

TECHNICALITIES OF EMPLOYMENT SUSPENSION IN KENYA: A REVIEW OF
THE CURRENT LEGAL FRAMEWORK

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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July 2021.

Word Count: 10,632 (Excluding Footnotes and bibliography)


Declaration

I, KHABONGO BILL ANDAYE, do hereby declare that this is my research and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, been submitted to any other university for a degree or a diploma. Other works referred to have been accordingly acknowledged.

Signed..... *khabongo*

Date – 28th July, 2021

This dissertation has been submitted for examination with my approval as university supervisor.

Signed..... 

Ms Anne Kotonya

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Acknowledgements

My acknowledgements here are an expression of gratitude to those who offered me support through this research. First, I thank God for his mercies and grace that have brought me this far in my quest of searching for knowledge.

A heartfelt appreciation to my supervisor, Ms Anne Kotonya for the support, which was mind-opening and steered me in the right direction.

I also thank my mother for her support and prayers, which have made me, sail through seamlessly. May God bless you. To my siblings, your support and encouragement cannot be forgotten, and I thank you for that.

May God Bless you all.

List of case law

Kenyan Case Law

1. Donald C Avude v Kenya Forests Services Limited [2015] eKLR.
2. Kenyatta University & Another v Fred Obare [2017] eKLR.
3. Peterson Ndung'u & 5 Others v Kenya Power and Lighting Company Limited [2014] eKLR.
4. Barthlomew Wanyama v Moses Gitari & 2 Others [2011] eKLR.
5. Emmanuel Mutisya v Agility Logistics [2011] eKLR.
6. Joseph Ndung'u v Mastermind Tobacco (K) Limited [2014] eKLR.
7. Benuel Mariera v Anawad Enterprises Limited [2014] eKLR.
8. Cecilia Muthoni v Nairobi Stock Exchange [2014] eKLR.
9. Caleb Chola Ogecha v Seb Estates Limited [2017] eKLR.
10. Paul Ng'eno v Pyrethrum Board of Kenya [2013] eKLR.
11. GMV v Bank of Africa Kenya Limited [2013] eKLR.
12. Selle v Associated Motorboat Company [1968] EA123.
13. Paul Mwaura Mbugua v Kagwe Tea Factory Limited & Another [2012] eKLR.
14. BDM v Kenya Revenue Authority [2018] eKLR.
15. Peter Omari Nyangasare v Registered Trustees of Impala Club.

South African Case Law

1. Koka v Director-General Provincial Administration North (1997), The Labour Court of South Africa.
2. Pretoria Society for the care of the Retarded v Loots (1997), Labour Appeal Court of South Africa.
3. Jooste v Transnet Ltd t/a SA Airways (1995) Labour Appeal Court of South Africa.
4. Sappi Forests (Pty) Ltd v CCMA & Others (2008), Labour Appeal Court of South Africa.

Nigerian Case Law

1. Duru v Sky Bank PLC [2015], Nigerian Employment and Labour Relations Court.
2. Kayode Bamisile v National Judicial Council [2013], Nigerian Employment and Labour Relations Court.

Canadian Case Law

1. Cabiakman v Industrial Life Assurance Company [2004], Supreme Court of Canada.

United Kingdom Case Law

1. Shaw v DPP [1962], The United Kingdom House of Lords.

List of Legal Instruments

1. Constitution of Kenya (2010).
2. Employment Act (2007).
3. Occupational Safety and Health Act (OSHA) (2007).
4. Employment and Labour Relations Court Act.
5. International Labour Organisation Conventions
 - a) Maternity Protection Convention, 2000, UNTS, 183.
 - b) Termination of Employment Convention, 1982 (No 158).
 - c) Employment Relationship Recommendation, 2006 (No 198).

List of Abbreviations

1. ILO – International Labour Organisation
2. OSHA – Occupational Safety and Health Act.
3. HR – Human Resources.
4. ELRC – Employment and Labour Relations Court.
5. NHIF – National Hospital Insurance Fund.
6. NSSF – National Social Security Fund.
7. KSH- Kenya Shillings.
8. EPO- European Patent Organisation.

Abstract

The suspension of an employment contract is an issue that has not been clearly stipulated both by legislation and courts of law. This creates chaos in how employment suspensions are handled as employers have mostly been left to decide on the matter. Issues such as the duration in which a suspension should last and the grounds of suspension have been left for the employer to decide and hence form the main purpose of the research. In addition to that, the issue of whether or not an employee should be paid during the suspension is also an uncertainty which the study aims to discuss.

This study aims to investigate the existing legal instruments that govern employment suspensions in Kenya. Furthermore, some conventions of the ILO including the Employment Relationship Recommendation, Termination of Employment Convention and Maternity Protection Convention will be used as a comparator with the aim of establishing how the international legal order deals with the question of employment suspension. The study also borrows from literature that has been written both in Kenya and in foreign jurisdictions with a doctrinal research methodology in place.

The findings of the study may contribute to filling the knowledge gap that exists and add to the existing information on employment suspension in the Kenyan labour laws. The outcomes of the research may be useful in the implementation of laws to ensure that employee suspensions are fair, and employees are not discriminated against. Finally, the study suggests the creation of subsidiary legislation that aims at providing more clarity on employee suspensions in Kenya

CHAPTER 1

1.0 Introduction

Labour law regulates employer-employee relationships.¹ It is a contractual relationship and hence has legal obligations. Both parties in employment relationships have different rights and duties.² Kenyan labour law consists of a combination of the principles of common law, legislation, such as the Employment Act, Labour Relations Act, Industrial Court Act, International Labour Organization (ILO) conventions and recommendations and collective bargaining agreements that are entered into by different employer's organizations and trade unions.

Common law imposes different duties to parties in an employment relationship, both the employer and employee. Employers have a duty of care towards employees to ensure their safety in the work environment. The Occupational Safety and Health Act (OSHA) also provides for this. There is also a duty to maintain mutual trust and confidence. As for the common law duties of an employee, the main duty is to place their services at the disposal of the employer, failure to do so maybe a justified ground for dismissal.³ Another common law responsibility of the employee is to refrain from engaging in any misconduct while at the workplace.⁴ Employees are not supposed to absent themselves without permission and wilful absence amounts to misconduct. Misconduct gives rise to disciplinary action against the employee purported to have engaged in the misconduct. Disciplinary action is usually procedural but depends on the gravity of the offence committed by the employee. This paper will therefore focus on a procedural stage during employee disciplinary proceedings, which is the stage of employee suspension.

A suspension is defined as the act of debarring temporarily especially from a privilege, office or function.⁵ In the Kenyan labour law regime, this concept has been coated with a cloud of uncertainties. The Employment Act has not pronounced itself adequately on this matter, which

¹ Section 2, *Employment Act*, (2012).

² Part 4, *Employment Act* (2012).

³ E Ramusanga, Deemed Dismissal as a form of termination of employment 'Published LLM Thesis' University of Johannesburg, Johannesburg, 2014, 1

⁴ E Ramusanga, Deemed Dismissal as a form of termination of employment 'Published LLM Thesis' University of Johannesburg, Johannesburg, 2014, 1

⁵ Merriam Webster Dictionary, 4th Ed.

is quite ironic because it is the founding statute governing employment laws in the country. Case law has provided some jurisprudence on the matter but a lack of solid law leaves judges to decide cases on a case-by-case basis without having to refer to a specific statute. The matter of employee suspension has therefore been left to employers.⁶ In cases where employees dispute the manner and circumstances under which a suspension has been conducted and approach a court, courts tend to set varying jurisprudence and hence hindering unanimity and development of jurisprudence.

Some of the uncertain issues concerning the question of suspension of workers are: Whether an employer owes a duty to the employee to communicate a certain period, under which the suspension will run if a duty indeed exists, then there are consequences of the breach of the duty of care. Furthermore, some employers send employees on suspensions without communicating the period in which it should last. There is also the issue of suspension with or without pay, which has received different determinations in the Kenyan courts. This issue has thrown both the employer and employee at crossroads because no one wants to run at a loss.

Furthermore, employees have a right to strike under the new constitutional dispensation.⁷ Employers have however developed retaliatory tactics against such striking employees. Whistle-blowers at the workplace have also not been left behind as they have been made to pay for their actions. An example of where a whistle-blower was punished is the Kenya Airways employee who recorded a plane landing that was carrying Chinese nationals at a time where the coronavirus pandemic had hit China hard.⁸ Employers have now been left to deal with the discipline of their employees at their discretion, following their set procedures under their respective employment handbooks as provided for in the Employment Act.⁹ The respective statements of disciplinary rules are not scrutinised by any labour officer or body permitted by law as to whether they pass the test of being just. Therefore, employees stand the risk of being discriminated against by the employer.

⁶ Section 12, *Employment Act* (2012).

⁷ Article 41, *Constitution of Kenya* (2010).

⁸ Wanjohi J, 'Kenya Airways Suspends Employee who took video of Chinese Flight at Jkia' Mwakilishi.com newspaper article, 28th February 2020 -<<https://www.mwakilishi.com/article/kenya-news/2020-02-28/kenya-airways-suspends-employee-who-took-video-of-chinese-flight-at-jkia>. -> on 15th June 2021.

⁹ Section 12, *Employment Act* (2012).

1.1 Statement of Problem

Ideally, in cases of misconduct at the workplace, the Employment Act requires the employer to come up with a statement of disciplinary rules that will act as a yardstick during disciplinary hearings, processes and decisions.¹⁰ Due process should be followed which include; Right to know the case against you in case of a suspension, the grounds must be reasonable and amounts to misconduct and it is necessary that investigations need to be conducted while the employee is away from the workplace. It is also important that the employee be provided with remuneration pending completion of the investigations.

However, the employment law regime in Kenya witnesses a twist on how matters employment suspension are conducted. The law is not clear, on how suspensions are to be conducted leaving the courts with different interpretations. This sometimes affects employees, as they become victims of unfair suspensions.¹¹ Some judges are of the view that during a suspension, suspended employees should not be paid during the period¹² while others have suggested half salaries for suspended employees.¹³ Another school of thought suggests that the suspended employees are entitled to their full pay stemming from the fact that the employment contract has not been terminated yet and hence an employment relationship with rights and duties still exists.¹⁴

The courts have pronounced themselves differently on matters of employment suspension some suggesting that it should be on full pay,¹⁵ others arguing that since employees are not productive, they should not be paid at all.¹⁶ The threshold of misconduct that amounts to a suspension and the duration under which a suspension ought to last is still not clear hence leaving the employer with the discretion of determining the course of action when need be.

¹⁰ Section 12, *Employment Act* (2012).

¹¹ *Donald C Avude v Kenya Forests Services Limited* [2015] eKLR.

¹² *Paul Ng'eno v Pyrethrum Board of Kenya* [2013] eKLR.

¹³ *Selle v Associated Motorboat Co* [1968] EA 123.

¹⁴ *Paul Mwaura Mbugua v Kagwe Tea Factory Limited & Another* [2012] eKLR.

¹⁵ *Kenyatta University v Fred Obare & Another* [2017] eKLR.

¹⁶ *Peterson Ndung'u & 5 Others v Kenya Power and Lighting Company Limited* [2014] eKLR.

1.2 Justification of Study

Suspension, as a means, is mostly used to pave way for independent and impartial investigations and hence being used as a tool to facilitate good administration. This, therefore, implies that it is used as a means to facilitate fair administration rather than an end in itself. Termination of employment is provided for under section VI of the Employment Act. Section 41 of the Employment Act states that before termination of an employment contract, the employer should explain to the employee reasons for termination and further allow the employees a chance to defend themselves. This, therefore, implies that suspension is not considered as a means of employment termination under the Kenyan employment laws. In *Barthlomew Wanyama v Moses Gitari*¹⁷, the court held that

“The main reason why an employee is suspended from duty is to allow for an independent investigation out of which further action may be taken. The suspension is an interim measure and not an end. Suspension in itself is not a form of termination of employment. It follows therefore that upon completion of Investigations, further action needs to be taken. During the time of suspension, the suspended employee remains an employee of the employer, until a termination letter is issued”

Several employees have been subjected to injustices at the workplace especially when it comes to matters of disciplinary action and therefore, many employers operate with impunity because the employees are at a lower level as compared to them.

The purpose of this study is to investigate the rights of employees during disciplinary action and is worth writing because it will investigate injustices employees face during such processes and suggest how legislation can be amended to put both employer and employee at a fair level playing ground. Furthermore, it is also aimed at providing uniformity in matters of employment suspension. Matters such as grounds of suspension, issues of payments during suspension, and duration of suspensions will receive more clarity. Fields that are not related to employment law but have provisions of suspensions such as the education sector have clear-cut provisions which do not require further interpretations rather applying the rules will form great help in this study.

¹⁷ *Barthlomew Wanyama v Moses Gitari & 2 Others* [2011] eKLR.

1.3 Objectives of the Study

- 1) Analyse Kenyan regulatory framework on employee suspension.
- 2) Examine ILO standards with regards to employee suspension.
- 3) Make recommendations for the formulation of an appropriate legal and regulatory framework on employee suspension that would provide clarity on how suspensions are conducted.

1.4 Research Questions

This dissertation seeks to answer the following research questions:

- 1) What are the existing legal Instruments that govern the law of employee suspensions in Kenya?
- 2) What inadequacies does the existing legal framework on the law of employee suspension pose?
- 3) What would be the ideal legal framework that would bring more clarity and certainty in employee suspension in Kenya?

1.5 Hypothesis

The current Employment Act is inadequate and has not pronounced itself clearly on the procedures before, during and after suspension of an employee and therefore the law should be amended properly to ensure both the employer's and employees' interests are taken into consideration.

CHAPTER 2

2.1 Theoretical Framework

Employment relationships are contractual. Owing to this nature, parties have different legal obligations they have to fulfil. With the legal obligations, comes rights and duties that parties have in the contractual relationship. In that regard, John Rawl's theory of justice will inform the philosophical underpinnings of this research.

While designing his theory of Justice, John Rawls came up with two theories he considered the core concept of justice. The concepts are the 'original position' and the 'veil of ignorance'. He conceptualises this theory through an analogy whereby he imagines of people who are unaware of their age, sex, wealth status etc. Hereby, the people will agree on justice as: Each person is to have equal rights and social and economic inequalities are to be arranged so that they are of the benefit of the least advantaged. The first principle states that all people are to receive their basic rights due to human existence. The second one on the other hand states that society should provide all citizens with basic needs that enable them to participate in the competition.¹⁸

Therefore, under the veil of ignorance, in relation to employment laws, an employee may not know the rights they may have in the employment contract and in case there is a breach of the rights, what redress do they have in law? Therefore, in this regard, the state should work on a more efficient legal framework on employee suspension to first get rid of uncertainties and above all to ensure that employee rights are upheld.

2.2 Research Methodology

This study employs a doctrinal research methodology. In doctrinal research methodology, a starting focal point of research is determined, then the law in statutes, books, and case law is analysed holistically and finally, reason is used to analyse the findings. The study will analyse the existing institutional and legal framework for employee suspension with a view of seeing the need for a more elaborate legal framework on the same. Other Acts of parliament with clear rules and procedures of suspensions in their unique fields such as the Education Act will be looked at to recommend a similar approach with the Employment Act.

¹⁸ KURA S, 'John Rawls A Theory of Justice Explained' -< <https://www.sociologygroup.com/john-rawls-a-theory-of-justice-explained/>-> on 23rd January, 2021.

To begin with. Doctrinal research was best preferred in this research because of its ease of access. Furthermore, it also aims to clarify the law through a distinctive mode of analysis to authoritative texts that consists of both primary and secondary sources.¹⁹ As this research has one of its objectives as recommending law reform, an analysis of the existing laws through research will enable the researcher to conclude that indeed there is a need for law reform. Furthermore, given the normative nature of doctrinal research, it enables the researcher to appreciate the development of the law in terms of judicial reasoning and legislative enactment.²⁰ In addition to that, this type of research enables the researcher to access a broad range of works during the research including but not limited to legal encyclopaedias and case digests.²¹ This improves the quality of the research as an array of easily available research materials.

This study required information that demonstrates the effectiveness of the legal framework on employee suspensions in Kenya. Primary sources used include legislations, international instruments and case law. Secondary sources include books, journals working papers, and dissertations.

¹⁹ Mc Conville, *Research Methods for Law*, 2nd Ed, Edinburgh University Press, Edinburgh, 2007, 4.

²⁰ Mc Conville, *Research Methods for Law*, 2nd Ed, Edinburgh University Press, 19.

²¹ Mc Conville, *Research Methods for Law*, 2nd Ed, Edinburgh University Press, 24.

CHAPTER 3

3.1 Literature review

This section will discuss an array of literature that has been researched on the topic of employee suspension, both in Kenya and in other jurisdictions.

A review of literature relating to the topic has shown that most of the studies conducted generally address employee suspension. Most studies have recognised the statement of disciplinary rules established under the Employment Act²² as reliance on how employment suspensions ought to be conducted. Chiruba²³ focussed on the question of indefinite suspension without pay. This research purely focussed on indefinite suspension, which eventually leads to constructive dismissal. Two cases were addressed which speak on the matter. *Peter Omare Nyangasare v Registered Trustees of Impala club*,²⁴ the claimant was sent on suspension after allegations of theft of money amounting to ksh 92,000. The claimant was arrested but never charged in a court of law and remained on indefinite suspension until the time the contract lapsed.

Chiruba also addressed the matter concerning *Benuel Mariera v Anawad Enterprises Limited*²⁵ where the claimant was given a suspension letter and instructed to surrender the company property including the company car and telephone. His salary was also not paid despite the company promising to pay him. Therefore, stemming from this research, only one limb of employee suspension was addressed, indefinite suspension without pay.

Odongo G in his article,²⁶ states five key points concerning employee suspension. That suspension is not a disciplinary penalty and should not be implemented in a manner as such a decision has already been made about the allegations, which suspension should be communicated to the employee in writing and should not continue for longer than necessary to investigate the allegations. There is however an issue with the 2nd limb because, the phrase

²²Section 12, *Employment Act*, (Chapter 226, Laws of Kenya).

²³ Okechi D, 'Constructive Dismissal: A Critical Analysis of its Legal perspective in Kenya' Unpublished LLM Thesis, Nairobi, 2014.

²⁴ Peter Omare Nyangasare v Registered Trustees of Impala Club, High court of Kenya, Unreported.

²⁵ Benuel Mariera v Anawad Enterprises Limited [2014] eKLR.

²⁶ Odongo G, 'Basic Tips on Use of employee Suspension as part of disciplinary Process in Kenya' HG.Org Legal Resources--<<https://www.hg.org/legal-articles/basic-tips-on-use-of-employee-suspension-as-part-of-disciplinary-process-in-kenya-53614>-> on 2 June 2021.

longer than necessary does not give a specific time frame for which the suspension should run, this will therefore bring back the question of indefinite suspensions and constructive dismissal. His research further asserts that during a suspension, an employee should receive full salary and benefits and finally, a formal communication inviting the employee to attend the disciplinary proceeding should be made in writing allowing the employee to go to the committee.

A Babu in her article,²⁷ tackles circumstances under which an employer can suspend an employee. The article reckons that suspension is only valid if it is established by the employment contract or is brought out by the organisation's policies. The article further brings it out that in absence of employee suspension in both the organisation's policies and the employment contract, the employer should send the employee on administrative leave rather than subjecting the employee to suspension.

Agasna and K Othero, in their article,²⁸ noted that employee suspension is a much-misunderstood concept in Kenya. They further noted that the law does not expressly provide for suspensions but the human resource manual or the employment contract can sanction it. On the question of wages, the Employment Act²⁹ cites circumstances in which employers should deduct employees' salaries. such circumstances include: Amounts deducted to any scheme the employee has authorised the employer to deduct, a reasonable amount of damage done to or loss, of any property in legal custody of the employer occasioned by wilful default of the employee, amounts equivalent to wages of one day caused by absence from work without permission, an amount equal to any shortage of money under the custody of an employee if the employee is tasked with receiving money, any amount paid to the employee as wages above what he is legally required to receive, any deductions that are authorised by law, {these include statutory deduction, for example, National Social Security Fund(NSSF) deductions and National Hospital Insurance Fund (NHIF) deductions}, any amount which the employee has requested the employer to deduct as wages in writing and other amounts that

²⁷ A Babu, 'Suspension, Gratuity, Sick Child leave, Transfer of Employment' Kenyan Employment Law Blog, 3 June 2020, <<https://kenyaemploymentlaw.com/2020/02/28/suspensiongratuitysick-child-leavetransfer-of-employment/>> on 28 June 2021.

²⁸ Agasna A and Othero K, 'Recommended Employment and Disciplinary Process in Kenya' Afri Law Network, 2017, 8.

²⁹ Section 19, *Employment Act* (Chapter 226, Laws of Kenya).

the Cabinet secretary might prescribe.³⁰

Corporate Staffing Services in their article³¹ brought out the following grounds of suspension: Gross misconduct, poor performance and physical incapability. The article further does not provide for a requirement by the employer to give the employee reasons for suspending them. Therefore, according to this article, the employer reserves the right of disclosing the reason for suspension. The article further discusses the question of salaries during suspension. Three views have been brought out which are: As long as an employee has not been fired, they are entitled to full pay, that the employee is entitled to pay after the disciplinary proceedings have come to an end and a determination has been reached and finally, the salary of an employee can be withheld if the organisation's policies have such a provision. On the duration under which an employee should be suspended, the article suggested that employers are supposed to restrict themselves to a suspension period of a maximum of six months and a suspension that exceeds six months could lead to possible claims of constructive dismissal.

Eyongdi D and Ochu G in their journal article,³² recognise the importance of the employment contract when determining matters of employee suspension. The authors suggest that employment contracts ought to establish rules governing employee suspension. The research further portrays that suspension can be used as a precursor to allow for seamless investigations as well as a punishment upon the conclusion of an investigation. The study furthermore covers the period under which the suspension should last; it states that the suspension should be either definite or indefinite.

In conclusion, the article³³ discusses the legal status of suspended employees and it is concluded that suspended employees remain employees and hence are supposed to receive all employee benefits until such a time that the contract becomes terminated. Furthermore, *Duru v Skye Bank Plc*³⁴ is discussed in the article. This case stated that during the period of suspension, the employee is neither terminated nor dismissed and hence, for the period of

³⁰ Section 19, *Employment Act* (Chapter 226, Laws of Kenya).

³¹ 'Kenyan Labour Law on Suspension', February 23rd, 2017, <<https://www.corporatestaffing.co.ke/2017/02/kenyan-labour-law-on-suspension/>> on 30th May 2021.

³² Eyongdi D, Ochu G 'The Marsh of Employee suspension and the contract of employment in Nigeria: Matters Arising' 15(1), *Unizik Law Journal*, 2019, 25.

³³ Eyongdi D, Ochu G 'The Marsh of Employee suspension and the contract of employment in Nigeria: Matters Arising' 15(1), *Unizik Law Journal*, 2019, 25.

³⁴ *Duru v Skye Bank Plc* (2015), Nigerian Employment and Labor Relations Court.

employees' indefinite suspension without pay, the employee is still in the employ of the employer and so they are entitled to salaries and allowances.³⁵

Eufemia Vierius's article³⁶ discusses different aspects of employee suspension. The article discusses different types of suspensions. Legal suspension is described to happen when the employment contract is suspended under legal provisions, the consent of the other party (the employer), not being necessary.³⁷ Some examples of situations where the suspension can be defined as legal include temporary inability to work due to illness or non-work related accident, maternity leave and when an employee is on quarantine because of exposure to a contagious disease such as the COVID-19.³⁸ In addition to that, Vierius's article further discusses other situations under which the employment relationship can be suspended. The situations are through the consent of the parties, for example, an employee consents to go for unpaid leave, and in addition to that, suspension by the unilateral act of the employee, for example, the employee takes up a study leave and finally, suspension by the unilateral act of the employer³⁹. Suspension by the unilateral act of the employee brings out the aspect of suspension being done as a part of a disciplinary process.

In contrast to the foregoing, this research will review the shortcomings employee suspension is coupled with, in Kenya. Matters of payment during suspension shall be discussed, the grounds of suspension, what constitutes gross misconduct and matters to do with the suspension of the employment contract for medical reasons. In addition to that, employment suspension as brought out in the Anti-corruption and economic crimes Act will be looked at.⁴⁰ Finally, lessons from the International labour organisation conventions that relate with matters to do with discipline under the employment relationship.

3.2 Delimitation of Study

The study will examine Kenya's current employment law framework on employee suspension. The study will also compare with the International Labour Organisation standards with regard to employee suspension.

³⁵ *Kayode Bamisile v National Judicial Council* (2013), Nigerian Employment and Labor Relations Court.

³⁶ Eufemia V, 'The suspension of Individual Labour Agreement' 22(2) *Walter De Gruyter*, 2016.

³⁷ Eufemia V, 'The suspension of Individual Labour Agreement' 22(2) *Walter De Gruyter*, 2016,395.

³⁸ Eufemia V, 'The suspension of Individual Labour Agreement' 22(2) *Walter De Gruyter*, 2016,396.

³⁹ Eufemia V, 'The suspension of Individual Labour Agreement' 22(2) *Walter De Gruyter*, 398.

⁴⁰ *Anti-Corruption and Economic Crimes Act* (Act No 3 of 2003).

3.3 Chapter Layout

Chapter One-Introduction and Background

This chapter encompasses the introduction to the study and the background of the study.

Chapter Two-Theoretical Framework

This chapter lays out the theory behind the study. It also outlines the research methods used in this study and justifications for the research methods used.

Chapter Three-Literature Review

This chapter contains an array of literature written on this study by different authors, both Kenyan and foreign. It also contains an analysis of case law that are relevant to this study. The study also contains a delimitation to the study, which is the jurisdictional confines upon which the study will base upon.

Chapter Four-Shortcomings of the current legal framework concerning employee suspension.

This chapter will begin the analysis part of the research. In this section, case law, statute, journal articles and books will be analysed to prove the hypothesis. Different shortcomings of the current legal framework concerning employee suspension will be discussed. Questions such as pay during suspension, types of employee suspension, duration of suspension, procedure during employee suspension and rights of the employee during the suspension will be discussed in this chapter.

Chapter 5-International Labour Organisation and Employee Suspension.

This chapter will offer a comparative study on how employee suspension matters are dealt with in the ILO Convention and incidentals thereto. Several treaties will be analysed in this section that are related to employee suspension and dismissal.

Chapter Six-Conclusion and Recommendations.

This chapter will summarise the findings of the study and give recommendations on how to improve the Legal framework around employee suspension.

CHAPTER 4

SHORTCOMINGS OF THE CURRENT LEGAL FRAMEWORK WITH REGARDS TO EMPLOYMENT SUSPENSION

It is important to note at this point, there are two main kinds of employee suspension. Both are earned differently considering the circumstances surrounding the suspension. The first is Administrative suspension where the employer imposes for administrative or business reasons and is not connected to the conduct or delivery of services by the employees that are so affected⁴¹. An example that is relevant to this type is where employees have been suspended and some sent on unpaid leave because of Covid-19. The different businesses or organizations deem it unsustainable to have a certain number of employees and hence, they are sent on suspension. Communication for the period of the administrative suspension is also communicated to the employee by the employer.

The disciplinary suspension is the other kind, which forms the cornerstone of this dissertation. Many questions have been raised on this type of suspension. Some of the questions posed here are the duration under which the suspension should last and whether there should be pay during the disciplinary suspension and what is the quantum of the pay the suspended employee should be given. The disciplinary suspension was defined in the case involving *Donald C Avude v Kenya Forest Services*,⁴² as a punitive measure for a reproachable act made during work. Examples of the instances where a disciplinary suspension may be issued are when an employee engages in gross misconduct while at the workplace, for example, stealing by servant. During a disciplinary suspension, the employer is required to conduct a disciplinary hearing and during the disciplinary hearing, it is important to consider the *audi alteram partem principle*, which means ‘let the other side be heard too’.

The question of suspension of employees from work, as has earlier been noted, has not been specifically legislated, and in most cases, employers and employees are left to decide on the issue, which is normally put in the employment handbook. As its nature dictates, suspension is an initiative of the employer and must be done by either the employment handbook or the

⁴¹ Dale and Lessmann LLP, ‘Administrative suspension of employees’, April 23, 2015, <<https://www.dalessmaann.com/news/blog/administrative-suspension-employees->> on 26th December 2020.

⁴² *Donald C Avude v Kenya Forest Services* (2015) eKLR.

contract of employment that was signed by both the employer and employee. Therefore, this chapter seeks to determine the shortcomings that may arise, when a lot of discretion is vested on the employer concerning matters suspension. Questions of malicious and unfair suspensions arise and questions of discrimination at the workplace arise.

4.1 Uncertainties in the Suspension Period for Employees: Question of Indefinite Suspensions

The current legal framework has dispelled a myriad of uncertainties when it comes to the question of the duration of employee suspension. Case law has witnessed different judges and magistrates ruling on different durations that employees are supposed to be suspended. There is no set duration that employers have been given to send their employees on suspension and later invite them for a disciplinary proceeding to try them. An example of where there is certainty in the law is the Basic Education Act, where the principals of polytechnics are given powers to suspend students from attending classes for thirty days.⁴³

The first cause of disagreement that arises in the suspension of employees is the duration in which the employees ought to be suspended before investigations are carried out. Courts have pronounced themselves differently on this issue. First, the issue of sending employees on indefinite suspension has been ruled out by the courts terming it as constructive dismissal. This was held in the matter concerning *Emmanuel Mutisya v Agility Logistics*⁴⁴ where the judge stated *inter alia*,

“Where an employer creates a situation in the workplace that makes continuation of the employment of an employee untenable, the employer is deemed to have constructively dismissed the employee and the employee is free to sue for damages as a result of the unfair termination of the employment contract.”

It was further asserted in the matter concerning *Joseph Ndung’u v Mastermind Tobacco Limited*⁴⁵ that an employee cannot be sent on indefinite suspension as it amounts to constructive dismissal. Constructive dismissal was discussed in the South African case involving *Pretoria Society for the Care of the Retarded v Loots*,⁴³ as a situation in the

⁴³ Section 18(1), *Basic Education Act*, (Chapter 211 Laws of Kenya (2012)).

⁴⁴ *Emmanuel Mutisya v Agility Logistics* (2011) eKLR.

⁴⁵ *Joseph Ndung’u v Mastermind Tobacco (K) Limited* (2014] eKLR.

workplace, which has been created by an employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employer has no other available option but to resign. Several tests have been established to determine whether a constructive dismissal has occurred. These tests will be discussed considering indefinite suspensions and a comparison drawn to determine whether indeed an indefinite suspension can amount to constructive dismissal.

The first test happens after an employee has resigned from the workplace and it looks at the motive of the resignation. Here, the conduct of the employer is looked at before the resignation and a question arises whether the employee would have continued the employment relationship indefinitely had it not been for the employer's conduct.⁴⁶ The burden of proof that indeed the employment contract was frustrated by the employer lies on the employee. In comparing this issue to the question of indefinite suspension, employees sent on indefinite suspension are always in a state of limbo, because they do not know when their jobs will be back. Employees who will be forced to resign because of lengthy and unfair disciplinary hearings coupled up with a reduction in earning or no earning will be deemed to be constructively dismissed. However, it is important to note that, although the duration of the suspension may be unknown to the employee, an employee who resigns from their workplace to escape disciplinary proceedings would not be protected by the rules governing constructive dismissal.⁴⁷ Therefore, in summary, sending employees on indefinite suspension may cause frustration of the contract, and subsequently, questions of constructive dismissal shall arise.

In another matter concerning *Benuel Mariera v Anawad Enterprises Limited*⁴⁸, there was also a lack of communication on the period in which the suspension would last. However, this case was unique because the employee was sent on suspension with full pay but was supposed to handover all the company property during the investigation period. The investigations were complete, but the employee was not reinstated. Furthermore, the employee was not paid during the indefinite suspension as was earlier promised by the employer. The court in this matter found that the employee was constructively dismissed, and damages were awarded to the plaintiff. It is quite evident that sending employees on

⁴⁶ *Jooste v Transnet Ltd t/a SA Airways* (1995) Labour Appeal Court of South Africa.

⁴⁷ *Pretoria Society for the care of the Retarded v Loots* (1997), Labour Appeal Court of South Africa.

⁴⁸ *Benuel Mariera v Anawad Enterprises Limited* (2014) eKLR.

indefinite suspension goes to the root of the contract and is a breach of mutual duty of trust and confidence.

On the issue of the period under which the suspension is to last, there is no set time limit. Some judges have decided that the period should be determined.⁴⁹In yet another case, the judge agreed that indeed there are no set regulations on the law as to the period under which a suspension should last but since the employers have been given a leeway to set their rules and regulations through the employment handbook, the timelines under which employees are sent on suspension pending a determination should be reasonable enough.⁵⁰In the matter concerning *Kenyatta University v Fred Obare*,⁵¹ the judge declared an indefinite suspension illegal and ordered a fresh disciplinary hearing to be conducted so that the employee can be tried. As has been seen by the interpretation of the law by different judges, there are still no time limits that have been unanimously settled upon by the judiciary or even the employers.

4.2 Payment during Suspension

As a common-law rule, suspension is always on full pay unless the employee agrees to be suspended without pay or where the organizations' policies provide for suspension without pay. The position in *Sappi Forests (Pty) Ltd v CCMA &Others*⁵² Pillay J ruled:

“The Position at Common Law has always been that an employer who suspends an employee without pay commits a breach of the employment contract. An employer may suspend an employee without pay if the employee so agrees, or legislation or a collective bargaining agreement authorizes the suspension”.

The question of pay during suspension also raises a cause of disagreement during employee suspension. Several arguments have been raised on the matter. Some employers argue that employees during suspension should not be paid at all; others argue that they should be sent on half pay and others argue that they should be given full payment until the disciplinary hearing has been completed and a verdict has been given. Each of the arguments will be considered separately.

Suspension without pay was mentioned in *Donald Avude v Kenya Forest Services*

⁴⁹ *Donald C Avude v Kenya Forests Services Limited* (2015) eKLR.

⁵⁰ *Cecilia Muthoni v Nairobi Stock Exchange* (2014) eKLR

⁵¹ *Kenyatta University v Fred Obare* (2017) eKLR.

⁵² *Sappi Forests (Pty) Ltd v CCMA &Others* (2008), Labour Appeal Court of South Africa.

*Limited*⁵³ where it was stated that payment during suspension is predicated upon the period in which an employee has been sent for suspension. It further stated that sending employees on indefinite suspension without pay would amount to inhumane treatment. This is premised on the principle of being innocent until proven guilty. However, scholars have noted that in suspending an employee in the form of a disciplinary penalty, employers may suspend employees without pay if both parties agree to it. This may be evidenced by collective bargaining agreements between the employer and employees and if the employment contract has provisions for unpaid suspension.⁵⁴

The judge in the case concerning *Caleb Chola Ogecha v Seb Estates Limited*,⁵⁵ the judge upheld a suspension without pay on the reasoning that an employer cannot be stopped from exercising his or her right to discipline employees. The judge further noted that the suspension had met the threshold in law as it sets out the reasons for the suspension, a timeline of 3 months, and a further condition, which indicated that there should be no payments for 3 months. As has been seen, different judges view the issue of suspensions without pay differently as some are against suspension without pay viewing it as prejudgment and against the principle of being innocent until proven guilty, on the other hand, some judges opine that employees can be suspended without pay and that their dues will be paid to them after the disciplinary process has been completed.

On the question of being sent on suspension with half the pay, employers are normally at crossroads here because, on one hand, an employee needs to survive and cater for their families. On the other hand, employers reason from the economic point of view, whereby the employee is not productive and hence, paying them will run the employer a loss. Therefore, to cushion both parties from serious economic losses, both the employer and employee decide to meet halfway, and half salary is paid pending determination of the disciplinary committee.

⁵³ *Donald C Avude v Kenya Forests Services Limited* (2015) eKLR.

⁵⁴ T Visagie, 'What Does Current case law state regarding unfair suspension in terms of Section 186(2) (b) of the Labour Relations Act', 17th May 2019 - <<https://ceosa.org.za/what-does-current-case-law-state-regarding-unfair-suspension-in-terms-of-section-1862b-of-the-labour-relations-act/#:~:text=When%20suspending%20an%20employee%20in,make%20provision%20for%20unpaid%20suspension>
[.Written](#)> on 2nd November 2020.

⁵⁵ *Caleb Chola Ogecha v Seb Estates Limited* (2017) eKLR.

The court in the case concerning *Paul Ng'eno v Pyrethrum Board of Kenya*⁵⁶ held that the suspended employee was entitled to half-pay during the period in which he had been suspended. However, paying employees half their salaries during a suspension has no legal validity in the Kenyan employment laws.

In addition to that, employers prefer to send their employees on suspension with full pay pending a determination of the matter. This is left to the discretion of the employer to decide whether they can afford to pay the employee during the suspension period. Collective Bargaining Agreements, the employment contract, and the employment handbook can also be a source of reference when it comes to the determination of whether an employee on suspension is entitled to full pay. As has been witnessed by different case laws, there are different rulings on the question of payments during the suspension. Therefore, it is difficult for sound jurisprudence to emerge from this question as the judiciary on the matter is in an indecisive state which might create a crisis.

4.3 Grounds of Suspension

This is another area that raises different interpretational questions. Different employees come up with different grounds of what they refer to as grounds of suspension. This has raised different claims of unfair dismissal. Suspension can be for either medical reasons or disciplinary reasons. However, some employers interpret differently the grounds of suspension and end up dismissing employees unfairly. It is also worthwhile noting that there needs to be reasonable grounds for a suspension to believe that should the employee not be suspended, he or she could: Interfere with the evidence, for example destroying incriminating evidence, threaten the witnesses for example in cases of organized theft or rather repeat the offence such as embezzling funds.⁵⁷

4.31 Suspensions for Medical Reasons

Employers also have the discretion to suspend the employee on medical grounds; however, this ground is prone to abuse such that instead of sending some class of employees, for

⁵⁶ *Paul Ng'eno v Pyrethrum Board of Kenya* (2013) eKLR.

⁵⁷ Miller C,' Suspension in the Disciplinary Process 'Published LLB Dissertation, Nelson Mandela Metropolitan University, Port Elizabeth, 2013, 14.

example, expectant women on maternity leave, which is a compulsory provision in the law⁵⁸, employers end up dismissing or sending expectant women on suspension without pay which amounts to discrimination, which is also against the constitution.⁵⁹ Women have been afforded constitutional protection and are not supposed to be discriminated against because of pregnancy or pregnancy-related issues. In cases where a claimant purports that discrimination took place in the workplace, the burden of proof lies on the employer to prove that discrimination did not take place. The employer is required not to discriminate against their employees on any grounds including grounds of pregnancy.⁶⁰

Uncertainties arise. Therefore, on the question of pay and the grounds of suspension, for instance, an expectant lady is ideally supposed to go on maternity leave for 3 months which is fully paid for however, employers decide to view such women as a liability and suspend them earlier either so that they can escape paying the maternity leave or dismiss them.

Furthermore, there are also instances where employers are forced to send their employees on compulsory leave for medical purposes. This is aimed at protecting the employees' health. An example is where an employee has developed a respiratory illness and they work in a factory where toxic chemicals are used which might affect the employee, the employer is allowed in common law to send such an employee on suspension for medical reasons whilst their health is being monitored. It is worthwhile noting that the employer is required to pay full salary to the employee during this suspension period and work to ensure that they have put a measure in place to ensure that the health of the worker is protected once they are re-instated.

4.32 Suspension on The Grounds of Misconduct

Indiscipline generally amounts to one of the main reasons employers send their employees on suspension, disciplinary suspension to be specific. For a suspension to fall under this scope, it must be disciplinary in nature and intent.⁶¹ However, employers are supposed to carry out due diligence before sending employees on a disciplinary suspension and they must establish that indeed the misconduct was gross and that the employee needs to be outside the workplace to

⁵⁸ Section 29, *Employment Act* (2012).

⁵⁹ Article 27, *Constitution of Kenya* (2010).

⁶⁰ *GMV v Bank of Africa Kenya Limited* (2013) eKLR.

⁶¹ Eyongdi D, 'The Marsh of Employee Suspension and the Contract of Employment in Nigeria: Matters Arising', 15(1), *Unizik Law Journal*, 2019, 7.

allow independent investigations to go on. If due diligence is not carried out, then the suspension would be unfair.

Another dilemma that most employers face is the issue of criminal charges that their employees may be having. The only provision allowed by law to dismiss or suspend employees because of criminal charges is when the said criminal charge has been conducted within the workplace, for example stealing by servant. In *Shaw v DPP*,⁶² it was argued that criminal activities done by an employee 5 kilometres away from the workplace did not meet the threshold of misconduct. For the action to be classified as misconduct, it must have a direct link to the employer's business and the public must believe the employer is acting in the interest of the employee.⁶³

An employer is only allowed to either dismiss or suspend their employees because of criminal offences punishable by imprisonment and the employees are not released on bail or bond for 14 days. Another ground permissible by law where an employer can suspend their employees because of misconduct is when an employee commits or is on reasonable ground suspected to have committed a criminal offence against or to the detriment of the employer's property.⁶⁴ These provisions have made it clear that criminal offences committed outside the workplace and are not connected in any way to the employment contract do not form a ground of employment suspension.

Case law has shown how the courts have generously interpreted the provisions above as was seen in the matter concerning *Cabiakman v Industrial Alliance Life Insurance Company*⁶⁵ where the court ruled that Cabiakman was unfairly suspended because of criminal charges. Closer home, the case involving *Donald C Avude v Kenya Forests Services Limited*⁶⁶ where defamatory statements were made by the employee and it was constituted as misconduct and hence the employee was dismissed. The court held that the dismissal was unfair because there was no connection between the defamatory words and the employer.

Lack of a firm legal framework in employee suspension has led to a myriad of interpretations on the same and hence, disadvantaging both the employer and employee, these uncertainties

⁶² *Shaw v DPP* (1962), The United Kingdom House of Lords.

⁶³ *Shaw v DPP* (1962), The United Kingdom House of Lords.

⁶⁴ Section 44, *Employment Act*, (2012).

⁶⁵ *Cabiakman v Industrial Alliance Life Insurance Company* (2004), The Supreme Court of Canada.

⁶⁶ *Donald C Avude v Kenya Forests Services Limited* (2015) eKLR.

have affected the development of sound jurisprudence in this area of employment law. Employers decide on the fate of employees out of their procedures, which are not regulated per se by anyone, and hence sometimes employees are discriminated upon.

4.33 Suspensions as Covered Under the Economic Crimes and Anti-Corruption Act

The Anti-corruption and economic crimes Act⁶⁷ has also been expansive to cover the fate of employees who have been charged with corruption and economic crimes. The scope of this Act is however limited to public and state officers. Public officers charged with economic crimes, corruption shall be suspended at half pay, and the suspension shall last until such a time that the case is determined. In cases where the proceedings have ended and the officer has not been convicted, they will be reinstated with full pay.⁶⁸

In cases where a person is convicted of corruption or economic crimes, the employee shall be suspended without pay with effect from the date of the conviction pending any appeals⁶⁹. In cases where the conviction is overturned, the public officer will retain their position and the suspension shall be lifted. In cases where the officer has not appealed within the set time of raising an appeal or the conviction has been upheld, the officer will be dismissed from employment.⁷⁰

⁶⁷ Section 62, Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

⁶⁸ Section 62, Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

⁶⁹ Section 62(3), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

⁷⁰ Section 62(3), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

CHAPTER 5

LESSONS FROM INTERNATIONAL LABOUR LAW: INTERNATIONAL LABOUR ORGANISATION AND EMPLOYEE SUSPENSION

5.1 History of the International Labour Organisation

The International labour organisation (ILO) was created in 1919 to reflect the belief that universal and lasting peace can be accomplished only if based on social justice.⁷¹The importance of social justice was to secure peace and protect workers that had witnessed periods of exploitation during the industrial revolution.⁷²At this point, the industrial revolution brought about trade between different countries and hence economic interdependence between different countries in the world. There was therefore a need to have similar working conditions in the different competing markets.⁷³

The preamble of the ILO Constitution states that universal peace and stability can be established only if social justice is an ingredient. Therefore, to achieve social justice, there was a need to improve the conditions of labour. The question of interdependence, therefore, came in. This is because there was a need to create uniformity such that all countries adopt humane conditions of labour, this way, social justice will be achieved globally.⁷⁴The declaration of Philadelphia was then adopted and had the main objectives of de-commodifying labour and that all human beings despite race have equal protection in law and require equal opportunities.⁷⁵

The ILO, in partnership with different countries, has established different international legal instruments on trade, human rights, and labour in the quest of establishing an international legal framework on employment law. The ILO, therefore, contributes to this legal framework by international labour standards and ensuring that economic development goes hand in hand with the creation of decent work. The ILO is therefore backed by governments, employers,

⁷¹ -< <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>> on 23rd December,2020.

⁷² -< <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>> on 23rd December,2020.

⁷³ -< <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>> on 23rd December,2020.

⁷⁴ International Labour Organisation(ILO), Constitution of the International Labour Organisation (ILO), 1April 1919, available at -<https://www.refworld.org/docid/3ddb5391a.html>-, accessed on 23rd December 2020.

⁷⁵ -< <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>> on 23rd December 2020.

and workers to ensure that the minimum social standards in the world of work are met⁷⁶. Since Kenya is a party to the ILO Convention,⁷⁷ the International labour standards set must be implemented and the question of employee suspension, which is a matter of policy must be looked at and establish whether there is compliance with standards set by International Law.

5.2 Employment Policy

In a bid to promote the creation of employment opportunities and decent pay, the ILO has come up with international standards on employment policy. These standards have the aim of achieving productive standards of employment and provide a framework for designing and implementing such policies.⁷⁸ Different ILO Instruments will then be discussed in a bid to examine the framework set by the ILO with regards to the disciplinary procedure at the workplace.

5.21 Employment Relationship Recommendation, 2006 (No 198)

The main objective of this recommendation is to protect workers from difficulties arising in employment relationships. First, whether an employment relationship exists, where situations arise that have tried to disguise the employment relationship or whether there are inadequacies in the legal framework, its interpretation or application, for example, in Kenya where the legal framework on the suspension of employees is inadequate.⁷⁹ This recommendation, therefore, envisages the adoption of a national policy to ensure that workers are protected in the context of an employment relationship.⁸⁰ This instrument also recognizes the fact that contractual arrangements can have the effect of depriving workers of the protection they are

⁷⁶ International Labour Organisation, Rules of the Game, An introduction to the standards -related work of the ILO, 2019, 55. -<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf, page> on 26th December, 2020.

⁷⁷ Article 2(5) *Constitution of Kenya* (2010).

⁷⁸ International Labor Organisation, Rules of the Game, An introduction to the standards -related work of the ILO, 2019, 56. -<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf, page> on 26th December, 2020.

⁷⁹ International Labor Organisation, Rules of the Game, An introduction to the standards -related work of the ILO, 2019, 56. -<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf, page> on 26th December, 2020.

⁸⁰ International Labor Organisation, Rules of the Game, An introduction to the standards -related work of the ILO, 2019, 57. -<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf, page> on 26th December, 2020.

due.⁸¹Concerning employee suspension, for example in Kenya where the legal framework on suspension is not steady, employment contracts might have clauses that are discriminative to the workers. Such clauses may include indefinite suspensions in case of misconduct and hence, employees get discriminated against when they are sent on such suspensions.

5.22 Employment Security

An employment relationship, as earlier stated, is a relationship of mutual trust and confidence. Both parties have rights and duties, and hence different legal obligations arise. Employees are in a more vulnerable position in the workplace, especially in developing countries like Kenya where over 4 million people are unemployed.⁸²Therefore, there is a demand for work and therefore, such situations create a recipe for discrimination at the workplace and equal work is not often rewarded with equal pay. Situations such as unfair dismissals and sending employees on indefinite suspension without pay will therefore arise in such kinds of relationships. There is, therefore, a need for employment security to ensure that there is minimal discrimination at the workplace. In line with this, the ILO has come up with instruments that are geared towards ensuring employment security.

5.23 Termination of Employment Convention, 1982, (No 158)

This convention covers employment relationships that have been terminated by the employer. Relationships that have been terminated by efforts of the employee, for example, cases like resigning are not covered under this convention. Mutual agreements by both the employer and employee to terminate employment contracts are also not covered under this convention.⁸³ Article 4 of the convention requires that before an employment relationship is terminated, there should be exhaustion of local remedies internally to ensure that the termination is fair. A warning or reprimand is first issued, then a second warning is issued, the employee is sent on suspension and allowed to defend themselves.⁸⁴

⁸¹ILO Employment Relationship Recommendation, 2006.

⁸² Amadala V, 'Corona's Effect on Kenya's Unemployment Rate' The Star, 1st September 2020, -<
<https://www.thestar.co.ke/business/kenya/2020-09-01-corona-effect-kenyas-unemployment-rate-doubles-to-104/>> on 28th December, 2020.

⁸³ 'Note on Convention No 158 and Recommendation No 166 Concerning termination of employment' -, on 28th December, 2020.

⁸⁴ Note on Convention No 158 and Recommendation No 166 Concerning termination of employment' -, on 28th December, 2020.

This instrument states that the employment of a worker should not be terminated unless there are valid reasons for the termination of such employment, connected with the capacities of the employee to perform the duties stated under the employment contract. Temporary absence due to illness, absence from working due to maternity leave, pregnancy, family responsibilities among others have been ruled out as grounds of disciplinary action.⁸⁵ The right to be heard has also been recognized by this instrument as an employee who feels they have been unfairly dismissed has the right to defend themselves or appeal.⁸⁶

5.3 Grounds of Disciplinary Action Under the Convention

The Convention has also been generous to outline what may consist of practical situations at the workplace which require disciplinary action as a retaliatory measure. These reasons are:

5.31 Reasons Connected with The Capacity of the Employee

Lack of capacity on the employee's side can be twofold: Lack of the requisite skills to perform the tasks given leading to unsatisfactory results. Poor work results are not caused by intentional misconduct, for example, poor work results because of illness.⁸⁷ For this reason, employees may be put on precautionary suspension.

5.32 Reasons Connected with The Conduct of the Worker

These are actions of misconduct and mostly from the employee's side. The actions of misconduct are twofold: The first one involves the inadequate performance of duties that the worker was contracted to perform for example neglect of duty and disobedience of legitimate orders. The second ground includes various types of improper behaviours for example disorderly conduct at the workplace, using abusive languages, and generally disrespecting colleagues.⁸⁸ Here, an administrative suspension will be issued to the employee awaiting completion of Investigations on the matter.

⁸⁵ Article 1(1), Discrimination (Employment & Occupation) Convention, 1958, 111.

⁸⁶ Article 4, Discrimination (Employment & Occupation) Convention.

⁸⁷ Note on Convention No 158 and Recommendation No 166 Concerning termination of employment' -, on 28th December, 2020.

⁸⁸ Note on Convention No 158 and Recommendation No 166 Concerning termination of employment' -, on 28th December, 2020.

5.33 Reasons Connected with The Operational Requirements of the Undertaking, Establishment or Service⁸⁹

This concerns itself with economics. For example, we are in the middle of a global pandemic and most employers had to downsize to cut costs. Another example is with banks where they periodically lay off staff or send them on suspension without pay until business improves. An example is Standard Chartered where it laid off 14% of the workforce amid the COVID-19 Crisis.⁹⁰

5.4 Prohibited Grounds of Disciplinary Action

Article 5 of the convention provides a list of grounds that are not considered sufficient for an employee to either be suspended or dismissed. The grounds mentioned are i) Participating in union activities outside working hours and within the premises of the employer or the premises of the employer but with the consent of the employee, ii) Seeking office as a worker's representative or acting as a union representative, iii) Race, sex, political opinion, social origin, iv) Absence from work during maternity leave and absence from work due to compulsory military obligations.⁹¹

5.5 Right to Defend Oneself Before the Employer

The convention, at article 7 recognizes the right to be brought before a disciplinary committee that is constituted by the employer. The disciplinary committee serves the purpose of providing the employee with a chance to prove that they were not in the wrong. The convention further requires the employer to read out all the allegations levelled against the employee and further an internal appeal mechanism provided by the employer should be available. This ensures that all local remedies are exhausted at the workplace before an employee decides to go to court for unfair suspension or termination of employment.

⁸⁹ Note on Convention No 158 and Recommendation No 166 Concerning termination of employment' -, on 28th December, 2020.

⁹⁰ Business Reporter, 'Stanchart Kenya to Lay off 14%of Workforce Amid Covid 19', The Kenyan Wall Street ,12 November 2020-< <https://kenyanwallstreet.com/stanchart-kenya-to-lay-off-14-of-workforce-amid-covid-19/>> on 28th December 2020.

⁹¹ Article 5, Discrimination (Employment & Occupation) Convention.

5.6 Maternity Protection

Employers may view expectant mothers as a liability and instead of allowing them their maternity leave as provided by the law, they view administrative suspension as an escape route, and hence, they go unpaid during the period in which they are not working. The ILO envisaged such a kind of situation and hence, came up with instruments that prohibit employers from discriminating against expectant women.

5.61 Maternity Protection Convention, 2000 (No183)

Provides 14 weeks of maternity protection. Women who are on maternity leave are entitled to pay and are not required to perform work that is harmful to their health. States are also required to prohibit the suspension or summary dismissal of expectant women. The burden of proof that the suspension or dismissal was not because of pregnancy reasons shall lie on the employer.⁹² After the maternity leave, protection shall continue which will have the effect of returning the women to the same position as they were before the pregnancy.⁹³

ILO ADMINISTRATIVE TRIBUNAL AT A GLANCE

P v EPO⁹⁴

In this matter, the complainant challenges the decision of the European Patent Organization (EPO) to suspend him from duties and to downgrade him. He was appointed as a member of the Internal Appeals Committee (IAC) as a member and there is a time he was unable to perform his duties because he was on strike. The complainant was then further informed of a decision to suspend him from active duty by the president of the EPO. The period of suspension was indefinite as he was suspended until further notice. The grounds of the suspension were refusal to participate in the work of the IAC and his conduct which was mainly aimed at disrupting the work of the IAC which is a violation of his official duties and consequently amounting to misconduct.⁹⁵

The disciplinary committee was established, and it concluded that the complainant was not guilty of misconduct by participating in a strike for half a day and by not attending sessions of the IAC. The disciplinary committee then recommended the disciplinary measure of

⁹² Article 8(1), Maternity Protection Convention, 2000, UNTS 183.

⁹³ Article 8(2), Maternity Protection Convention, 2000.

⁹⁴ P v EPO, ILO Administrative Tribunal, 125th Session, No 3971.

⁹⁵ P v EPO, ILO Administrative Tribunal, 125th Session, No 3971.

relegation to be taken against the complaint. The president then informed the disciplinary committee that he would not go by their decision to relegate him, but he would impose a suspension, a ban from entering the EPO's offices, and downgrade him. The claimant, therefore, moved to the ILO tribunal so that the ban and suspension can be set aside. The tribunal dismissed the complaint because due process was followed and even though the president overruled the disciplinary committee's ruling that failure to attend the IAC meetings does not amount to misconduct, the president argued that one of the roles of the IAC members is sitting and listening to appeals and grounds like illness are the only ones that can excuse one from attending the hearings. The complaint was therefore dismissed.⁹⁶

As has been seen in the above case by the ILO administrative tribunal, firstly, the employee was brought before a disciplinary committee and allowed a lawyer to defend him. This happened after his suspension was in force. The disciplinary committee sat, and the findings were forwarded to the president of the EPO. The president overturned the findings, and the complainant went on to the ILO Administrative Tribunal. The Tribunal listened to both sides and held that the complainant had not exhausted internal remedies before approaching the tribunal and therefore the complaint was dismissed. This is a good example of how procedural the question of suspension is.

Conclusion

This chapter has witnessed how International law deals with the question of employee suspension and dismissal. It has a stinger legal framework than what we have in Kenya and hence, our legal framework should be strengthened to be at par with standards set by the International Labour Organization.

⁹⁶ P v EPO, ILO Administrative Tribunal, 125th Session, No 3971.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

As has been brought out in the discussions above, employment contracts are entered freely by two or more people, who have different rights and duties. Discipline is paramount for both parties in such a relationship and hence, an employer reserves the right to discipline employees on the wrong. Employees also have the right to equally put checks on their employers whenever they feel discriminated against. This can be achieved through legal action in court or industrial action like strikes and boycotts. It is important to also note that employment contracts are anchored on the principle of freedom of contract and hence, whenever an employee feels discriminated against and would like to leave the employment relationship, they are free to resign, subject to compliance with the employment contract, for example, issuing notice when needed.

During an employment relationship, situations may arise where an employee becomes in disciplined and therefore, employers retaliate by imposing different disciplinary measures on them. Therefore, it is common practice for employers to suspend employees. During suspension, the contract has not been terminated *in toto* but rather is a cessation of duties for a short time. However, in the process, employers become tough-headed and use this as an avenue of summary-dismissal by sending employees on indefinite suspensions without pay. The employee may stand suspended, but the life and family of the employee are not suspended. There is also the issue of grounds that are acceptable for a suspension to be in place. Employers sometimes become unfair by suspending expectant women without pay as they are a liability.

Employee suspensions can also be done for administrative reasons basically to ensure that the business is running smoothly without any hitches. In Kenya, employees are arbitrarily suspended without the right to a fair hearing or even being brought before a disciplinary committee. This is also the issue of grounds that are acceptable for a suspension to be in place. Employers sometimes become unfair by suspending expectant women without pay as they are a liability.

Employee suspensions can also be done for administrative reasons basically to ensure that the business is running smoothly without any hitches. In Kenya, employees are arbitrarily suspended without the right to a fair hearing or even being brought before a disciplinary committee. This is unfair on the employee as most of the time, employees' fate is on the

employer. Therefore, there is a lacuna in the legal framework of employee suspensions.

6.2 Recommendations

From the discussions above, this study comes with a few recommendations that are aimed at providing more clarity on the way employee suspensions are handled. The Employment Act must be amended as it gives employers too much power. Firstly, on the issue of payment of salaries, there is still no settled way of approaching the matter. Three alternatives are available to the employers, either to pay full salaries, to pay half salaries, or not to pay. Courts have ruled that it is a violation of the employees 'rights not to pay them during a suspension as they are still legally employed, the only bone of contention is that they are not performing their duties.'⁹⁷Indefinite suspensions go hand in hand with pay and in situations where employers send their employees on indefinite suspension without pay, it is tantamount to dismissal and this should be outlawed. The courts should also be quick to grant damages to employees that have been unfairly suspended. Furthermore, section 19 of the Employment Act is quite clear on the situations that shall amount to deduction of employee salaries and suspension is not one of the listed grounds.⁹⁸

Furthermore, if suspension is imposed as a disciplinary sanction, substantive and procedural fairness should be followed. Statement of disciplinary rules may vary from employer to employer and hence, may lack provisions for substantive and procedural fairness. The employment Act must therefore be expanded to provide for a special procedure that deals with employee discipline. The first process should be an oral warning, which is followed by a written warning, after the written warning and no change is noted, a show-cause letter is written to the employee. After the show cause letter is written and replied to by the employee, the employer may stop from there or take disciplinary action against the employee.

Disciplinary action should be initiated by a suspension that has a defined period. During the suspension, the employer should hold a disciplinary hearing which should be constituted in a way that an employee can come with a lawyer and a fellow employee. At the hearing, they should be allowed to defend themselves and then a decision of the hearing comes out expeditiously. The employer should also have appeal mechanisms that assist employees who feel they may have been discriminated against during the hearing. This way, all the internal remedies would have been exhausted procedurally and it will be a fairer approach to dealing

⁹⁷ Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR.

⁹⁸ Section 19, Employment Act (2012).

with employee suspension.

In conclusion, it is quite evident that a stronger legal framework is needed for employee suspension because a lot of injustices occur both on the side of the employer and employee.

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