations apply to all pre-packaged foods offered for sale.¹³² As noted above, this likely includes donated food because sale is broadly interpreted to include food that is donated free of charge, based on the FDCA’s broad definition of sale.¹³³

The Labelling of Pre-packaged Foods – General Requirements align with the 2018 update to the *Codex Alimentarius* General Standard for the Labeling of Prepackaged Foods, which endorses a dual date labeling scheme, with food using either a “best before” label to indicate quality or a “use by” label to indicate safety.¹³⁴ Specifically, the “use by” date is intended to convey the last date on which the product should not be sold or consumed due to *safety and* quality reasons.¹³⁵ The *Codex Alimentarius* advises that the “use by” date or “expiration date” only be applied to foods that pose an increased risk to health over time.¹³⁶ For all other foods, it recommends a quality-based label, expressed as “best before,” *instead of* the safety-based label.¹³⁷ The above described Regulations offer no clarity as to whether food can be donated past the quality date. There also is no guidance about how the date labeling rules apply to donated food.

Liability protections 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. This fear is particularly heightened when the applicable law provides for “strict liability,” *i.e.*, a donor or food recovery organization that did not act maliciously or intend

to inflict harm may still be held legally and financially responsible for any resulting damage. Other countries, including the United States and Argentina, have established protections for both food donors and food recovery organizations to limit the likelihood that these actors will be held responsible for harm if they follow food safety rules. Kenya does not provide explicit legal protections for food donors and food recovery organizations.

The Constitution of the Republic of Kenya provides for consumer rights, which includes the right to goods of reasonable quality, the protection of their health and safety, and compensation for loss or injury.¹³⁸ The Constitution also gives the Parliament powers to enact legislation to advance these rights.¹³⁹ Generally, claims of harm arising from goods, including food may be brought under the Consumer Protection Act¹⁴⁰ or the Competition Act.¹⁴¹

The Consumer Protection Act (CPA) is mainly concerned with protecting consumers from unfair trade practices, promoting ethical business practices, ensuring a fair and efficient consumer market, and providing a dispute resolution mechanism.¹⁴² The CPA gives consumers authority to file claims against a supplier of goods or services pursuant to a consumer agreement.¹⁴³ A consumer agreement is defined as an agreement for the “supply of goods or services for *payment*.”¹⁴⁴ Most donated food in Kenya is offered free of charge to beneficiaries. Food donated free of charge by food donors or food recovery organizations likely does not fall under the Consumer Protection Act.

In addition, the Competition Act promotes the rights and safety of consumers in Kenya and governs liability in respect to defective or unsafe goods.¹⁴⁵ The Act applies to persons who engage in trade¹⁴⁶ which it defines as including commerce.¹⁴⁷ Although the Competition Act does not define commerce, commerce generally is defined as requiring the exchanging of goods for value.¹⁴⁸ 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.¹⁴⁹ The Consumer Protection Guidelines published by the Competition Authority of Kenya elaborate that strict liability is concerned with “the product and not the conduct of the manufacturer.”¹⁵⁰ For strict liability to apply, the “sale of the product,” such as food, must occur as part of the supplier’s usual course of business.¹⁵¹ Though the application of the Act to food donation is somewhat unclear, if the food donor is a food business that regularly produces food, then the donor may be able to be held strictly liable under the Competition Act if someone fell sick after consuming donated food, because production and sale of such food is a food donor’s usual course of business. The same is likely not true for food donors who are not themselves in the practice of producing food (for example, if the food was purchased by a company for an event and then the company donated the surplus after the event). It is not clear whether food recovery organizations would fall under the scope of the Act because the Competition Act and Consumer Protection Guidelines do not reference donation.

The Competition Act broadly applies to any goods.¹⁵² Where goods fall under the jurisdiction of another agency or regulator, the Competition Authority of Kenya collaborates with the responsible agency or regulator.¹⁵³ To ensure there are no regulatory gaps regarding consumer protection, the Competition Authority of Kenya will also become involved in “specialist matters” that a responsible agency cannot adequately address due to limited powers.¹⁵⁴ As such, although most donated food in Kenya is offered free of charge to beneficiaries and thus likely does not qualify as “trade” as defined by the Competition Act¹⁵⁵ or qualify as a “sale of product” as stated in the Consumer Protection Guidelines¹⁵⁶ – the Competition Authority of Kenya may still become involved in a liability issue regarding food donation.

Even if food donors and food recovery organizations do face the threat of liability, the Competition Act sets forth several defenses that may shield these entities from liability. Under the Competition Act, liability for damages does not arise in the following instances: (1) the alleged defect was a result of compliance with a required standard, (2) if the good completed the manufacturing process, and the defect is a result of a design or markings, (3) the defect could not be discovered at the time of supply due to insufficient scientific or technical knowledge, and (4) if the alleged defect did not exist at the time of supply.¹⁵⁷ The fourth defense may be helpful for food donation, as it may offer a defense for food manufacturers if the food became unsafe after it left the manufacturers hands. However, it might not protect a food retailer that donated food, or a recovery organization that distributed the donated food.

In summary, there is no explicit liability protection for food donation under Kenyan law, and it is unclear how the Competition Act and Consumer Protection Act would apply to free food donation. Food donors and food recovery organizations should ensure that donated food complies with applicable laws, including those discussed in this Legal Guide, and should keep records of their compliance with these laws in order to reduce their liability risks as much as possible.

Taxes

Reducing food loss and waste results in sizable economic benefits to society, as it minimizes the costs associated with producing and discarding food that is never consumed. Food donation also helps mitigate the costs of hunger and stimulates the economy: food banks and intermediaries provide jobs or sponsor community development, while recipients of donated food can spend limited financial resources on other basic goods and services. But food donation can also be expensive, as food donors must allocate time and money to glean, package, store, and transport surplus food that otherwise would be discarded at no cost. As a result, it is often easier and less expensive for farmers, businesses, and private individuals to throw away food rather than donate it. Some countries have addressed this issue by offering tax incentives and removing financial barriers to food donation.

Incentives

Tax incentives can provide significant support for food donation efforts and for the reduction of food loss and waste. For example, corporate donors may be more likely to donate surplus food to food recovery organizations if they receive a charitable deduction or credit to offset the cost of transportation and logistics. These tax incentives could help reduce the burden of the national income tax or other taxes levied on businesses. The corporate income tax rate in Kenya is 30%.¹⁵⁸ Corporate taxpayers in Kenya may reduce their tax burden by claiming deductions for qualifying expenses.¹⁵⁹ However, Kenya does not provide any tax incentives for in-kind donations, such as donations of food.

Under Kenya's Income Tax Act (Cap. 470), corporate and individual donors are eligible to claim a deduction for any cash donation in the year of income to a registered qualifying charitable organization whose income is exempt from tax under the Act.¹⁶⁰ The receiving charitable organization must meet certain requirements under the Income Tax Act.¹⁶¹ In particular, the charitable organization must be of a public character, must be established for the purpose of the relief of distress of the public,¹⁶² and must use its income for the benefit of Kenyans.¹⁶³ The Income Tax (Charitable Donations) Regulations, 2007 further provide that donations must be in cash and must not be repayable or refundable to the donor under any circumstance.¹⁶⁴ In particular, the Income Tax (Charitable Donations) Regulations only apply to cash donations,¹⁶⁵ and not in-kind donations. However, donors and charitable organizations rarely benefit from this incentive because the process of applying for and getting an exemption under the Income Tax Act is lengthy and unclear.

Furthermore, the Finance Act, 2017 amended the Income Tax Act to allow tax payers to deduct expenditures incurred on donations for relieving distress during a national disaster declared by the president.¹⁶⁶ However, only donations made to the Kenya Red Cross, county governments, and any institution responsible for the management of national disaster qualify for the deduction.¹⁶⁷ Presumably, donations to food recovery organizations, such as Food Banking Kenya will not be tax deductible, as they do not meet the criterion established in the Finance Act.

In summary, Kenya provides some tax incentives for donors. However, the restrictive application to only cash donations means that these incentives do not apply to in-kind donations, such as donations of food. Thus, there is no economic incentive to directly support the donation of food products.

Barriers

While certain tax schemes may encourage food donations, they may also be potential deterrents. In many countries the value-added tax (VAT), in particular, presents a financial barrier to donating food. As a general rule, VAT is levied on the final consumer of goods. The VAT is levied on goods at each stage of the supply chain, through a system of debits (an output VAT) and credits (an input VAT). The output VAT is the amount that a VAT registered business, or vendor, will charge on its own sale of the good, whereas the input VAT is the amount invoiced to the vendor upon the good's purchase.

For most commercial transactions in Kenya, the Value Added Tax Act (No. 35 of 2013) requires vendors to incorporate VAT at a rate of either 0% for zero-rated supplies, 8% for the local supply of certain petroleum products, or 16% for local taxable supplies and imported taxable goods and services.¹⁶⁸ Any business or individual that supplies or expects to supply taxable goods worth Ksh. 5,000,000 million or more within 12 months must register for VAT.¹⁶⁹ Kenya's VAT system also provides two categories of exceptions to the taxable supplies that directly impact food products, laying out lists of products that are either exempt or zero-rated.¹⁷⁰

The first category is exempt supplies, which refers to supplies for which VAT is not added to the selling price of the product.¹⁷¹ Exempt supplies in Kenya include food and agricultural products such as meat, fish, water, maize flour, unprocessed milk, vegetables, fruits, nuts, cereals, beans, lentils, peas, sweet corn, seeds, bread, rice, eggs, potatoes, cassava, tomatoes, nuts, millet, rice, flour and other cereal flours, and any other unprocessed foodstuff.¹⁷² In general, when foodstuff is VAT exempt, the government does not tax the transfer of that food.¹⁷³ However, a food business cannot reclaim the input VAT it paid on business purchases along the value chain to produce it, placing a financial burden on food donors.¹⁷⁴

The second category is zero-rated supplies, which refers to supplies that are taxable, but have the tax rate is of zero.¹⁷⁵ The Value Added Tax Act (No. 35 of 2013) lists certain unprocessed agricultural products as zero-rated goods. These include, milk and milk products, bulbs, tubers and tuberous roots, corms, crowns, rhizomes, coffee, maize, rice, wheat flour, and bread.¹⁷⁶ Foodstuff that is zero-rated is essentially exempt from the taxation scheme. In addition, a business or individual is entitled to claim a refund on any input tax paid throughout the supply chain.¹⁷⁷

The fact that some food products are exempt and others are zero-rated may create some confusion for businesses. Further, certain foodstuffs such as bread, wheat flour, maize, and rice are both exempt and zero-rated, while certain and most foodstuffs are only exempt, making the system even more confusing for those products.

As most food products are exempt rather than zero-rated, this may pose a barrier to donation of those products. This is because, as mentioned earlier, when food is exempt, food businesses are unable to recover input taxes.¹⁷⁸ Typically, if a business pays VAT on the ingredients or inputs it purchases to make a product, it is reimbursed for those costs when it sells the product to consumers. However, for exempt items, if a food business pays VAT on the ingredients it acquires to produce a food product that is exempt, it cannot charge VAT to the end consumer and cannot claim reimbursement from the government for the VAT paid on the inputs it acquired. This appears to be an issue both for exempt food products that are sold as well as donated.

Further, while the list of exempt and zero-rated foods is expansive, it is not exhaustive and does not provide for all types of food in Kenya. There is no other exemption or zero rating in Kenyan law that applies to the donation of other food products not included in one of those two categories. For foods that are not exempt or zero rated, presumably VAT would be due at the time of the donation, meaning that either the food bank/ food recovery organization or the food donor would need to pay the government the amount of VAT due on the donated food. This may pose a barrier to donation, as it imposes a cost on the act of donation.

Donation requirements or food waste penalties

Some countries employ food donation requirements or impose monetary penalties (often known as organic waste bans or waste taxes) for food that is sent to landfills.¹⁷⁹ The aim of organic waste bans or taxes is to encourage businesses to adopt strategies that would mitigate food waste and promote more sustainable food systems. At the time of writing, Kenya had not adopted a donation requirement or an organic waste ban relating exclusively to food waste at any level of government.

Government grants and incentives

Grants and incentive programs funded at the national or local level offer another important resource for food donation initiatives. This is particularly true in countries where donors consider tax incentives insufficient to offset the costs of donation or where a lack of infrastructure limits food recovery efforts. For example, government grants can help food donors and food recovery organizations acquire equipment and resources necessary for recovering, storing, processing, and transporting food for donation. Government funding can also support new innovations and emerging technologies that will make food donation more efficient and sustainable. At the time of writing, Kenya did not offer national or county grants for food donation.

CONCLUSION

This Legal Guide is intended to identify Kenya's current laws, policies, and programs that relate to food loss and waste and food donation. While the national government is primarily responsible for guaranteeing food security and sustainable food systems, food recovery organizations acting in a private capacity and food manufacturers and retailers can provide an additional social safety net.

This Legal Guide provides a starting point from which policymakers, private-sector actors, and civil society may better understand the current laws and policies relevant to food donation. It also offers a foundation for dialogue about food loss and waste prevention and the value of food recovery to Kenya's food security, economic stability, and environmental sustainability. A separate document produced under The Global Food Donation Policy Atlas Project sets forth policy recommendations specific to Kenya to contribute to this discussion. In the meantime, food donors and food recovery organizations should take into account the laws, policies, and legal issues discussed in this Legal Guide when donating food or facilitating the distribution of donated food to those in need. To better understand the regulation of food donation in Kenya, donors, intermediaries, and policymakers should investigate the laws identified in this Legal Guide and seek additional legal counsel, if necessary.

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- 157 See Competition Act, *supra* note 141 at § 66; *Id.* at §§ 155 – 161.
- 158 Kenya, PWC, <https://taxsummaries.pwc.com/kenya/corporate/taxes-on-corporate-income> [<https://perma.cc/76TX-ZM5W>].
- 159 *Id.*
- 160 Income Tax Act, Cap. 470 § 15(2)(w).
- 161 *Id.* The charitable organization must qualify under the conditions put forth in section 10 of the First Schedule of the Act.
- 162 See *Id.*, at First Schedule § 10.
- 163 *Id.* at § 15(2)(w). The charitable organization must qualify under the conditions put forth in section 10 of the First Schedule of the Act.
- 164 *Id.*; Income Tax (Charitable Donations) Regulations, 2007 § 4.
- 165 *Id.*; *Id.*
- 166 Finance Act (2017) § 12 (aa); See Income Tax Act, *supra* note 160.
- 167 *Id.* at § 12 (aa); *Id.* at § 15(2)(aa).
- 168 Value Added Tax Act, No. 35 (1993) § 5; VALUE ADDED TAX, KENYA REVENUE AUTHORITY 3, <https://www.kra.go.ke/images/publications/VAT-E-brochure-Final.pdf> [<https://perma.cc/8UFR-TW6T>].
- 169 *Id.*; *Id.* at 2.
- 170 *Id.* at § 2, 5, First Schedule; see Kenya enacts significant tax measures for 2021, EY, https://www.ey.com/en_gl/tax-alerts/kenya-enacts-significant-tax-measures-for-2021 (last visited Jan. 11, 2021), [<https://perma.cc/WZ9B-2BBK>].
- 171 See Value Added Tax Act, *supra* note 168 at § 2 (“exempt supplies’ means supplies specified in the First Schedule which are not subject to tax”); KENYA REVENUE AUTHORITY, *supra* note 168.
- 172 *Id.* at Second Schedule Part I [See the Second Schedule for an exhaustive list of tax exempt foodstuffs].
- 173 HARV. L. SCH. FOOD. L. POL’Y CLINIC, PROMOTING FOOD DONATION: TAX LAW AND POLICY 6, <https://www.foodbanking.org/wp-content/uploads/2021/10/2021-Atlas-Tax-Brief.pdf> [<https://perma.cc/REJ8-NA2W>].
- 174 See KENYA REVENUE AUTHORITY, *supra* note 168; *Id.*
- 175 Value Added Tax Act, No. 35 (1993) § 7, Second Schedule Part A.
- 176 *Id.* at § 7, Fifth Schedule, Part A – Zero-rated Supplies, Part B – Zero-rated Goods, Part C – Zero-rated Goods.
- 177 See KENYA REVENUE AUTHORITY, *supra* note 168.
- 178 See HARV. L. SCH. FOOD. L. POL’Y CLINIC, *supra* note 173.
- 179 For instance, certain states and municipalities in the United States have enacted laws to require certain kinds of businesses to subscribe to organic waste recycling services. HARV. L. SCH. FOOD L. AND POL’Y CLINIC & CTR FOR ECOTECHNOLOGY, BANS AND BEYOND: DESIGNING AND IMPLEMENTING ORGANIC WASTE BANS AND MANDATORY ORGANICS RECYCLING LAWS (July 2019), https://www.chlpi.org/wp-content/uploads/2013/12/Organic-Waste-Bans_FINAL-compressed.pdf https://www.chlpi.org/wp-content/uploads/2013/12/Organic-Waste-Bans_FINAL-compressed.pdf [<https://perma.cc/2QRA-P2FH>].



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