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a case for Employment Act rules to
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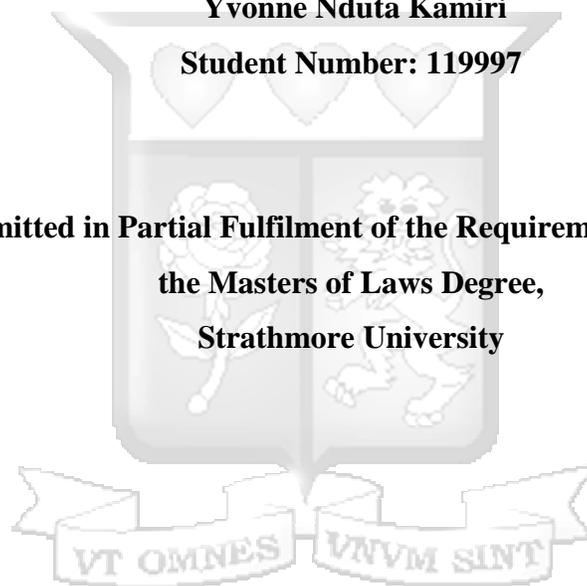
**Equal Remuneration for Work of Equal Value: A Case for Employment Act Rules
to Promote Gender Pay Equity in Kenya.**

By

Yvonne Nduta Kamiri

Student Number: 119997

**A Thesis Submitted in Partial Fulfilment of the Requirements for The Award of
the Masters of Laws Degree,
Strathmore University**



Masters of Laws

Strathmore University

December, 2021

DECLARATION

I, **Yvonne Nduta**, declare that this thesis which I submit for the degree of Master of Laws at Strathmore University Law School, is my original work and has not previously been submitted for a degree at another University.

Signature  Date: 17th November, 2021

APPROVAL

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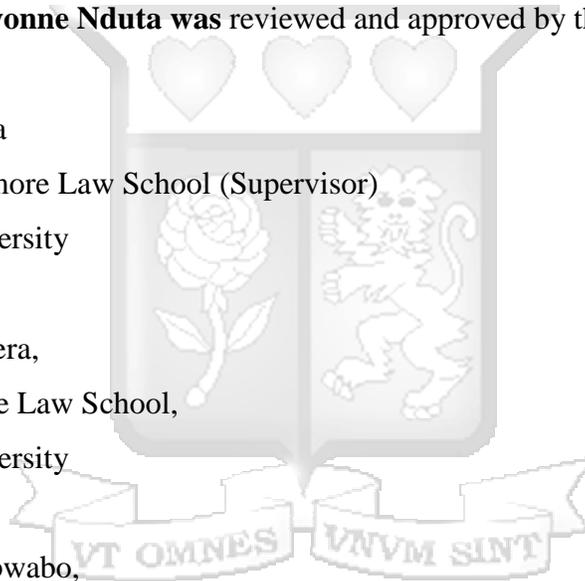
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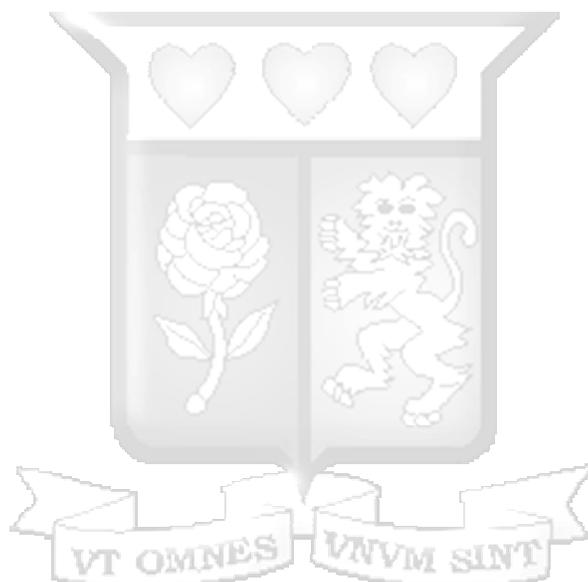
DEDICATION

This thesis is dedicated to my husband Crispin Kinini for your optimistic support. To my family, friends and colleagues thank you for your prayers, time, support, and encouragement.



ACKNOWLEDGEMENT

My gratitude goes to my supervisor Dr. Jane Wathuta for her counsel in the preparation of this thesis. I also thank my LLM lecturers, the SLS administration staff and class colleagues for their great insights that contributed to the shaping of this thesis.



LIST OF CASES

Kenyan Case Law

Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others (2018) eKLR.

David Wanjau Muhoro v Ol Pejeta Ranching Limited (2014) eKLR.

Erastus K Gitonga & 4 others v National Environmental Management Authority; Law Society of Kenya (Interested Party) (2019) eKLR.

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinions Application 2 of 2012 (2012) eKLR.

Kenya Association of Health Administrators v Salaries and Remuneration Commission & 3 others; Kenya Health Professionals Society & another (Interested Parties) (2021) eKLR.

Koki Muia v Samsung Electronics East Africa Limited (2015) eKLR.

Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) Eklr

South African Case Law

Chemical Workers' Industrial Union v Johnson & Johnson (Pty) Ltd. (1997) 9 BLLR 1186, Labour Court of South Africa.

Co-Operative Worker Association and Another v Petroleum Oil & Gas Co-Operative of SA and Others (2006) ZALC 83; [2007] 1 BLLR 55, Labour Court of South Africa.

DM Sethole and 18 Others v Dr Kenneth Kaunda District Municipality JS 576 / 13 (2017), Labour Court of South Africa.

Harksen v Lane NO and Others (CCT9/97) (1997) ZACC 12; 1997 (11) BCLR 1489, Labour Court of South Africa.

Lagadien v University of Cape Town (C489/98) (2000) ZALC 107 (2000), Labour Court of South Africa.

Louw v Golden Arrow Bus Service (Pty) Ltd. (C 37/97) (1999) ZALC 166 (1999), Labour Court of South Africa.

Ntai & Others v South African Breweries Limited (J4476/99) (2000) ZALC 134, Labour Court of South Africa.

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SA Chemical Workers Union v Sentrachem Ltd (J789/99) (1999) ZALC 180, Labour Court of South Africa.

Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others (JR1501/17) (2019) ZALCJHB 31; (2019) 7 BLLR 733 (LC); (2019) 40 ILJ 1873, Labour Court of South Africa.

Unitrans Supply Chain Solutions (Pty) and Another v Nampak Glass (Pty) Ltd and Others, (J195/14) (2014) ZALCJHB 61; (2014) 35 ILJ 2888, Labour Court of South Africa.

Woolworths (Pty) Ltd v Whitehead (CA06/99) (2000) ZALAC, Labour Appeal Court of South Africa.

LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
LLM	Master of Laws
UN WOMEN	United Nations Entity for Gender Equality and the Empowerment of Women



LIST OF STATUTES

KENYA

1. The Constitution of Kenya, 2010.
2. The Employment Act, 2007.

SOUTH AFRICA

1. The Constitution of the Republic of South Africa, 1996.
2. The Employment Equity Act, 2013.

INTERNATIONAL TREATIES AND CONVENTIONS

1. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).
2. Discrimination (Employment and Occupation) Convention, No. 111
3. Equal Remuneration Convention (No. 100).
4. Employment Equity Regulations.
5. Treaty of Peace of Versailles

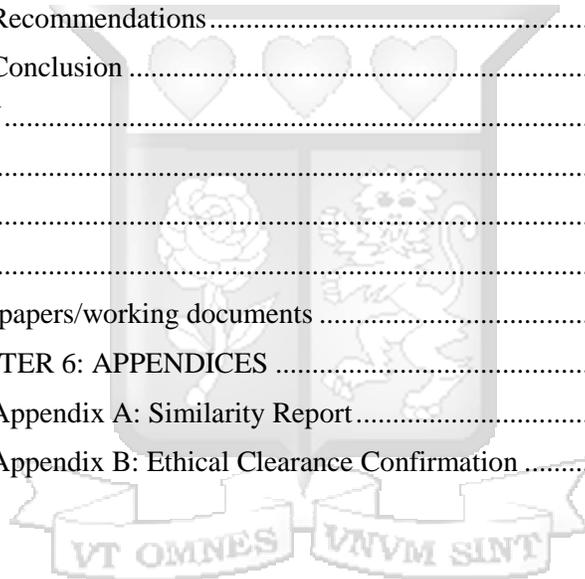
ABSTRACT

Article 27 (3) of the Constitution of Kenya, 2010 stipulates the right to equal treatment between men and women in political, economic, cultural, and social spheres. In addition to this Section 5(5) of the Employment Act, 2007 details the principle of equal remuneration for work of equal value, between men and women, this is referred to as gender pay equity. It is evident from several studies that have been conducted, that gender pay equity, has proved difficult to achieve in most countries in the world, Kenya included resulting in gender pay gap. To mitigate the effects of the gender-pay gap, it is imperative to evaluate provisions in the law, in order to discover whether they strengthen or limit the gender pay equity principle. This study, therefore, sought to assess the sufficiency of Kenyan Law in respect of gender pay equity and to explore the need for rules to the Employment Act, in a bid to promote gender pay equity. A comparative methodology approach between Kenya and South Africa, was relied on to analyse the South Africa's legislation, regulations, code of good conduct and case law. The findings from this comparison illustrate that there were several gaps in the formulation of Kenya's Employment Act, 2007, which limit its effectiveness in being applied to implement gender pay equity in Kenya. Further, together with other studies on gender pay equity in the workplace, this study underscores the need for legislative reforms through the enactment of rules that should be formulated to address the gaps identified in Kenya's legislation on gender pay equity.

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Strathmore University

School of Graduate Studies

CERTIFICATE OF FINAL VERSION OF THESIS

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DECLARATION

We, the undersigned, agree and certify that this is the final version of the thesis, and no further alterations will be made.

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Yvonne Nduta Kamiri		17 th November, 2021
Principal Supervisor	Signature	Date 18 th November, 2021
Co- Supervisor	Signature	Date 18 th November, 2021
Dean, School of Graduate Studies	Signature	Date 18 th November, 2021

1 CHAPTER 1: INTRODUCTION

1.1 Background

The promulgation of the Constitution of Kenya, 2010 on 27 August 2010, which contains a comprehensive bill of rights¹, was the culmination of a struggle for constitutional reforms in Kenya on the protection of human rights and enhancement of equality.² Notably, in terms of gender equality, Article 27 of the Constitution, 2010 provides for the right to equal treatment between men and women in political, economic, cultural, and social spheres, while Article 41 states that every worker has the right to fair remuneration.³ In addition to this Section 5(5) of the Employment Act, 2007 details the principle of equal remuneration for work of equal value, which included pay between men and women, this is referred to as gender pay equity.

Despite the legislative gains the country has made in enhancing equality, gender disparities are evident in various sectors, inter alia property ownership and inheritance, matrimonial property retention in divorce, elected and nominated positions in politics.⁴ With this backdrop of the gender gaps in various sectors, it is no surprise that Equileap in partnership with the Nairobi Securities Exchange (NSE) conducted a study in respect of all sixty-one public listed companies in Kenya, which indicates that Kenya's average score in gender equality in the workplace is 26%⁵, with women earning 32% less than men. Also, the 2020 Human Development Report (HDR) indicates that, while Kenyan men earned an estimated gross income (GNI) of \$4,829 women earned \$3,666.⁶

As will be seen in more detail in the literature review and gender pay gap theories these studies on the gender pay gap have been criticised for relying on, limited global data with many

¹O'Loughlin E, 'Kenya's Constitution in a global context' *International Journal of Constitutional Law*, 2017, 839–848— <https://doi.org/10.1093/icon/mox062> on 14 August 2021

²Overseas Development Institute, *Women and power Shaping the development of Kenya's 2010 Constitution*, 1-7, <https://cdn.odi.org/media/documents/10338.pdf> on 10 April 2019.

³Article 27 (3), the *Constitution of Kenya* (2010).

⁴Kameri- Mbote P, 'Fallacies of Equality and inequality multiple exclusions in law and legal discourses' *International Environmental Law Research Centre*, 2013, 15-21 —<<http://www.ielrc.org/content/w1301.pdf> on 12 April 2019

⁵Gender Equality in Kenya Assessing 60 leading companies on workplace equality https://equileap.com/wp-content/uploads/2019/11/Gender-equality-in-Kenya_Special-report-by-Equileap.pdf on 13 August 2021.

⁶The Next Frontier: Human Development and the Anthropocene, Human Development Report, 2020,5.

incomparable variables such as age, sex, education and skills, differing employment sectors and economic situations, to arrive at their findings⁷. However other scholars such as Bolotnyy indicate that even in a controlled environment where critical data such as, the similarity of work tasks, where wages are calculated at a fixed rate per hour which does not change despite an employee being male or female, is readily available, there still exist a wage gap to men's favour.⁸

It is due to these gender pay differentials that the question as to whether there is attainment of gender pay equity and the underlying reasons where gender pay equity has not been attained, in law and in fact, has been the subject to intense scholarly deliberations in many countries, Kenya included.

In a comparison with Kenya, South African has enacted legislation on gender pay equity in the form of the Employment Equity Act, 2013, the Employment Equity Regulations, 2014 and the Code of Good Practice on Equal Pay /Remuneration for Work of Equal Value. These regulations provide criteria for accessing gender pay equity, such as: requiring employers to provide criteria for evaluating male and female-dominated jobs. Employers are therefore required to conduct objective job appraisals based on criteria such as responsibility, working conditions, skills and effort required. These evaluations culminate in a report and plan where employers have to indicate how they will progressively align the remuneration of female-dominated jobs with comparable male-dominated jobs in the organisation. Kenya can learn from South Africa by enacting rules to the Employment Act, 2007 similar to what has taken place in South Africa which will aid in the implementation of gender pay equity.

⁷ Bolotnyy V, Emanuel N, 'Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators.' Forthcoming, Journal of Labor Economics Harvard University, Working Paper, 2018 https://scholar.harvard.edu/files/bolotnyy/files/be_gendergap.pdf on 12 November, 2021.

⁸ Bolotnyy V, Emanuel N, 'Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators.' Forthcoming, Journal of Labor Economics Harvard University, Working Paper, 2018 https://scholar.harvard.edu/files/bolotnyy/files/be_gendergap.pdf on 12 November, 2021.

1.1.1 Conceptual Framework

The concept of gender pay equity is not a recent concept, as it had been acknowledged internationally by the International Labour Organisation as early as 1919 in the Seventh principle of Article 427 of the Treaty of Versailles.⁹ This principle of equal remuneration for work of equal value is based on certain key concepts which need further explanation as they are key to this thesis.

1.1.1.1 Gender

Scholarly works are in agreement that there is no agreed definition of Gender as there are various modes of considering the meaning of gender including *gender as sex/biological* differentiation, *gender as societal differentiation* and *gender identity or personal perception*. On gender as synonymous with sex, scholars such as Dr. Paul R. Mchugh, a Professor of Psychiatry at Johns Hopkins University, posit that gender and sex are synonymous as sex is not assigned, it is objectively recognizable based on biology at birth.¹⁰ Further, the United Nations Entity for Gender Equality and the Empowerment of Women (UNWOMEN) identifies with this as it defines gender as referring to both women and men which is a cross-cutting socio-cultural variable.¹¹

Simone de Beauvoir progresses the perspective of gender as societal differentiation, meaning in society women are defined and differentiated in relation to men.¹² Thus she theorised that, based on this, people end up acting in pre-defined roles in society. This theory is supported by others on the Gender role spectrum who view gender as behaviour that is socially prescribed in both men and women, and often this behaviour is stereotyped behaviour.¹³ However, this theory has been criticised as assuming away physical, political and other differences between men and women that are not based on social norms and thus aiming at equality of treatment of the sexes

⁹ Article 427, Treaty of Peace of Versailles, April 1919, Volume 1.

¹⁰ Harris Funeral Homes, Inc. V. Equal Employment Opportunity Commission and others (2018), The Supreme Court of The United States.

¹¹ <https://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf> on 14 August 2021.

¹² Barnett H, Introduction to feminist jurisprudence, Cavendish Publishing Limited, London, 1998, 3-4.

¹³ Bullough V, 'The Contributions of John Money: A Personal View' Taylor & Francis, Ltd, 2003, 230-236.

which is not possible as these differences necessitate equity¹⁴.

Lastly, gender can be considered from the gender identity standpoint as indicated in a study by Dr. John Money based on his 1966 study of male identical twins, the Reimer Twins, one of whose male genital organs had been destroyed during infant circumcision.¹⁵ Dr. Money advised the parents to castrate the boy and raise him as a girl, which they did, and he studied the development of the twin's side by side and reported that the boy had successfully adapted a feminine identity. He concluded that gender identity is the perception that a person has about his or her gender, either female, male or ambivalent.¹⁶ This conclusion has been countered by other medical professionals notably Dr. Diamond who countered that socialisation cannot override biological identity. In his study of the Reimer twins in 1997¹⁷ Dr. Diamond found that Dr. Money's experiment had failed as the child raised as a female had preferences that were discordant with feminine behaviour despite his parents requiring and encouraging feminine behaviour from him and had returned to a male name and living their life as a male.¹⁸

This thesis ascribes itself to the conclusion of Dr. Diamond in his study that individuals are not psychosexually neutral at birth. This means that gender is determined by the XX or XY chromosomes that a person is born with and therefore, reference to gender in this study is either male or female.

¹⁴ Dietz M, 'Introduction: Debating Simone de Beauvoir', The University of Chicago Press Vol. 18, No. 1 (Autumn, 1992), pp.74-88, <https://www.jstor.org/stable/3174727>, on 12 November 2021

¹⁵ Gaetano, Phil, 'David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case', Arizona State University, Embryo Project Encyclopedia, <https://embryo.asu.edu/pages/david-reimer-and-john-money-gender-reassignment-controversy-johnjoan-case>, on 12 November 2021.

¹⁶ Bullough V, The Contributions of John Money: A Personal View, 230-236.

¹⁷ Diamond M, Sigmundson H, 'Sex Reassignment at Birth: A Long-Term Review and Clinical Implications' 151 Archives of Pediatrics and Adolescent Medicine 3, 1997, 298-304.

¹⁸ Diamond M and Sigmundson H, Sex Reassignment at Birth: A Long-Term Review and Clinical Implications, 298-304.

1.1.1.2 Gender Equality

Gender equality has been defined as referring to rights, responsibilities and opportunities of males and females, not from a perspective that females and males will become the same, but that female's and male's rights, responsibilities and opportunities will be objective, that is, not depend on whether they are born male or female.¹⁹ The definition of gender equality by UNWOMEN provides that equality between men and women should be in terms of quantitative and qualitative aspects.²⁰ The UNWOMEN notes in its concept definitions that the quantitative is underscored by the aim to achieve equitable representation of women – increasing balance and parity, while the qualitative aspect refers to achieving equitable influence on establishing development priorities and outcomes for women and men. The UNWOMEN advocates that the rationale for gender equality is not just human rights and social justice based but also the promotion of equality assists in suitable development for all in society.

The Constitution of Kenya, 2010 at Article 20(4) lists equality and equity as key principles of interpreting the bill of rights for all Kenyans and Article 27(3) which provides for the right to equal treatment between men and women in opportunities in politics, economic opportunities, cultural and social spheres.²¹ In this thesis, the use of the term gender equality is used to describe the right to qualitative and quantitative aspects of equal opportunity and remuneration in employment between men and women.

1.1.1.3 Gender Pay Equity

Gender pay equity is defined as the principle that not only should the jobs that are the same be paid equally, but also that jobs that are not the same, but of equal value should be paid the same.²² Gender Pay Equity in employment has been a key concern for many countries, as research has shown the existence of the gender pay gap, that is, the difference in men's and women's average

¹⁹ [OSAGI Gender Mainstreaming - Concepts and definitions \(un.org\)](#) on 13 August 2021.

²⁰ <https://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf> on 14 August 2021.

²¹ Article 27 (3), *Constitution of Kenya* (2010).

²² Oelz, M., Olney, S., & Tomei M, 'Equal pay: An introductory guide' Cornell University ILR School, (2013) [Equal Pay: An Introductory Guide - CORE Reader](#) on 12 April 2021.

earnings reported as a ratio or actual gap between the sexes.²³ The UNWOMEN reports that globally, women only make 77 cents for each dollar men earn.²⁴ This gender pay gap exists despite the evidence that, for example, financial institutions with more women leaders have higher capital buffers, lower non-performing loans, and lower instances of distress.²⁵ Further several studies have been conducted which prove the benefits of pay equity as this results in increased reputation and attractiveness to new employees, improved labour relation and lower legal costs with employees as there are fewer confrontations between staff and employers on remuneration and higher employee retention rates by employers as the correct employee are recruited, have jobs satisfaction due to equity.²⁶ This shows that having inclusive policies in the employment sector is of monetary benefit to employees, employers, and the country as a whole.

This is the principle of equity is provided for in Kenyan law under Section 5 of the Kenya Employment Act, 2007 which requires that an employer shall pay his employees equal remuneration for work of equal value. This thesis will analyse this provision of the law and its implementation in Kenya's employment sector, specifically for the formal private sector.

1.1.1.4 Remuneration

Remuneration is defined in Article 1 of the Equal Remuneration Convention No. 100 to include the ordinary, basic, or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment²⁷. The Convention aims at giving the term as wide an interpretation as possible to cover all benefits, monetary or in-kind, which an employee derives from employment, not just the basic pay package that may be specified in an employee's payslip. Kenya's Employment Act, 2007 has borrowed from this definition as Section 2 of the Act defines

²³ Directorate-General for Employment, Social Affairs and Equal Opportunities Unit, *Legal Aspects of the Gender Pay Gap Report by the Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women*, 2007, 6.

²⁴ <https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures#notes> on 26 May 2019.

²⁵ Sahay R, Čihák M, Women in Finance: A Case for Closing Gaps, <https://www.imf.org/~media/Files/Publications/SDN/2018/SDN1805.ashx>, on 10 April 2019.

²⁶ Chicha, M'A comparative analysis of promoting pay equity: models and impacts' International Labour Office Declaration Working Paper No. 49,2006, 37-39, - https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_decl_wp_27_en.pdf on 12 November 2021.

²⁷ Article 1, Ratifications of C100 – Equal Remuneration Convention.

remuneration as the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee²⁸. The term remuneration is used interchangeably with pay in this thesis to indicate all emoluments that an employee is entitled to.

1.2 Problem Statement

In Kenya, gender disparities are evident in various sectors inter alia property ownership and inheritance, matrimonial property retention in divorce, right to bury the spouse, elected and nominated positions in politics²⁹ and in respect of employment opportunities.³⁰ It is with this background in mind that research has been done on the state of gender pay equity in Kenya. This research such as the one conducted by Equileap in partnership with the Nairobi Securities Exchange (NSE) in respect of all sixty-one public listed companies in Kenya, indicates that Kenya's average score in gender equality in the workplace is 26%³¹, with women earning 32% less than men. Also, 2020 Human Development Report (HDR) indicates that, while Kenyan men earned an estimated gross income (GNI) of \$4,829 women earned \$3,666.³²

As indicated earlier though studies on gender pay gap may be criticised for relying on, limited data to arrive at their findings³³. However, studies such as that conducted by Bennedsen indicate that, rather than criticising gender pay gap studies for lacking information, this limitation is an indication of the need for government-mandated reporting on gender pay discrepancies.³⁴ This study concludes that such government reporting mandates can be effective in ensuring employers

²⁸Section 2, Employment Act (Act No. 11 of 2007).

²⁹ Kameri- Mbote P, 'Fallacies of Equality and inequality multiple exclusions in law and legal discourses' *International Environmental Law Research Centre*, 2013, 15-21 -<<http://www.ielrc.org/content/w1301.pdf> on 12 April 2019.

³⁰ Muchangi D, Kerre F and Kalei A, 'Impact of Kenyan New Labour Laws On Gender Disparities In Industrial Occupations In Kenyan Organizations and The Respective Trade Unions' 3 *International Journal Of Economics 7, Commerce And Management, United Kingdom July 2015*, -<<http://ijecm.co.uk/wp-content/uploads/2015/07/3725.pdf>>, on 25 July, 2019.

³¹ Gender Equality in Kenya Assessing 60 leading companies on workplace equality https://equileap.com/wp-content/uploads/2019/11/Gender-equality-in-Kenya_Special-report-by-Equileap.pdf on 13 August 2021.

³²The Next Frontier: Human Development and the Anthropocene, Human Development Report, 2020,5.

³³ Bolotnyy V, Emanuel N, 'Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators.' Forthcoming, *Journal of Labor Economics Harvard University, Working Paper, 2018* https://scholar.harvard.edu/files/bolotnyy/files/be_gendergap.pdf on 12 November, 2021.

³⁴ Bennedsen M, Simintzi E, Tsoutsoura M and Wolfenzon D, 'Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them' *Harvard Business Review, Gender Pay Gaps, 2019* https://valored.it/wp-content/uploads/2019/03/2019_HarvardBusinessReview_GenderPayGaps_23Jan2019.pdf , on 12 November, 2021

are encouraged to ensure gender pay equity in their institutions to avoid legal suits and reputational risk damage that arise from negative reports.

The preceding information means that despite the Constitution of Kenya 2010 specifying gender equality and Section 5 (5) of the Employment Act, 2007 providing for the principle of gender pay equity, Kenya is yet to achieve gender pay equity. In addition to this, as will be seen in this thesis, there are no legal criteria on how pay equity is to be implemented by employers as well as reporting mandate on gender pay equity. This means that there is a need to go beyond providing for the principle of pay equity by having rules on how this principle should be implemented by employers. It is hoped that such clarity, will in turn aid in the promotion of gender pay equity and reduce the gender pay gap detailed in the studies above. It is for this reason that this author thought it imperative to undertake a comparative approach between Kenya and South Africa to draw lessons that Kenya can rely on in enacting its rules on gender pay equity.

1.3 Hypothesis

This study was premised on the hypothesis that the Kenya Employment Act, 2007, is not clear on the implementation criteria of the principle of equal pay for work of equal value, a principle that underpins gender pay equity and consequently, is an obstacle to achieving gender pay equity in the country.

1.4 Research Objectives

- (i) To demonstrate that current legislation in Kenya falls short of providing clear criteria on the implementation of gender pay equity by employers.
- (ii) To conduct a comparative study between Kenyan and South African law on gender pay equity and its implementation criteria.
- (iii) To make recommendations on the legislative reforms that may be undertaken to address the gaps identified in Kenya's legislation on gender pay equity implementation by employers.

1.5 Research Questions

The research questions to be considered in this study are that:

- (i) How does current legislation in Kenya fall short of providing clear criteria for employers in implementing gender pay equity?
- (ii) What lessons can be drawn for Kenya, from South African legislation and case law on the criteria for implementing gender pay equity by employers?
- (iii) What recommendations can be made on possible legislative reforms that Kenya may undertake to address any identified gaps in Kenya's legislation on gender pay equity implementation?

1.6 Approach and methodology

This study relied on desktop research in the form of comparative methodology that examined legislation, case law/judicial decisions, principles, norms, guidelines from secondary sources of information based on materials including books, journals, newspaper articles, publications, reports, and commentaries. The research adopted a historical approach where consideration was given to the gender pay gap from the perspective of various theories and the Kenyan legislative context. Comparative methodology research was employed to give a comprehensive comparison between South Africa and Kenya in respect of laws, regulations, government guidelines, and case law in both countries. This approach was preferred in order to identify gaps in Kenyan legislation on gender pay equity and recommend the legislative reforms that may be undertaken by Kenya to address these gaps and enhance the implementation of gender pay equity.

1.7 Limitations and scope of the study

This study hinged on desktop analysis of the legal framework on gender pay equity from secondary sources such as texts, existing laws, and courts' jurisprudence in Kenya and South Africa. The scope of the study is limited to Kenya's private sector in respect of formal employment. This is due to the fact that there are no regulations on wages or remuneration in the

informal sector and limited data on remuneration employment in the informal sector.³⁵ Also the remuneration for public sector employees is determined by the Salaries and Remuneration Commission of Kenya which was established by Article 230, of the Constitution of Kenya, 2010. The Commission periodically reviews and sets remuneration of the public sector in a manner that ought to be fiscally sustainable and generally devoid of gender bias, as the pay grade and benefits involved are set for all employees not negotiated at employment on a case by case basis.³⁶ This study concentrates on the private sector as there are no standards of remuneration which cover all roles in the sector and as has been highlighted in studies on employment in the formal sector.³⁷ This lack of regulations on remuneration for all roles in the private sector leaves female employees exposed to employer bias towards men as has been observed in several studies to inhibit gender pay equity.³⁸

Further, due to time constraints, primary data collection was not possible which impeded the authors' ability to gather the views of key stakeholders like employers, employees, women's rights activists, and regulators on gender pay equity in Kenya's formal employment in the private sector, which would have further enriched this research.

1.8 Literature Review

In respect of the global history of women's campaign for equal pay, Davis notes that written accounts of the demand for gender pay equity in the United Kingdom can be traced to several incidences such as the 1832 strike by women in the Women Power Loom Weavers Association in Glasgow and publications in journals such as the Pioneer in 1834 in which women stated that low wages were due to the tyrannical will of male supremacy.³⁹ This agitation for pay equity

³⁵ Juma T, Onah E, 'Remuneration Policy and Inequalities in Kenya, a Source of Labour Wars: Borrowing From Global Lessons' International Journal of Social Relevance & Concern, Volume 4 Issue 5 May, 2016 <https://ssrn.com/abstract=2780281>, on 12 November, 2021

³⁶ Andati R, Otuya W, 'A Critical Review of Literature on Labour Relations and Employee Performance in Kenya after the Promulgation of 2010 Constitution' American Based Research Journal, Vol-8-Issue-12,2019, [American Based Research Journal Vol-8-Issue-12 Dec-2019 ISSN \(2304-7151\) \(ssrn.com\)](https://www.americanbasedresearchjournal.com/vol-8-issue-12-2019/american-based-research-journal-vol-8-issue-12-dec-2019-issn-2304-7151-ssrn-com), on 12 November, 2021.

³⁷ Mwange N, Onsomu E and Wanjala B 'Wage Disparities in the formal sectors: Policy Options for Kenya' Policy Analysts, Kenya Institute for Public Policy Research and Analysis, 2015, <http://repository.kippra.or.ke/handle/123456789/2896>, on 12 November, 2021

³⁸ Kabubo-Mariara J, 'Wage determination and the gender wage gap in Kenya, African Economic Research Consortium' AERC Research Paper Number 132, 2003 — <https://aercafrica.org/wp-content/uploads/2018/07/rp132.pdf>, on 15 April 2021.

³⁹ Davis, M 'An historical introduction to the campaign for equal pay' Unionhistory.info.

continued in the United Kingdom until the 1970 Equal Pay Act was given Royal Assent on 29th May, 1970.⁴⁰

Devine reiterates that these campaigns for gender pay equity were also concurrently happening in the United States, as the 19th century also saw public demands for pay equity including the publication of a letter in the New York Times which questioned why female government employees in the US Treasury Department earned less than their male counterparts.⁴¹ Further in 1911 the New York teachers after a period of agitation were granted equal pay to their male colleagues by the New York Board of Education.⁴² This and several efforts by various women's rights groups as well as Trade Unions culminated in the United States Congress passing the 1963 Equal Pay Act.⁴³ This push for gender pay equity by women's rights activists in the United Kingdom and the United States did have an influence on women's rights activists in Kenya.

House-Midamba contends, that in Kenya, the history of recognition of women in the formal employment sector through legislation, can be traced back to the now-repealed, The Employment of Women, Young Persons, and Children Act, Chapter 227 of the Laws of Kenya. This Act was criticised as it equated Women with minors who legally could not make independent decisions for themselves and prohibited among other things the employment of a woman between the hours of 6.30 p.m and 6.30 a.m. without the permission of the Minister of Labour.⁴⁴ This legislation was repealed by the Employment Act of 1976 which made all jobs legally open to women and as time progressed the new Employment Act of 1979 provided for two months of paid maternity leave for female employees. This was followed several years later by the Employment Act 2007 which now provides for equal remuneration for work of equal value under Section 5.

⁴⁰ Furgerson D, Devine BF, '50 years of the Equal Pay Act', House of Commons Library, May 2020 - <<https://commonslibrary.parliament.uk/50-years-of-the-equal-pay-act/>> on 14 September 2021.

⁴¹ Alter C, 'Here's the History of the Battle for Equal Pay for American Women,' Time Magazine, 14 April 2015, - <<https://time.com/3774661/equal-pay-history/>> on 14 September 2021.

⁴² American Business Women's Association, 'A brief history of women's struggle for equal pay', Bizwomen: The Business Journals, 1 April 2016, - <<https://www.bizjournals.com/bizwomen/channels/partners/American-Business-Womens-Association/2016/04/a-brief-history-of-womens-struggle-for-equal-pay.html?page=all>> on 14 September 2021.

⁴³ History.com Editors, 'Equal Pay Act,' A&E Television Networks, 30 November 2017, - <<https://www.history.com/topics/womens-rights/equal-pay-act>> on 14 September 2021.

⁴⁴ Bessie HM, The Legal Basis of Gender Inequality in Kenya, *African Journal for International and Comparative Law* 850, 1993, 6.

Despite the progress in the law, several studies including the Equileap study detailed above and the 2020 Human Development Report (HDR) indicates that, while Kenyan men earned an estimated gross income (GNI) of \$4,829 women earned \$3,666⁴⁵, have brought to light that there is a lack of gender pay equity in Kenya. Several reasons have been advanced for this gender pay gap, including gender differences in education in Kenya. Agesa posits that there exists a considerable difference in gender access to education in this country, and therefore it is not surprising that this low enrolment rate of girls in school coupled with low completion rates result in lower earnings for women versus men in Kenya.⁴⁶ Agesa further notes that there is compelling evidence that despite more women being educated the return for women is still lower than men, which indicates that the gender wage gap is due to discrimination against women. This was corroborated in a later study by Kabubo, in which it was observed that there is employer preferences or bias towards men.⁴⁷ Kabubo further concluded that there is a need for government intervention in respect of this employer bias toward women.

These studies on gender pay gap statistics and the resulting arguments by scholars that the cause of the gap is due to discrimination or employer bias in favour of men have been criticised. The main basis for the criticisms is that the studies rely on, limited data comprising varying information on workplaces, varying employee characteristics such as race, age and different sectors of the economy, to arrive at their findings. This criticism may have some basis as the Equileap study itself acknowledges that there is limited transparency among companies in the dataset on gender-segregated pay information thus bringing their statistical findings into question if it is based on limited data.⁴⁸

However, studies such as that conducted by Bennedsen indicate that, rather than criticising gender pay gap studies for relying on limited information, this limitation is an indication of the need for

⁴⁵The Next Frontier: Human Development and the Anthropocene, Human Development Report, 2020,5.

⁴⁶ Richard U, The Urban Gender Wage Gap in an African Country: Findings from Kenya, 20 *Canadian Journal of Development Studies* 1, 1999, 59-76.

⁴⁷ Kabubo-Mariara J, 'Wage determination and the gender wage gap in Kenya, African Economic Research Consortium' AERC Research Paper Number 132, 2003 — <https://aercafrica.org/wp-content/uploads/2018/07/rp132.pdf>, on 15 April 2021.

⁴⁸ Gender Equality in Kenya Assessing 60 leading companies on workplace equality https://equileap.com/wp-content/uploads/2019/11/Gender-equality-in-Kenya_Special-report-by-Equileap.pdf on 13 August 2021.

government-mandated reporting on gender pay discrepancies.⁴⁹ This means that once employers are required to report this information in a manner that it can be accessed and studied then proper statistics can be developed and the issue of the existence of the gender pay gap and why can be studied in a more in-depth manner. This study also concludes that such government reporting mandates on gender pay disparities, can be effective in ensuring employers are encouraged to ensure gender pay equity in their institutions to avoid legal suits and reputational risk damage that arise from negative reports.

Further other studies by scholars such as other scholars such as Bolotnyy indicate that even in a controlled environment where critical data such as similarity of work tasks, wages are calculated at a fixed rate per hour, is readily available there still exist a wage gap to men's favour.⁵⁰

Although the studies detailed above is well-grounded in economic and policy empirical data, more investigation is required to broaden knowledge of gender pay equity from the legal perspective of the Constitution, 2010 Employment Act, 2007 and case law perspective. It is clear from the research in this area that despite significant steps and study in the area of gender pay equity in Kenya, there has been no specific study on the requirement for rules in the /employment Act, 2007 on criteria for gender pay equity in Kenya. This thesis studies the current Kenyan legal framework on gender pay equity versus the more developed South African framework with the aim of noting what Kenya can borrow from South African regulations and guidelines which have been relied on to assist in the actualisation of the principle of equal remuneration for work of equal value as provided in South African law.

⁴⁹ Bennedsen M, Simintzi E, Tsoutsoura M and Wolfenzon D, 'Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them' Harvard Business Review, Gender Pay Gaps, 2019 https://valored.it/wp-content/uploads/2019/03/2019_HarvardBusinessReview_GenderPayGaps_23Jan2019.pdf , on 12 November, 2021.

⁵⁰ Bolotnyy V, Emanuel N, 'Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators.' Forthcoming, Journal of Labor Economics Harvard University, Working Paper, 2018 https://scholar.harvard.edu/files/bolotnyy/files/be_gendergap.pdf on 12 November, 2021.

1.9 Chapter Breakdown

This thesis is organised into five chapters:

Chapter One covers the introduction, which gives a background on the legislative framework of gender pay equity in Kenya and why the same needs to be amended to provide for rules on the criteria of the principle of gender pay equity and employer providing gender pay equity information for publication. The chapter also gives the conceptual framework which lays the basis used to analyse the problem and understand the literature review.

Chapter two of this thesis sets out to analyse the various theories on gender pay equity including the human capital model, labour market theory, occupational segregation, the criticism of each theory and confirmation of which theory most relates to this thesis.

Chapter three of this thesis analyses Kenyan legislation on gender pay equity, from the perspective of the provisions of the 2010 Constitution and the Employment Act, 2007. The Chapter identifies that the law places a duty on an employer to promote equal opportunity in employment and prohibits the employer from direct or indirect discrimination of an employee or prospective employee on grounds that include sex. Also, the chapter analyses the fact that the law requires an employer to pay his employees equal remuneration for work of equal value, which is gender pay equity. The chapter notes, however that despite Kenya legislation providing for the principle of equal remuneration for work value on which gender pay equity is anchored, the Kenyan law does not guide employers on how this principle should be implemented. The Chapter advocates that rules to the Employment Act, 2007 should be enacted to guide employers, employee associations and the government on the implementation of gender pay equity.

Chapter four gives a comparative analysis between Kenya's and South Africa's legislative framework and case law on gender pay equity in order to draw key lessons and recommendations for Kenya from South Africa's robust legal framework on the implementation of gender pay equity.

Chapter five provides this thesis's findings, makes recommendations on the enactment of rules to the Employment Act, 2007, and provides a conclusion on the matter of gender pay equity in Kenya.

2 CHAPTER 2: THEORETICAL FRAMEWORK ON GENDER PAY EQUITY

2.1 Introduction

This chapter sets out to analyse the gender pay gap theories including the human capital model, labour market theory, occupational segregation with the aim of understanding the reasons which explain the lack of gender pay equity in employment, between women and men.

2.2 Gender Pay Gap Theories

The gender pay gap, that is, the difference in men's and women's average earnings reported as a ratio or actual gap between the sexes, has been of concern to many researchers, women's rights activists, and governments the world over.⁵¹ Several reports such as those from the UN Women indicate that globally, women only make 77 cents for each dollar men earn, though these statistics may vary in different countries and different employment sectors.⁵² As indicated earlier in this thesis, these studies on gender pay gap have been criticised as unreliable. Most of these criticisms emanate from the fact that these studies rely on global data with varying information on workplaces, employee characteristics such as race and age and comprising different sectors of the economy, to arrive at their findings.

This criticism may have some basis as the Equileap study itself acknowledges that there is limited transparency among companies in the dataset on gender-segregated pay information.⁵³ However, other studies by scholars such as Bolotnyy indicate that even in a controlled environment where critical data such as specific employment sectors, there is similarity of work tasks, wages are calculated at a fixed rate per hour despite gender, there still exist a wage gap to men's favour.⁵⁴

⁵¹ Directorate-General for Employment, Social Affairs and Equal Opportunities Unit, *Legal Aspects of the Gender Pay Gap Report by the Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women*, 2007, 6.

⁵² <https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures#notes> on 26 May 2019.

⁵³ Gender Equality in Kenya Assessing 60 leading companies on workplace equality https://equileap.com/wp-content/uploads/2019/11/Gender-equality-in-Kenya_Special-report-by-Equileap.pdf on 13 August 2021.

⁵⁴ Bolotnyy V, Emanuel N, 'Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators.' Forthcoming, *Journal of Labor Economics* Harvard University, Working Paper, 2018 https://scholar.harvard.edu/files/bolotnyy/files/be_gendergap.pdf on 12 November, 2021.

This, therefore, begs the question as to why there exist gender pay gaps between men and women in employment. The causes for the gender gap have been studied leading to various theories on the same, including the human capital model, labour market discrimination, and pay differentials linked to occupational segregation.⁵⁵

2.2.1 Human Capital Model theory

The Human Capital Model theory provides that earnings are related to capital stock acquired by investing in oneself to improve one's qualifications and skills during the course of one's career.⁵⁶ This theory hypothesises that the skills that people have through education, training and experience are the basis for the earnings they receive. Therefore, the gender pay gap is the result of women having lower 'human capital' than men – that is, lower knowledge, qualifications, skills, or experience which explains why they earn less⁵⁷. The reason given for this lower human capital is that due to family responsibilities women expect to work for a shorter period of their lives than men and so they invest less. This gives rise to lower productivity and therefore to the average woman earning less than the average man.

Several studies have concluded that traditional human capital variables such as education, fertility, experience, which have previously been assumed to favour men, explain little of the gender wage gap suggesting that therefore that other variables need to be considered in discussing the gender pay gap.⁵⁸ This is because several studies in Europe have shown that even where women do not have families and have equal or better education and experience than men, they still earn less than men in the same field.⁵⁹ Also, this theory does not account for the current social context of increased education and experience of women in the labour market, declining

⁵⁵ Virginija G, Analysis of theoretical approaches to gender pay gap, 7 *Journal of Business Economics and Management*, 2, 2006, 85, [Analysis of theoretical approaches to gender pay gap \(tandfonline.com\)](https://doi.org/10.1080/10971480600581444), on 16 October, 2021.

⁵⁶ Libby B, 'Reviewed Work(s): Out of the Margin: Feminist Perspective on Economics by Edith Kuiper, Jolande Sap, Susan Feiner, Notburga Ott and Zafiris Tzannatos, 30 *Journal of Economic Issues* 3, 1996, 900-902.

⁵⁷ Blau, F. and Khan, L. (2007), "The gender pay gap: Have women gone as far as they can?", *Academy of Management Perspective*, vol. 21, no. 1, USA, 2007, [The Gender Pay Gap: Have Women Gone as Far as They Can? on JSTOR](https://www.jstor.org/stable/4146444), on 16th November, 2021.

⁵⁸ Blau F, Kahn L 'The Gender Wage Gap: Extent, Trends, And Explanations', NBER WORKING PAPER SERIES, Working Paper 21913, Working Paper 21913, <http://www.nber.org/papers/w21913> on 12 November, 2021.

⁵⁹Virginija G, Analysis of theoretical approaches to gender pay gap, 85.

in family sizes which women work just as many years as men in various professional fields and divorce rates or women choosing not to give birth at all meaning they do not have to take career breaks due to family commitments. It has been noted that the human capital model cannot be relied on in the current circumstances of the 21st Century as a basis for why women, despite investing just as much in their careers, still earn less.⁶⁰

Further, there is empirical evidence from various studies that in hiring or promoting personnel employers will consider, not just the individual capacities of the employee but will employee statistical discrimination, that is, the decisions will be made based on general predictions of the productivity of men versus women.⁶¹ The theory, therefore, does not cater for empirical evidence of discrimination, which means that even where factors such as education and work experience are held constant, other factors such as discriminatory predictions do affect women's earnings as seen in highlighted studies.⁶²

2.2.2 The Theory of Labour Market Discrimination

The theory of Labour Market Discrimination is based on the work of the economist Gary Becker who argued that in a deregulated economic market, employers who discriminate and pay less based on factors such as gender would invariably lose out on attracting good workers.⁶³ He theorised that these good workers would go to firms where they were being offered equal pay and eventually the wage discrimination would correct itself in the labour market through demand and supply of good workers. This research was critiqued as it does not take cognisance of the limited option of female employees where discrimination is the norm rather than the exception in the labour market.⁶⁴

⁶⁰ Virginija G, Analysis of theoretical approaches to gender pay gap,86.

⁶¹ Belley P, Havet N, Lacroix G, 'Wage Growth and Job Mobility in the Early Career: Testing a Statistical Discrimination Model of the Gender Wage Gap' ZA DP No. 6893, 2012, [Wage Growth and Job Mobility in the Early Career: Testing a Statistical Discrimination Model of the Gender Wage Gap \(iza.org\)](#), on 16 November, 2021.

⁶² Oehmichen J, Sarry M, Wolff M, 'Beyond human capital explanations for the gender pay gap among executives: investigating board embeddedness effects on discrimination' Business Research, 2017, 370.

Blau F, Kahn L 'The Gender Wage Gap: Extent, Trends, And Explanations', NBER WORKING PAPER SERIES, Working Paper 21913, Working Paper 21913, <http://www.nber.org/papers/w21913> on 12 November, 2021.

⁶³ Becker, G, 'Human capital, Effort and the sexual Division Labour', Journal of Labour Economics, Vol 3, No 5, 1985, 33, [Human Capital, Effort, and the Sexual Division of Labor \(uchicago.edu\)](#), on 17 November, 2021.

⁶⁴ Virginija G, Analysis of theoretical approaches to gender pay gap,87

This study has further been contradicted by several recent studies including that of Amit Seru⁶⁵ which found that men made up to 75 % of the financial advisory industry. However, her study showed that on average, roughly 1 in 11 male advisers had a record of past misconduct, compared to only 1 in 33 female advisers but that a female advisor accused of misconduct was 50 % more likely to lose their jobs and 30% were less likely than their male counterparts to get another job. This study debunks the assertions that labour market discrimination corrects itself through demand and supply mechanisms.

2.2.3 The Theory of Occupational Segregation

The theory of Occupational Segregation is based on the basis of labour supply which looks at segregation from an employee availability perspective. This theory provides that women may prefer or choose certain jobs over others due to gender socialization that is cultural bias, social pressure and even discrimination.⁶⁶ This means that due to gender roles assigned by society on acceptable careers for women, both employers and employees may make choices in respect of certain jobs based on gender.⁶⁷ The gender-segregation can be horizontal meaning that the proportion of men and women in different occupations differ greatly.⁶⁸ Vertical segregation means that in the same occupation men are at a higher managerial level or that women are underrepresented.⁶⁹ It is argued that segregation results in men being at the top of the managerial hierarchy making decisions based on societal biases thus they may make decisions that lead to gender pay inequality.

This theory has been criticised for making occupations appear to be based solely on choices that

⁶⁵ Mark E, Gregor M, & Seru A, 'The Market for Financial Adviser Misconduct' *Journal of Political Economy*, 2017, 1-78, 2020. <http://Www.Nber.Org/Papers/W23242> on 15 February 2021.

⁶⁶ Sallee, M, "Toward a theory of gendered socialization", *NASPA Journal About Women in Higher Education*, vol. 4, no. 2, USA, 2011, [Toward a Theory of Gendered Socialization \(tandfonline.com\)](http://Tandfonline.com), on 17 November, 2021

⁶⁷ Richard A, 'Theories of Occupational Segregation by Sex: An Overview' 136 *International Labour Review*, 1997, 315.

⁶⁸ Zhang Y, Hannum E, Wang M, 'Gender-Based Employment and Income Differences in Urban China: Considering the Contributions of Marriage and Parenthood' *Social Forces*, Volume 86, Issue 4, 2008, <https://doi.org/10.1353/sof.0.0035>.

⁶⁹ Shuhua Xu, T, Song T, 'Gender Employment: Occupational Gender Segregation and Income Gap' <https://doi.org/10.2991/assehr.k.210519.175>, 2021, on 17 November, 2021.

people make. It does not consider occupational choice is often constrained, by discriminatory socialization, lack of information, or more direct barriers to entry to training or work in occupations where women are the minority of the workforce in some occupations⁷⁰.

This theory aligns with this thesis as this theory asserts that for occupational segregation to be extinguished then gender stereotyping by employees, employers and governments need to be tackled through state action.⁷¹ This means that similar to the analysis of this thesis it is clear that the enactment of rules or laws is important, to ensure that societal bias on employment of women is tackled and therefore gender pay equity can be implemented.

2.3 Conclusion

The theories highlighted above postulate varied reasons to explain the lack of gender pay equity or the gender pay gap that exists between women and men. As indicated in the analysis of the various theories, no one theory can claim to have the absolute answer as to the issue of the gender wage gap. This study considers that discrimination is a key factor in explaining the lack of gender pay equity in society and therefore there is a need for clear rules and provisions in the Employment Act which establish criteria for gender pay equity in Kenya.

⁷⁰Institute for Women’s Policy Research, ‘Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap’ 2010, 2-14.

⁷¹Rubery J, Koukiadak A, ‘Closing the gender pay gap: A review of the issues, policy mechanisms and international evidence’ International Labour Organisation, 2016 https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_540889.pdf, on 17 November, 2021.

3 CHAPTER 3: KENYA'S LEGISLATION: ENGENDERING PAY EQUITY FOR FEMALE EMPLOYEES?

3.1 Introduction

This chapter will focus on Kenya's legislative framework on gender pay equity. This will be done by analysing the Kenya Constitution, International Conventions that Kenya has ratified, and the 2007 Employment Act and case law.

3.1.1 Background on Gender Pay Equity in Kenya

Gender pay equity in Kenya is intertwined with the history of women's rights activists pushing for legislative reform on gender equality and the prohibition of discrimination based on sex. This push for equality in the recent past can be traced to 1996 when Charity Ngilu, when then a member of parliament, unsuccessfully moved a motion in Parliament on the implementation of the Beijing Platform for Action.⁷² In 1997, the Affirmative Action Bill, which would have seen the increase of women's participation in Parliament and local authorities to at least one third, was tabled in Parliament by Phoebe Asiyo but this attempt was also unsuccessful.⁷³

Given these unsuccessful attempts at legalising affirmative action for women, it is no surprise that the Constitution of Kenya, 2010 was celebrated for including Article 27 which provides for equality between men and women and allows for affirmative action to be taken through legislation and policies to redress historical disadvantages. However, as notable scholars like Professor Kamari-Mbote has posited "*de jure equality does not amount to de facto equality*" as the law does not operate in a vacuum but exists in a society with a history, culture, norms and practices.⁷⁴ Evidence of this societal bias can be seen in the lack of implementation of one of the basic safeguards in the Constitution on gender equity, the *two-thirds gender rule*.⁷⁵ This forced

⁷² Adawo L, Gikonyo L, Kudu R, and Mutoro O, History of feminism in Kenya, Network of young African and Spanish women for empowerment, October 2011, 11.

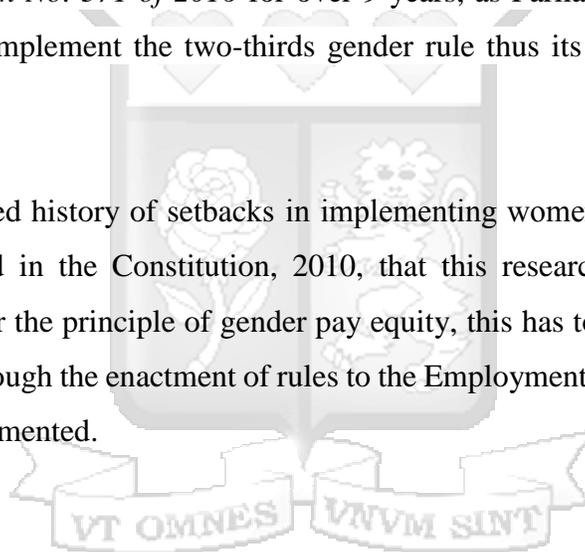
⁷³ Kabira M, Kimani E 'The Historical Journey of Women's Leadership in Kenya', 843,2012, <http://www.ku.ac.ke/schools/humanities/images/stories/docs/Research/The-Historical-Journey-of-Women-Leadership-in-Kenya.pdf> , on 16 November 2021..

⁷⁴ Kamari-Mbote P, 'Quest for Equal Gender Representation in Kenya's Parliament,' in Japhet Biegon (ed), *Gender equality and political processes in Kenya: Challenges and prospects*, Strathmore University Press, 2016, 51.

⁷⁵ Society of International Development, Actualization and Implementation Of the 'Two-Thirds Gender Principle' In Kenya, https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya#_ftn5

women's rights activists to seek the intervention of the Courts, resulting in the Supreme Court Advisory Opinion, which provided that the two-thirds gender rule would be progressively realised, not immediate, and as such, the Court gave the state up to 27th August, 2015 for Parliament to pass legislation on the rule.⁷⁶ Further court intervention has to be sought again in 2020 and the former Chief Justice David Maraga, as he then was, in his advice to the President to dissolve parliament stated Kenyans did have possible cultural resistance to the transformational ideas on gender equality in the Constitution and therefore, the Constitution had specified a radical remedy of dissolution of Parliament "*desired to incentivize the political elites to adhere to and fully operationalize the transformational agenda of the Constitution*".⁷⁷ The opinion concluded that it was incontestable that Parliament had not complied with the Court's orders in *Constitutional Petition No. 371 of 2016* for over 9 years, as Parliament had not enacted the legislation required to implement the two-thirds gender rule thus its dissolution was the only course of action.⁷⁸

It is due to this continued history of setbacks in implementing women's rights, even when the principles are enshrined in the Constitution, 2010, that this research advocates that though Kenyan law provides for the principle of gender pay equity, this has to move to a *de facto* state by providing criteria through the enactment of rules to the Employment Act, 2007 on how gender pay equity will be implemented.



3.1.2 Kenyan Legislation

3.1.2.1 The Constitution of Kenya, 2010

The promulgation of the Constitution of Kenya, 2010 on 27th August 2010 heralded a strong commitment to the value of equality and non-discrimination in Kenyan law especially in respect of gender equality. The preamble of the Constitution of Kenya, 2010 provides that it recognises

⁷⁶ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinions Application 2 of 2012 (2012) eKLR .

⁷⁷ <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/09/Copy-of-CJs-Advice-to-President.pdf> on 20 September 2021.

⁷⁸ <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/09/Copy-of-CJs-Advice-to-President.pdf> on 20 September 2021.

the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law. Article 10 provides for the principle of equality as it states that human dignity, equity, social justice, inclusiveness, equality, and non-discrimination among others are national values and principles of governance. In addition to this, Article 20(4) lists equality and equity as key principles for interpreting the bill of rights.

Article 27 gives clarification on this principle of equality and freedom from discrimination by elaborating that this principle includes full and equal enjoyment of all rights. It further outlines that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres. The Article mandates that the State or a person shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth. Further Article 27 empowers the state to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Finally, the 2010 Constitution also provides for fair labour practices under Article 41 including the right to fair remuneration. Lastly, the Employment and Labour Relations Court emerged as a new court from the Constitution of Kenya, 2010. This court has original as well as appellate jurisdiction in respect of all employment disputes in Kenya and has provided a means for employers, employees, and their representatives to address employment-related disputes and the enforcement of employee rights including gender pay equity.

It is evident from the preceding information that the Constitution of Kenya, 2010 enshrines gender pay equity by providing for gender equality in Kenya, non-discrimination based on sex and more specifically for the right of every worker to fair remuneration. Further the Constitution of Kenya, 2010 empowers the state to take legislative measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups which can be relied on to strengthen legislation on gender pay equity and the remedy of breach of the right to equal remuneration through the Employment and Labour relations court. It is important to note though, that inasmuch as the Kenyan Employment Act 2007 outlaws both direct

and indirect discrimination, there is no clear meaning provided for direct or indirect discrimination. This gives room for any malicious employers to act in defiance of the law while using it for their own gain.

3.1.2.2 Application of International Conventions

Article 2 (6) of the Constitution of Kenya, 2010 provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. This means that various conventions ratified by Kenya form part of Kenyan law. This includes the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) ratified by Kenya on 9th March 1984. This Convention provides that states include principles of equality between men and women in their Constitution and legislation ⁷⁹ and this has been done by Kenyan through various sections of the Constitution of Kenya, 2010 such as Article 27 which provides for equality and freedom from discrimination and Article 41 on the right to fair labour practices as well as Section 5 of the Employment Act, 2007.

However, the same Convention requires states to go beyond providing for the principle and take measures to ensure full development of women's enjoyment of human rights especially in employment including affirmative action that women have the same rights as men in employment opportunities, free choice of employment, promotion, remuneration and equal treatment. The CEDAW Committee has noted in its 2017 report that Kenya through the Constitution and the Employment Act, 2007 has provided for the principle of equality of women and men in employment.⁸⁰ The Committee however noted that there was a scarcity of data in Kenya which makes it difficult to assess the applicability of the principle of gender pay equity.⁸¹ This indicates that the information available from the requirement of employers filing annual returns under Section 79 of the Employment Act, 2007 on the full name, age, sex, occupation, date of employment, nationality, and educational level of each of his employees is not sufficient in respect of gender matrices including gender pay equity. Therefore, there is a need for Kenya to enact regulations that specify the criteria based on which employers should report on gender

⁷⁹ Article 11 (1) (d), *Convention on the Elimination of All Forms of Discrimination against Women*, 1979.

⁸⁰ Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention, Eighth periodic report of States parties due in 2015.

⁸¹ *Convention on the Elimination of all Forms of Discrimination against Women*, 2015.

matrices including pay as this will provide required information that can be accessed on gender pay equity by all stakeholders such as employees, employers, and government bodies and even the CEDAW and other international committees.

In respect of gender equality in employment, the Discrimination (Employment and Occupation) Convention, No. 111 which was ratified by Kenya in 2001, prohibits discrimination based on sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Articles 2 and 3 of the Convention require the Members states to have policies, laws and regulations or rules that aim at ensuring equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect of a range of factors including sex. Similar to the findings of the CEDAW Committee detailed above, the Committee on Convention 100 report in respect of Kenyan's implementation of the convention indicates that there was a need for the Kenyan government to provide information on the distribution of women and men in employment and occupation in line with the need for sex-disaggregated data and gender statistics which is critical in accessing equal opportunity and treatment of women and men.⁸² This reiterates the need of enacting rules requiring employers in Kenya to fill out more detailed information with the National Employment Authority, than the current requirement of filling basic information required under Section 79 of the Employment Act, 2007 of full name, age, sex, occupation, date of employment, nationality, and educational level of employees.

Further, Kenya has also ratified the Equal Remuneration Convention No. 100 which deals with gender pay equity in particular. Article 1 of the Convention provides that each member of the Convention will promote and ensure the application to all workers the principle of equal remuneration for men and women workers for work of equal value.⁸³ The member states who have ratified the Convention such as Kenya, are required to ensure the implementation of the principle of gender pay equity by taking steps through national laws and regulations, legally established mechanisms for wage determination, collective bargaining agreements and other

⁸² https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4051690 on 21 April 2020.

⁸³ https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf on 21 April 2020.

mechanisms to ensure promotion and enforcement of the gender pay equity principle. On the critical hinge of gender pay equity which is remuneration, the Convention stipulates that remuneration includes the ordinary, basic, or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment. This definition is critical as it acts as a guide to employers and government regulators on how to define remuneration with the aim of ensuring the Convention is adhered to for equal remuneration for work of equal value between men and women, that is, gender pay equity. The Convention also defines gender pay equity as being the establishment of rates of remuneration based on a non-discriminatory basis such as sex. This guides employers, employees seeking to enforce their rights and governments to ensure that there are objective means for determining pay and thus enhances non-discriminatory practices which are a necessary basis for gender pay equity.

In addition to these requirements, on the issue of equal work or work of equal value, which is the second hinge of gender pay equity, Article 3 requires the ratifying countries to promote objective and non-discriminatory appraisal of jobs on the basis of the work to be performed. This article also clarifies that the aim of the Convention is not to erase all remuneration rate differentials, by providing that where objective job appraisals are conducted remuneration differentials that arise from the same shall not be considered to be contrary to the principle of gender pay equity. The Convention does not specify the evaluation methods to be used, but there are various methods of non-discriminatory job evaluation which have been developed all over the world.

In addition to the Convention itself, non-binding recommendations are developed from the reports of various Committees formed in respect of assessing implementation of the Convention.⁸⁴ In Recommendation No. 90, there is an emphasis that is given to the importance of collaboration and stakeholder engagement in the context of job evaluation, and provides that members states should be in agreement with the employers' and workers' organizations concerned in order to determine and implement job evaluation methods thus the choice of which job evaluation method to rely on by an employer must be preceded by stakeholder engagement.⁸⁵

⁸⁴ <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> on 15 September 2021.

⁸⁵ Equal Remuneration Recommendation, 1951 (No. 90), Paragraph 5.

This ensures that any pay differentials between jobs are based on objective rather than discriminatory factors such as gender. From various reports on the implementation of this process of job evaluation all over the world, it can be deduced that these job evaluation methods rely on analytical analysis of jobs by assigning different factors such as skills, responsibility, effort, working conditions and experience required and assigning numerical values to these factors which are thereafter relied on to value or compare different jobs to determine if they are equal work or work of equal value.⁸⁶

The Convention also has a supervision mechanism in respect of the countries which have ratified the Convention through a Committee of Experts which conducts studies on the countries' adherence to the Convention and reports on the same. These reports can be used by the countries to improve their adherence to the Convention. The Committee of Experts on the application of conventions has reiterated that Kenya has not provided sufficient information regarding the application of the principle of equal remuneration for work of equal value in a manner that indicates that the country ensures the application of the principle so as to avoid gender bias and discrimination based on sex.⁸⁷

It is understood from the provisions of the conventions above and various committee reports that Kenya needs to go beyond providing principles of equality and prohibition of discrimination. There is also a need for the country to go further and track information on how this principle of equality between women and men in employment is being implemented in the formal sector.

3.1.2.3 The Employment Act

Kenya's legislative reform in relation to gender pay equity can be traced back to the 2001 recommendations of the Cockar Task Force which resulted in the enactment in 2007 of various laws in respect of the Employment sector in Kenya, including the Employment Act, Labour Institutions Act, Labour Relations Act, Industrial Training Act, and Work Injury Benefits Act.⁸⁸

⁸⁶ Oelz, M., Olney, S., & Tomei M, 'Equal pay: An introductory guide' Cornell University ILR School, (2013) [Equal Pay: An Introductory Guide - CORE Reader](#) on 22 August 2021

⁸⁷ https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4051679 on 21 April 2020.

⁸⁸ Rika J, The Re-constituted Industrial Court Of Kenya and the Role of the Social Partners, Kenya Law, 2012, [The Re-constituted Industrial Court Of Kenya And The Role Of The Social Partners | Kenya](#)

The Employment Act, 2007 which is the primary source of employment law in Kenya, also provides for non-discrimination in employment through various provisions. Section 5 commences on non-discrimination by making it the responsibility of the state through the Executive and Judiciary, via the Minister, labour officers and the Industrial Court, which are said to have a duty to promote equality of opportunity. Section 5 (2) also places the duty on an employer to promote equal opportunity in employment and section 5(3) prohibits the employer from direct or indirect discrimination against an employee or prospective employee or harassment of an employee or prospective employee on grounds that include sex and pregnancy, which are key factors in gender pay equity.

Section 5(5) of the Employment Act, 2007, obliges employers to pay employees equal remuneration for work of equal value, which is referred to as gender pay equity. Section 2 of the Employment Act, 2007 defines remuneration as the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee. Additionally, the Kenyan government confirmed to the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2011 that the provision of accommodation or an accommodation allowance, and of food are covered within the definition of remuneration too.⁸⁹

However, the second hinge of the principle of pay equity, that is, equal work or work of equal value, is not defined in the Employment Act, 2007. This makes it difficult for various stakeholders to have a clear criterion on what constitutes equal work or work of equal value and in turn difficult to clearly determine if the gender pay equity principle is being adhered to. This also means that despite section 5(6) providing that an employer who contravenes these provisions commits an offence, and section 10 which stipulates that an employer who commits an offence shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both, it may be difficult to prosecute offending employers as there is no clear guide to equal work or work of equal value which is critical in determining gender pay equity. It is no wonder therefore that there are no records of employers being found guilty of the offence of

[Law](#) on 12 April, 2019.

⁸⁹ Direct Request (CEACR), ILC session, (2012) (Kenya)

contravening the principle of gender pay equity.

It should be noted that there are exceptions to the rules of non-discrimination as dictated in Section 5(4) of the Employment Act, 2007. This subsection specifies that there can be differentials between employees, but the basis for the same can only be justified based on affirmative action, the inherent requirements of a job, the national employment policy, or restriction on access to limited categories of employment where it is necessary in the interest of State security. Section 260 of the Constitution of Kenya, 2010 defines affirmative action as including any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom. The Employment Act, 2007 does not provide the implementation mechanism for affirmative action in respect of gender pay equity. As will be highlighted in Chapters 4 and 5 of this thesis rules should be enacted in Kenya requiring that where there are instances of gender pay inequity, employers should develop employment equity plans which indicate how the inequity will be tackled within specified time periods and the Labour office should have the power to enforce compliance with the same.

Further, noting that there is no definition or guidelines in the Act or the Constitution in respect of inherent job requirements, the proposed Kenyan rules on gender pay equity should provide for this. This is because this lack of criteria for this exception of inherent job requirements, means that there is ambiguity in the application of this exception, which may be to the detriment of employees as a lack of standards may give way to bias or discriminatory practises (cultural or otherwise) being relied on by employers as a defence under the banner of inherent job requirements.

It is noteworthy that Section 79 of the Employment Act, 2007 provides that an employer shall keep a register in which they shall enter the full name, age, sex, occupation, date of employment, nationality, and educational level of each of his employees and file a return with this information for the year ending on 31st December by not later than 31st January of the following year with the National Employment Authority. The CEDAW Committee, as stated earlier in this chapter, has noted in its 2017 report that in Kenya there is a scarcity of data which makes it difficult to access the applicability of the principle of gender pay equity as most Kenya data provided to the

committee as collected by various government agencies was gender-blind, that is, did not include gender parameters, thus an assessment of gender pay equity could not be accurately carried out.⁹⁰ In addition to this, there is no requirement that information about companies and their achievement of the principle of gender pay equity needs to be published unlike in other jurisdictions such as South Africa where publication of such information about companies is mandated.⁹¹

This thesis recommends as will also be seen in Chapters 4 and 5 that, Kenya should consider the expansion of the reporting mandate of employers under Section 79 of the Employment Act, 2007. Similar to South Africa, Kenyan employers should include information on job evaluation tools used by the employer to assess various roles in the institution and include information on what has been taken to avoid bias in female-dominated versus male-dominated jobs. In addition, the pay for various jobs grades in the entity should be provided, with reasons for the basis or any differential and where there are no legally justifiable reasons the employer should be required to file a plan on the progressive aligning of roles with gender pay inequity. Further, the Labour office should be empowered to conduct periodic audits as to whether these gender pay equity plans are being adhered to and where non-compliance is found the office should be empowered to seek court intervention to have the employer found guilty of an offence against Section 5 of the Employment Act, 2007. Finally, this information should be available to the public as this will assist in ensuring companies adhere to gender pay equity as employees and employee organisations, as well as the Labour office, can rely on court intervention where a breach of the law can be demonstrated.

In addition to this, the Employment Act, 2007 under section 91 allows the Minister (presently referred to as Cabinet Secretary, Ministry of Labour and Social Protection) in consultation with the National Labour Board, to make rules providing for all or any of the purposes, for the administration of this Act or that may be necessary or expedient for carrying out the objects or purposes of this Act. It elaborates further that these rules, for the purposes of subsection (1) (j),

⁹⁰ *Convention on the Elimination of all Forms of Discrimination against Women*, 2015.

⁹¹ Employment Equity Regulations, 2014, (GN No. 37873)

prescribe the conditions of the employment of women. This means that the Cabinet Secretary may through section 91 of the Employment Act, 2007 provide rules guiding on the need to provide criteria on what constitutes equal work for equal value, exceptions to the principle of gender pay equity such as inherent job requirements, reporting on gender matrices and the publication of such reports which employers should report on gender matrices in employment which can provide information that can be relied on to gauge the progression to gender pay equity in Kenya a right enshrined in the Constitution 2010 and the Employment Act, 2007.

From the above, it can be seen that Kenyan does have provisions in the Employment Act, 2007 which prohibit discrimination against women in employment and provide for gender pay equity. However, the parameters or criteria on how employers can implement the provisions on gender pay equity including determining equal work or work of equal value, exceptions to the principle of gender pay equity such as inherent job requirements, reporting on gender matrices and the publication of such reports, are not specifically provided for in the Employment Act, 2007 and the rules made thereunder by the Cabinet Secretary, therefore, there is need for rules which can guide employees, employers and government agencies on the implementation of the gender pay equity principle.

3.1.3 Case Law

The Employment and Labour Relations Court, referred to as the Industrial Court, was established by the Constitution of Kenya, 2010 under Article 162. This Court's jurisdiction extends not only to disputes between employers and employees, and those involving trade unions, employer organisations, collective agreements, but also to the interpretation of the Constitution of Kenya, 2010 in respect of such employment and labour relations matters.⁹² Appeals from this Court lie in the Court of Appeal. Further, section 5 (1) of the Employment Act, 2007 places a duty on the Industrial Court to promote equality of opportunity in employment. The industrial court has pronounced itself the principle of pay equity in several court cases, as elaborated below.

The Employment and Labour Relations Court as well as the Court of Appeal has had the

⁹² United States International University v Attorney General & 2 Others (2012) eKLR.

opportunity of settling various disputes filled by employees and employee organisations as well as appeals by employers on the issue of pay equity under the Kenya Constitution, 2010 and the Employment Act, 2007. An analysis of these cases indicates that the court considers numerous factors below in making its determination.

3.1.3.1. Burden of proof

One of the first critical points emerging in determining whether there has been a breach of the right to pay equity and thus gender pay equity, from case law, is the consideration of the onus of proof. Section 5 (7) of the Employment Act, 2007 dictates that in any proceedings where a contravention of this section is alleged, this includes subsection 5 on pay equity, the employer shall bear the burden of proving that the discrimination did not take place as alleged and that the discriminatory act or omission is not based on any of the grounds specified in this section. The High Court in the case of *David Wanjau Muhoro v Ol Pejeta Ranching Limited*⁹³ did find that the test of proving discrimination against an employee comprised, the employee by evidence, establishing a prima facie case of discrimination, the employer rebutting the presumption, by introducing evidence of the legitimate non-discriminatory reason for its actions or existing disparities between employees and the court at the end examining the evidence and confirming if discrimination has been proven.

In the matter of *Kenya Association of Health Administrators v Salaries and Remuneration Commission (SRC) & 3 others*⁹⁴, the association instituted proceedings against the SRC and other parties alleging that the decision of the SRC of not including its members as being eligible for a medical emergency allowance and benefits was discriminatory. The Court in considering the onus of proof stated that where there is an allegation of discrimination which is contrary to the right of pay equity, it is incumbent of the alleging party to establish thorough evidence at the first instance that there was a presumption of unequal pay. The Court from the evidence provided would consider the context and would determine if the alleging party had established a motive or reason for the discrimination that is prohibited by the law. In this case, the Court found that the claimant

⁹³ *David Wanjau Muhoro v Ol Pejeta Ranching Limited* (2014) eKLR.

⁹⁴ *Kenya Association of Health Administrators v Salaries and Remuneration Commission & 3 others; Kenya Health Professionals Society & another (Interested Parties)* (2021) eKLR.

had not established that there was a presumption of unequal pay as the context was that the allowances and benefits were meant for workers who came into direct contact with Covid-19 patients or those suspected to have it, of which the claimant had not provided evidence to show the workers it was representing were in direct contact with such cases. It is clear from this case that the rules on gender pay equity to be enacted should specify that though the burden of proof is on the employer to prove there was no discrimination, this burden is triggered only where the alleging party establishes thorough evidence at the first instance that there was a presumption of unequal pay.

3.1.3.2. Discrimination

Another consideration for the courts in determining if a breach of the principle of gender pay equity has occurred, is the definition of discrimination. The Court of Appeal in *Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others*⁹⁵ held that discrimination means affording different treatment to different persons attributable wholly or to their descriptions, whereby persons of one such description is subjected to restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. The Court also stated that discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex or a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

The need for establishing a definition of discrimination was also evident in the case of *Koki Muia v Samsung Electronics East Africa*⁹⁶, where the claimant sued her former employer for racial discrimination and discrimination based on sex. The claimant's case was based on evidence provided that the employer did not permit Kenyans to ascend to high offices in the company and sent incompetent Koreans to supervise more qualified Kenyans. The Court in defining

⁹⁵ *Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others* (2018) eKLR

⁹⁶ *Koki Muia v Samsung Electronics East Africa Limited* (2015) eKLR.

discrimination took cognisance of the fact that Kenya had ratified ILO Convention 111 which defines discrimination to include “(a) any distinction, exclusion, preference made on the basis of *race*, colour, *sex*, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing the equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with the representative employers’ and workers’ organisation, where such exist, and with other appropriate bodies.” The Court in this matter applied the test of discrimination based on the definition of discrimination in the ILO Convention 111 which prohibits discrimination, which is the making a distinction based on prohibited grounds such as race or sex to the effect of nullifying or impairing equality of opportunity or treatment in employment.

Further, the Court stated that where a distinction arises, due to the general principles of fairness and justice, there is a need to also apply the test of reasonableness. The Court thereafter made the finding that from the evidence adduced in court, the employer’s actions of bringing Korean nationals to supervise competent Kenyan employees, such as one witness from the employer who was an ex-military man with limited understanding of English, and the fact that there were only three women in a company of nineteen staff, was unreasonable and discriminatory practice based on race and sex and a breach of the ILO Convention 111. It was held by the court that the employee was the subject of racial and sexual discrimination, and she was awarded 12 months’ compensation for sexual and racial discrimination as well as unlawful termination.

The parameter dictated by the Court in the case law above that is unfair and unreasonable treatment or denial of normal privileges, forms the critical criteria on discrimination and should be included in the rules on gender pay equity enacted in respect of the Employment Act, 2007.

3.1.3.3. Fairness

Fairness in the treatment of employees in the employment environment is another key consideration of Kenyan courts. As discussed earlier, Article 41 of the Constitution provides for the right to fair labour practices which is specified to include the right to fair remuneration and therefore the right to gender pay equity. Neither the Constitution 2010 nor the Employment Act, 2007 defines fairness, but the courts have pronounced themselves on this factor in various cases for example the Court of Appeal in the matter of OI Pejeta Ranching Limited v David Wanjau Muhoro⁹⁷, which involved discrimination on the basis of race, did state that fairness dictates that people doing similar work or work of equal value should receive equal pay.

The issue of fairness in remuneration was also discussed in the case of Erastus K Gitonga & 4 others v National Environmental Management Authority; Law Society of Kenya (Interested Party)⁹⁸ in which the claimants were advocates of the High Court of Kenya employed by the respondent as legal officers on a full-time basis, and on permanent and pensionable terms of service. After working for some time, they were appointed and gazetted as public prosecutors by the Director of Public Prosecutions for purposes of cases arising under the Environmental Management and Co-ordination Act. The claimants were claiming both non-practising allowances and prosecutorial allowances which they alleged to be entitled to after having worked as legal officers and public prosecutors for the respondent, similar to other Prosecutors under the Directors of Public Prosecution. The Court found that the principle of equal remuneration for work of equal value, in its true form, would be extended to a situation, of work of equal value should receive equal pay. The Court stated that the principles of justice, equity, and logic should be taken into account in considering whether an unfair labour practise has been committed. The Court granted the order sought by the claimants and made a declaration that the respondent's action of not paying the claimants a non-practising allowance and prosecutorial allowance was unlawful, wrongful, and unfair. It is clear from the case law above that the rules proposed in this thesis on gender pay equity, should include guidelines on what constitutes fairness and the criteria

⁹⁷ OI Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR.

⁹⁸ Erastus K Gitonga & 4 others v National Environmental Management Authority; Law Society of Kenya (Interested Party) (2019) eKLR

of determining the same as between an employee and employer.

3.1.3.4. Comparators

The issue of suitable comparators is another parameter of consideration by the Court in matters of gender pay equity. The Employment Act, 2007 does not define or specify comparators however in determining whether work is equal or of equal value requires a comparison between more than one job. The courts in Kenya have again been initiative-taking in relying on common law and persuasive cases from other jurisdictions in giving indications on comparators. In the High Court matter of David Wanjau Muhoro v Ol Pejeta Ranching Limited⁹⁹, the Court did find that, under the ILO Conventions 100 and 111, disparities in pay between employees was permitted when there were objective instances in the value of work when jobs are compared on objective criteria such as skills, working conditions, responsibilities, and effort.

The Court of Appeal, in the appeal in the above case, that is, Ol Pejeta Ranching Limited v David Wanjau Muhoro¹⁰⁰ went further into the issue of comparators in this matter and stated that guidelines published in an article by Adolph A. Landman¹⁰¹, The Anatomy of Disputes about Equal Pay for Equal Work, appear well-founded, applicable, and reasonable. In this article, the author states that for discrimination to be established there must be suitable comparators. The article elaborates that the comparator must be an existing employee, the comparator is usually a person doing the same job or a job of equal value, and the comparator should be from the same employer of an associated employer. The Court of Appeal found that the comparators chosen in the instant case fit the criteria provided, that the record was clear that the pay differences between the white managers and black managers were a concern acknowledged by the senior management and based on the evidence adduced in court it was reasonable to conclude that there was discrimination against the respondent based on race.

⁹⁹ David Wanjau Muhoro v Ol Pejeta Ranching Limited (2014) eKLR.

¹⁰⁰ Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR.

¹⁰¹ Landman AA, 'The Anatomy of Disputes about Equal Pay for Equal Work', South African Mercantile Law Journal, 2002, 341 - <https://heinonline.org/HOL/LandingPage?handle=hein.journals/safrmerlj14&div=27&id=&page=>> on 2 October 2021.

The issue of having comparators was elaborated further in the case of Kenya Association of Health Administrators v Salaries and Remuneration Commission (SRC) & 3 others¹⁰² which we had considered earlier. The court detailed that it is incumbent on the alleging party to establish comparators through evidence. In determining comparators, the Court stated that from the evidence provided it would consider if, from the evidence provided on the information of other employees, the employees perform the same work or work of equal value, the nature of activities entrusted to employees, the training requirement for conducting the work and working conditions, as well as the professional qualifications and categorisation or classification of the jobs.

In this case, the Court found that the Association had failed to prove discrimination as it merely contended that its workers were health administrators but did not provide evidence that could be considered based on the factors required in considering comparators, such as, the professional qualifications/training, nature of duties or functions of the workers being represented that these workers would be in direct contact with Covid -19 patients and would therefore be eligible for benefits and allowances accorded to workers in direct contact. There is a need for rules in Kenya to provide criteria such as those found in Convention 100 and in other jurisdictions on comparators. These rules should highlight that comparators can only be determined by assessing jobs on objective criteria such as skills, working conditions, responsibilities, and effort in order to determine if two jobs are work of equal value, which is a key hinge to determining claims of gender pay inequity.

3.1.3.5. Exceptions

The Courts also considered what is commonly referred to as the exceptions to pay equity in Kenyan law as provided by Section 5 (4) of the Employment Act, 2007. This subsection specifies that there can be differentials between employees, but the basis for the same can only be justified based on affirmative action, the inherent requirement of a job, the national employment policy, or restriction on access to limited categories of employment where it is necessary in the interest of State security. There is no definition or guidelines in the Act in respect of the exception of

¹⁰² Kenya Association of Health Administrators v Salaries and Remuneration Commission & 3 others; Kenya Health Professionals Society & another (Interested Parties) (2021) eKLR.

inherent job requirements thus one has to look to case law for guidance on the same.

On the exception of inherent requirements of the job, the court in *Kenya Association of Health Administrators v Salaries and Remuneration Commission (SRC) & 3 others*¹⁰³ found that the inherent requirements may include risks and exposure based on safety and health considerations. In this case, the Court found that even without evidence, it was clear from the notes from the documents on record that those eligible for the Covid-19 medical emergency allowance are doctors, dentists, nurses, clinical officers, community health officers, public health officers and the like as they were directly in the line of contracting Covid-19 on the basis of the patients they have to face directly in the course of work and not in the back office like the hospital administrators who were the claimants. Therefore, the inherent requirements and risks of the duties of administrators were not comparable to frontline workers in hospitals.

The lack of criteria for these exceptions of inherent job requirements means that there may be ambiguity in the application of these exceptions which may be to the detriment of employees as a lack of standards may give way to bias or discriminatory practices (cultural or otherwise) being defended under the banners of inherent job requirements. There is a need for the inclusion of definitions and criteria in respect of inherent job requirements vis a vis gender pay equity in the regulations on gender pay equity proposed in this thesis.

3.2. Conclusion

The case law above gives the indication that the Courts in Kenya in considering the evidence adduced in a claim for breach of pay equity, including gender pay equity, will consider that the burden proof for an employer is discharged by the employee first providing evidence that establishes a prima facie case of discrimination, then the employer rebutting the presumption, by introducing evidence of the legitimate non-discriminatory reason for its actions or existing disparities between employees and the Court at the end examining the evidence and confirming if discrimination has been proven or not. The courts will apply the test of discrimination, which is the making of a distinction based on prohibited grounds and in the case of gender pay equity,

¹⁰³ *Kenya Association of Health Administrators v Salaries and Remuneration Commission & 3 others; Kenya Health Professionals Society & another (Interested Parties)* (2021) eKLR.

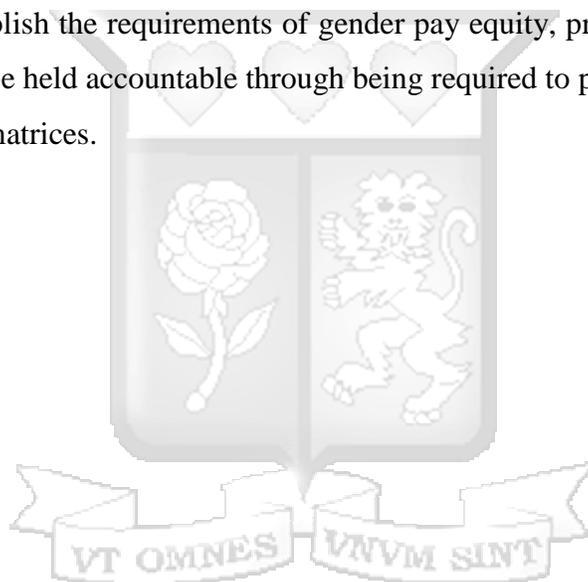
the prohibited ground would be sex, without a legally allowable justification.

In addition to this, the Court is likely to consider the evidence presented in respect of an existing comparator to the claimant, who should be conducting the same job or a job of equal value and work for the same employer or an associated employer. The Court may finally conclude by considering based on the general principles of fairness and justice in employment if the treatment of the claimant was reasonable or it was discriminatory that is the distinction is based on a prohibited ground, which in the case of a claim of breach of gender pay equity is sex and which discrimination was applied to nullify or impairing equality of opportunity or treatment in employment. The Court will also consider if the evidence provided by the employer is reasonable to disprove the claimants claim of the breach of gender pay equity or that there exists an exception to gender pay equity such as affirmative action and inherent job requirements which the employer relied on and thus a claim of breach of gender pay equity cannot be sustained. These parameters will be considered by the Court and the outcome will be a determination on whether the employer in question breached the Constitution of Kenya, 2010, the Employment Act, 2007, ILO Conventions 100 and 111 and principles set out in applicable case law.

The analysis of the Constitution of Kenya, 2010, the Employment Act, 2007, the Conventions that Kenya has ratified, and the Comments of the Committee of Experts on Kenya's implementation of international conventions makes it evident that Kenya has taken action to enshrine the principle of gender pay equity in the Constitution of Kenya, 2010 and the Employment Act, 2007 and by signing and working to implement various conventions. However, a common theme that is noticeable in the Kenyan case law above is that the courts in determining the criteria, or guidelines to be applied as they were referred to by the Court of Appeal, in claims of breach of gender pay equity, have limited legislative documents to rely on. This was even raised by the appellant in the OI Pejeta case who did argue that, though Section 5 of the Employment Act, 2007 does contain provisions in respect of the general principles against discrimination at the workplace, *“no regulations or guidelines exist to guide courts on such issue or how aspects of job evaluation need to be factored in to dispel allegations of disproportionate pay differences leading to discrimination aspects of job evaluation need to be factored in to dispel*

*allegations of disproportionate pay differences leading to discrimination”.*¹⁰⁴

The courts have proceeded to consider the issue of pay equity without guidelines in the form of rules by relying on articles by noted authors and case law from South Africa and the United Kingdom to etch out guidelines on pay equity that the evidence in the court matter could be considered against and a determination arrived at. This elucidates the need for Kenyan law to go beyond just providing for the principle of pay equity and therein gender pay equity, but to move to the next stage of implementing this principle through rules that provide details on the criteria for pay equity in general and gender pay equity in particular. This study argues that Kenyan law through rules in respect of the Employment Act should provide clear criteria which can be relied on as a standard to establish the requirements of gender pay equity, proving discrimination and requiring employers to be held accountable through being required to provide information to the government on gender matrices.



¹⁰⁴ Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR.

4 CHAPTER 4: COMPARISON BETWEEN SOUTH AFRICAN AND KENYAN LAW ON GENDER PAY EQUITY CRITERIA

4.1 Introduction

This chapter focuses on the comparison between Kenyan and South Africa Legislation and case law on the issue of gender pay equity pay since both are African, the Constitution of Kenya, 2010 is closely modelled after the Constitution of the Republic of South African, 1996 and both countries have ratified the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). This Comparison will be conducted with the aim of noting what lessons for Kenya can be drawn from South Africa's Legislation and case law on gender pay equity.

4.1.1 Background of Pay Equity in South Africa

South Africa was involved for many years in the liberation struggle against the apartheid system, which was based on laws and practices that excluded and discriminated against a majority of the South African population from various sectors including the economy due to their race.¹⁰⁵ After independence, the South African government led by the ruling party of the Africa National Congress party had as its vision to strive for the achievement of the right of all South Africans, as a whole, to political and economic self-determination in a united South Africa.¹⁰⁶

In 1995, the Presidential Labour Market Commission was established by the South African Parliament and its terms of references included the objective of this Commission to study employment creation, fair remuneration, productivity enhancement and macroeconomic stability.¹⁰⁷ The commission's report defined employment equity as a term used to describe the

¹⁰⁵ Burger R and Jafta R, 'Affirmative action in South Africa: an empirical assessment of the impact on labour market outcomes' The Centre for Research on Inequality, Human Security and Ethnicity (CRISE), working paper no. 76, 2010, 15- <https://assets.publishing.service.gov.uk/media/57a08b2ced915d622c000b5d/workingpaper76.pdf> on 29 September 2021.

¹⁰⁶ <https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa/> on 22 September 2021.

¹⁰⁷Maziya M, 'Contemporary Labour Market Policy and Poverty in South Africa,' Development Policy Research Unit, University of Cape Town, working paper No. 99/34, 1999, 14 <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1090.2369&rep=rep1&type=pdf> on 29 September 2021.

labour market as non-discriminatory and socially equitable.¹⁰⁸ The work of this commission laid the basis for South African legislation on employment matters such as the Labour Relations Act, 1995 and the Employment Equity Act, 1998. Further, the Constitution of the Republic of South Africa, 1996 as we will see in this chapter did have provisions providing for the principle of equality, affirmative action and prohibiting discrimination in all spheres of life.

4.2 South African Legislation

4.2.1 Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996 strives to address historical inequality through Section 9 in Chapter 2 on the Bill of rights.¹⁰⁹ This Section provides that everyone is equal before the law, gives the state the power to take measures including legislative measures to promote the achievement of equality. The Section also provides that neither the state nor any person may discriminate directly or indirectly against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth

Similar to the Constitution of Kenya, 2010, the Constitution of the Republic of South Africa, 1996, section 22, allows each South African citizen the right to choose their trade, occupation, or profession freely. Further section 23 enshrines the right of employees to fair labour practices and affords employees the right to join unions or employee associations. The Constitution gives the enforcement mechanism of these rights by providing that an aggrieved party has the right to approach a court alleging that their right has been infringed on, and the court may grant appropriate relief.

¹⁰⁸Standing G, Sender J, and Weeks J, 'Restructuring the labour market: The South African challenge,' International Labour Organization, 1996, 8 - https://www.ilo.org/public/libdoc/ilo/1996/96B09_304_engl.pdf on 15 September 2021.

¹⁰⁹Section 9, Chapter 2, Bill of Rights Act (South Africa).

4.2.2 Application of International Conventions

The Constitution of the Republic of South Africa, 1996 does provide that international law is applicable in South Africa and this was what the Constitution of Kenya, 2010 was modelled after. Section 39 (1)(b) of the 1996 Constitution requires that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law. Article 233 reiterates this by dictating that every court, when interpreting legislation, must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. This means that where there is a claim of breach of the right to gender pay equity, an employee in South Africa may rely not only on South African legislation but international law that is applicable in South Africa.

Just like Kenya, South Africa has ratified the Equal Remuneration Convention No. 100¹¹⁰ which provides that equal pay and workers' rights, apply equally to female and male workers. In addition to this the South Africa has also ratified the Discrimination (Employment and Occupation) Convention, No. 111.¹¹¹ During the monitoring of South Africa's adherence to this convention the ILO Committee, had several observations and recommendations about the South African labour market. This included the observation that South African women were systematically disadvantaged in the opportunities, income, conditions of work and remuneration available to them.¹¹² The Committee of experts, similar to the recommendations made to Kenya, recommended that the Country undertake policy and legislative action to redress gender and racial inequalities in the countries Labour market. This legislative action was taken through the enactment of an Act, regulations and a code of conduct, as highlighted later in this chapter.

¹¹⁰ Ratifications of C100 – Equal Remuneration Convention.

¹¹¹ Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958, (No. 111).

¹¹² Standing G, Sender J, and Weeks J, 'Restructuring the labour market: The South African challenge,' International Labour Organization, 1996, 8 - https://www.ilo.org/public/libdoc/ilo/1996/96B09_304_engl.pdf on 15 September 2021.

4.2.3 National Legislation

South Africa's primary legislation on gender pay equity is the Employment Equity Amendment Act, No 47 of 2013¹¹³(previously Act 55 of 1998) and the regulations introduced by Government Gazette Notice 37873 (the Regulations). The Employment Equity Act, 2013 had two main objectives which have been highlighted as the advancement of equal opportunity and fair treatment in employment and affirmative action for designated groups.¹¹⁴ Section 6 (1), of the Employment Equity Act 2013 was retained, and it provides that an employer is not permitted to unfairly discriminate against any employee on any of the following listed grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth, or on any other arbitrary ground. This Section 6 of the Employment Equity Act is similar to Section 5 (3) of Kenya's Employment Act which prohibits discrimination based on race, sex, pregnancy among other prohibited grounds.

The Employment Equity Act, 2013 Act amended the Employment Equity Act 1998 by the introduction of several sections of which sections 6(4) and 6(5) were critical additions. Similar to Section 5(5) of Kenya's Employment Act, 2007, the principle of equal remuneration for work of equal value is set out in South Africa's Employment Equity Act, 2013 at section 6(4). However, unlike the Kenyan Act, the South African Act Section 6 (4) goes further and provides criteria for accessing pay equity by setting out that in considering whether there is unfair discrimination the key factors are determining if there are differences in the terms of employment between employees of the same employer, considering if the employees with different terms are performing the same or substantially the same work or work of equal value and finally confirming if the difference in terms is based on the prohibited grounds of discrimination listed in section 6 (1) or any other arbitrary ground.

In addition to this South Africa's Employment Equity Act, 2013, under Section 6(5) empowers the Minister of Labour, after consultations with the Commission for Employment Equity, to prescribe the criteria and the methodology for assessing work of equal value which is critical to

¹¹³ Section 2, Employment Equity Amendment Act (South Africa).

¹¹⁴ Section 2, Employment Equity Amendment Act (South Africa).

gender pay equity and this is similar to Kenya's Employment Act, 2007 section 91 (1)(j) which provides a mechanism through the Cabinet Secretary Ministry of Labour and Social Protection, in consultation with the National Labour Board, may make rules prescribing the conditions of the employment of women. However, a review of subsidiary legislation enacted in both countries reveals that Kenya has not taken advantage of the section to provide rules on gender pay equity, while South Africa, as elaborated later in this chapter, had made use of this section of the law to provide clear regulations and code of conduct on pay equity including specific provisions on gender pay equity.

The South African Employment Equity Act, 2013 section 11, creates a dual requirement for the burden of proof. The Section stipulates that if unfair discrimination is alleged based on a prohibited ground as per section 6(1) of the Act by an employee, the employer must prove, on a balance of probabilities, that such discrimination did not take place as alleged, or that such discrimination is rational and fair. However, section 11 also provides that where an employee alleges that the unfair discrimination is alleged on an *arbitrary ground*, the complainant must prove on a balance of probabilities that the conduct complained of is irrational, amounts to discrimination and the discrimination is unfair. Unfortunately, the Act does not define arbitrary ground, but the Labour Court has given guidance on this interpretation, as we will see later in this chapter. Unlike South African law, Section 5 (7) of the Kenyan Employment Act, 2007 dictates that in any proceedings where a contravention of this section is alleged, this includes subsection 5 on pay equity, the employer shall bear the burden of proving that the discrimination did not take place as alleged. The difference between these two jurisdictions on the burden of proof requirement could be linked to the fact, Kenyan law does not provide for discrimination based on arbitrary grounds.

Unlike in Kenya, employees in South Africa are legally facilitated in the right to access information for comparison to determine if there is a difference, due to discrimination on prohibited grounds, in their pay for employees carrying out the same work. This is permitted through Section 78 of the Basic Conditions of Employment Act, 1997 which entitles employees to discuss their terms and conditions of employment with other employees, their employer, or any other person. This ensures that employers cannot gag employees through prohibitive

confidentiality clauses in their employment contracts from discussing their pay with other employers and even government agencies which monitor pay equity in South Africa and may want to corroborate the gender pay equity information provided by employers to these government agencies.

Further Section 2 Employment Equity Act, 2013 defines a designated employer as one who employs 50 or more employees, or where the employees are below 50 and an employer one who has a turnover of larger than the specific threshold established for different sectors of the economy. Section 21, 22 and 27 of the Employment Equity Act, 2013 requires designated employers to report on the pay/remuneration and benefits received by employees in each occupational level of their workforce, and where there are disproportionate income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment, employers must take steps to progressively reduce these differentials. In addition to this, where there are pay differentials prohibited by the Employment Equity Act, 2013 the designated employer is required to benchmark on measures to reduce these pay differentials and advise the Minister on appropriate measures to reduce these differentials and the information they submit is accessible to unions for collective bargain agreement purposes.

The Act also provides for an enforcement mechanism under section 42 where the Department of Labour may undertake a compliance assessment to assess reasonable steps taken by the employer to comply with the Act, section 44 empowers the Department of Labour to make recommendations to an employer in writing requiring them to take certain steps within a specified period to comply with the Act failure to which under Section 45 the Department of labour may seek court redress through fines against the employer and an order that they must comply with the Act as required by the various recommendations of the Department of Labour. On the other hand, the Kenyan Employment Act, 2007 merely provides for the principle of pay equity and requires employers to file minimal information on full name, age, sex, occupation, date of employment, nationality, and educational level of each of their employees annually. Kenyan can learn from South Africa by requiring employers to keep a record of information on gender pay equity, file the required information and allow employees greater access to information on remuneration, which can be relied on by employees in seeking redress where there has been a

breach of the principle of gender pay equity and on the positive side of the spectrum this access to information will encourage employers to adhere to the principle of gender pay equity as there will be closer monitoring of their adherence by government and employee rights association and unions which can act to seek redress for employee where employers are in breach of the principle.

In both the South African Employment Equity Act, 2013 Section 6(2)(a) and the Kenyan Employment Act, 2007 section 5(4) there are provisions on exceptions that give further criteria on gender pay equity. Both jurisdictions, through the sections listed above, provide that it is not discriminatory to distinguish between any person on the basis of the inherent requirements of a job and to take affirmative action measures consistent with the promotion of equality and elimination of discrimination in the workplace. Unlike the Kenyan Act, which is silent on the definition of affirmative action, Section 2 of the Employment Equity Act, 2013, on definitions, provides women who are South African Citizens, as members of the designated groups. Section 2 of the Employment Equity Act, 2013 read together with section 15 of the South African Employment Equity Act, 2013 provides as definition for affirmative action as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer means that employers are required to ensure equality and equity in the employment of women in various occupational categories this lays the foundation for gender pay equity as employers must ensure equal opportunity of employment for women in the workforce in all categories and thereafter gender pay equity.

In addition to this, Section 15(2) of the Employment Equity Act 2013 prescribes the affirmative action measures to be taken by designated employers being to identify and eliminate employment barriers, to diversify the workplace based on equal dignity and respect, to reasonably accommodate people from designated groups in order to ensure that they enjoy equal opportunities and to ensure the equitable representation of suitably qualified people from the designated groups on all levels in the workforce. It is provided that these measures must be reflected in the employer's employment equity plan. Kenya can learn from this and define the term affirmative action as this will assist in allowing employers to tackle previous gender imbalances in the workforce, as employers will be required to afford women equal employment

opportunity in all occupational categories in the workforce and take measures to ensure they have pay equity, which measures are affirmative action that is not discriminatory, as a repercussion of a clear definition of terms used in the Employment Act, 2007 like in South Africa.

4.2.4 Employment Equity Regulations and Code of Good Practice

South Africa gazetted the Employment Equity Regulations in 2014 and the Code of Good Practice on Equal Pay /Remuneration for Work of Equal Value in 2015. The regulations as specified in regulation 2 are published to prescribe the criteria and methodology of assessing work of equal value as contemplated in Section 6(4) of the Employment Equity Act,2013. The aim of the Code as detailed in Clause 1 of the Code is to provide practical guidance to employers and employees on how to apply the principle of pay equity, to promote the implementation of remuneration equity in the workplace by encouraging employers to manage their remuneration policies, practices and to have proper consultation processes as well as providing guidance to employers in the implementation of the Employment Equity Act and Regulations. The Regulations and Code must be read jointly as specified Section 2 of the Code, as this assist in providing greater clarity on the employer's obligations.

Regulation 6 provides that in determining work of equal value, an assessment should be conducted in a manner devoid of bias and should not be based on arbitrary grounds. This regulation specifies the criteria for considering work of equal value as including the responsibility for people, finance and materials demanded in the work. In addition to this, the employer should consider the skills and qualifications including skills and prior learning required, the effort required whether physical mental or emotional and the conditions of work such as the physical environment, psychological conditions, time, and location of the work. This regulation is further elaborated by Clause 6 of the Code of Good Practice, which provides guidelines on evaluating male-dominated and female-dominated jobs. The Code recognises that due to stereotypes with regard to work considered women's work, the design of traditional job evaluations being based on male dominated jobs and historically weaker bargaining power of women, job evaluations may not ensure the complete absence of discrimination. Clause 6 of the Code of Good Practice, 2015 goes on to require employers to establish the value of male-dominated and female-dominated jobs in order to be able to ascertain whether particular jobs have been undervalued

and to align female - dominated jobs with comparable male -dominated jobs in the organisation. In addition to this, the code requires that for a female employee to succeed in a claim that they would have received higher remuneration if they were not female they would have to show that a male employee hired to perform the work would have been employed on different terms and conditions of employment.

Kenya should learn from these sections in the Regulations and Code as detailed above. This is because these sections require that employers must firstly select a method of job evaluation that ensures that its content is equally tailored to both female-dominated and male-dominated jobs. Secondly, employers are required to establish the value of female versus predominantly male jobs in order to be able to determine if there has been any undervaluation of jobs in the workforce. Once these base parameters have been considered, the employers can carry out an assessment of work of equal value by evaluating different work based on the responsibility of the work, skills and qualifications, effort required and conditions of work.

Regulation 7 provides justification for when employers may fairly and rationally differentiate terms and conditions of employment for employees performing work of equal value. This can be based on seniority of service, individual qualifications above minimum requirements, individual performance based on a performance evaluation system, demotion due to organisational restructuring, temporary jobs, the market value of skills where there is a shortage of certain skills and other relevant factors that are fair and rational and not discriminatory. The Employment Act, 2007 in Kenya could borrow from this by having rules that provide clear criteria for the exceptions to gender pay equity as enumerated by Section 5(4) of the Act other than just stating inherent job requirements and affirmative action, both of which are not defined nor expounded on in the Act.

Further Regulation 10 creates a duty on any employer to report through annual consolidated employment equity reports and as required by Regulation 12 an income differential statement to the Department of Labour. This report is a summary report, generated from information garnered through an employer implementing the requirements of regulation 8. This regulation requires that a designated employer, must have all employee fill out a declaration form in which the employees

can add more information than what is provided for, the employer is required to adhere to the Codes of Good Practice when collecting information and conducting job analysis as required by the regulations. Further, the designated employer is required to prepare an employment equity plan and retain it for five years after the expiry of the plan. The compliance of employers with this requirement for report is guaranteed by the Department of Labour being empowered by regulation 14, which ensures the Department can seek a court order for compliance. Also as seen earlier under Section 45 of the Employment Equity Act, the Department of Labour may refer errant employers to the Labour Court and the employer may be fined, where an employer doesn't comply with these reporting requirements.

Kenya can learn from South Africa by going beyond just providing for the principle of gender pay equity and having clear rules on the same. It can have rules similar to the South African Employment Equity Act, 2013, the Employment Equity Regulations, 2014 and the Code of Good Practice on Equal Pay /Remuneration for Work of Equal Value. These rules in Kenya, similar to what is in South Africa, should aim at providing criteria where employers are required to access gender pay equity, such as: requiring employers to provide criteria for evaluating male-dominated and female-dominated jobs. Also, the employers should be required to carry out objective job appraisals based on criteria such as responsibility, skills required, the effort required and working conditions and progressively align remuneration of female-dominated jobs with comparable male-dominated jobs in the organisation. Further employers should be required to report on this information and submitting plans on how to remedy any pay differentials that are not allowable under the Employment Act, 2007 as well as requiring employers to submit reports of the same to the Ministry of Labour in Kenya and allowing this information to be accessible to employees, employee associations and unions as this will encourage transparency and fact-checking of employer reports and that employers work to implement the plans they submit to the labour office for remedying any prohibited gender pay differentials.

4.3 Case law

Section 151 of the Labour Relations Act, 1995(as amended in 2018) has established the Labour Court as a superior court of law and equity, equal to the High Court in South Africa. This Court has exclusive jurisdiction in all matters relating to employment and labour relations matters and has on several occasions issued orders and decisions in respect of employees, employers and the Department of labour as affects the interpretation of the Employment Equity Act, Employment Equity Regulations, and the Code of Good Practice.

4.3.1 Onus of burden of proof

Previously in this chapter, it was indicated that the Section 11 Employment Equity Act, 2013 of South Africa prescribes that a dual burden of proof test. If the complaint by the employee is based on a prohibited ground as per Section 6(1), of which sex is a prohibited ground, the burden of proof lies with the employer to prove their actions were not discriminatory as alleged, or that such discrimination is rational and fair. This position was upheld by the Labour Court in *Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others* where the Court stated that where unfair discrimination is alleged it is the employer's responsibility to prove that what took place was rational and fair and therefore discrimination did not take place in respect of the employee.¹¹⁵ This is similar to the Kenya requirement, under Section 5 of the Employment Act, 2007, where the employer bears the burden of proof in respect of a claim of breach of the employees right to fair remuneration.

Section 11 also contains the other key legal provision on the burden of proof, as it stipulates that where the employee alleges that there is unfair discrimination on an *arbitrary ground*, the complainant must prove on a balance of probabilities that the conduct complained of is irrational, amounts to discrimination and the discrimination is unfair. The Employment Equity Act, 2013

¹¹⁵ *Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others* (2019), labour Court of South Africa.

does not provide a definition of arbitrary grounds, but the Labour court did give guidance on this in the matter of *Ntai v South African Breweries Limited* in which the court observed that applicants alleging discrimination based on arbitrary grounds must identify clearly for the Court with proof the specific arbitrary ground relied on, or they risk failing at the first hurdle of their claim of discrimination based on arbitrary grounds.¹¹⁶

The Labour Court went further in defining arbitrary ground, in the matter of *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* where the Court found that the conduct of an employer in respect of an employee must be against the dignity of the employee to then accordingly fall within the prohibited arbitrary grounds and thus be an unfair labour practice.¹¹⁷ Finally, in the more recent case of *Naidoo and Others v Parliament of the Republic of South Africa* in which 69 employees from the Parliamentary Protection Officers sued Parliament because it employed new employees at a higher pay rate under the title Chamber Support Officers which the Protection officers claimed was discrimination based on an arbitrary ground.¹¹⁸ The Labour Court held that for a complaint of discrimination on arbitrary grounds to be sustained, the discrimination alleged must undermine the complainant's human dignity. The Court went further to explain that the term against human dignity means that the complainant must demonstrate that those pay differentials which exist, are linked to their attributes or characteristic and thus discrimination based on these uncontrollable factors and impairs the complainant's dignity. The complainants failed in the instant case as they merely demonstrated pay differentials but did not establish how the discrimination based on arbitrary ground impaired their human dignity.

Kenya may learn from South Africa's dual burden of proof to have section 5 of the Employment Act, 2007 amended either directly or through having rules that provide for a second arm on the issue of burden of proof where an employee is alleging that there was no pay equity due to a ground of discrimination that is not listed in the Employment Act, 2007. The rules could prohibit discrimination based on any arbitrary ground which impair human dignity as the closed list of prohibited grounds in the Employment Act, 2007 or the Constitution, 2010 may not always be sufficient to deal with all grounds that may arise in an employer-employee relationship as is

¹¹⁶ *Ntai & Others v South African Breweries Limited* (2001), Labour Court of South Africa.

¹¹⁷ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009), Labour Appeal Court of South Africa.

¹¹⁸ *Naidoo and Others v Parliament of the Republic of South Africa* (2018), Labour Court of South Africa.

evident in the various dispute scenarios in South African case law. After the addition of arbitrary grounds, Kenya may also amend the burden of proof to require an employee who alleges the breach of their right to gender pay equity due to discrimination to bear the burden of proof as provided in South African law, as the employee would be required to prove this arbitrary ground and then demonstrate that it was because of this and not due to fair and rational grounds that they were discriminated against and denied the right to gender pay equity.

4.3.2 Fairness

As analysed earlier in this chapter South African law through various sections in the Employment Equity Act, 2013, Employment Equity Regulations, 2014, and the Code of Good Practice, 2015 has prohibited unfair labour practices including discriminatory remuneration practices that undermine the right to pay equity in general and gender pay equity in particular. The Court, in discussing what amounts to an unfair labour practice, in the matter of *Chemical Workers Union v Sentrachem Ltd.*, a dispute in which the applicants alleged that the respondent discriminated against its black employees by paying them less than their white counterparts who were employed on the same grade or engaged in the same work, held that wage discrimination based on race or any other difference other than skills and experience was an unfair labour practice and ordered the employer to remedy the discrimination against its black employees within six months.¹¹⁹

It is quite clear from the *Chemical Workers Union v Sentrachem Ltd* case that the Labour Court in South Africa has pronounced itself on the fact that discrimination in respect of pay equity and one could argue also in gender pay equity, arises not when there is a pay differentiation between employees with different characteristics such as race or sex, but where this differentiation is not based on objective factors such as skills or experience but on discrimination, that is, based on factors such as sex or race. There is a need for Kenyan law through rules on gender pay equity to provide objective criteria of factors such as skills and experience among others that can be relied on by employers in determining remuneration as this will assist in guiding employers to have objective criteria for determining the remuneration of employee and this may assist in reducing gender pay inequality among employees as employers are encouraged to base employee pay will

¹¹⁹ SA *Chemical Workers Union v Sentrachem Ltd* (1988), Industrial Court of South Africa.

depend on objective factors not, discriminatory ones.

4.3.3 Discrimination

The Court after establishing who is required to discharge the burden of proof will consider the evidence before it further to establish if the claimant has proof of direct or indirect discrimination. In order to determine this, the Court would consider the evidence to confirm if there is unequal pay for work of equal value and if the basis of this is differentiation in pay is discrimination which is prohibited by the law. In the matter of *Louw v Golden Arrow Bus Service (Pty) Limited*, the Court opined that it is not an unfair labour practise to pay different wages for equal work or for work of equal value. The Court clarified that the unfair labour practice was for an employer to pay different wages for equal work or work of equal value, if the reason or motive which was the basis for this, is direct or indirect discrimination based on a prohibited ground of discrimination such as race or ethnic origin among others or arbitrary ground.

The case of *Harken v Lane NO and Others*, is another key source of case law on discrimination in South Africa.¹²⁰ The apex Court of South Africa, the Constitutional Court of South Africa, found in this case that in determining if there is discrimination in line with Section 9 Constitution of the Republic of South Africa, 1996, the test to be applied is whether there was equal protection and benefit as guaranteed under the law for those in the matter and if there was unfair discrimination. In the case the Court found that to determine if there is discrimination a court must determine if there was a differentiation if the differentiation was discriminatory and if this discrimination was unfair.

4.3.4 Comparators

In the analysis of equal pay for work of equal value, one of the main factors that the Courts consider is a suitable comparator as this comparison between more than one employee is required in determining whether the equal work or work of equal value, differences in remuneration and

¹²⁰ *Harksen v Lane NO and Others* (1997), Constitutional Court of South Africa.

actual discrimination has been proven. In *Harksen v Lane* the Court stated that to succeed in showing that work is the same or similar the claimant must identify an appropriate better-paid comparator by fact.¹²¹ In addition to this, the claimant must indicate the relevant period for which the comparison is to be drawn and lay a factual foundation that the work done by the comparator is equal or similar in nature, to that done by the claimant. The Courts have found that where the claimant fails to establish sufficient comparison through evidence, then their claim will necessarily fail.¹²²

It should be noted that in determining comparators the courts do not hesitate to recognise a party as the true employer of an employee despite the labels that the parties had attached to their relationship or confines of any contracts between the parties as this is used to ensure employers do not simply use different subsidiaries as a cover for unfair and discriminatory labour practices. This was illustrated in the case of *Unitrans Supply Chain Solutions (Pty) Limited & Another v Nampak Glass (Pty) Limited and Others*.¹²³ In this case, the Labour Court considered the expiry of the warehousing agreement between two entities and the utilisations of an owned subsidiary to perform the required services. Van Niekerk J held that they would not hesitate to recognise and give effect to an employment relationship, and specifically, to recognise a party as the true employer despite the labels that the parties have attached to their relationship and despite the confines of any contracts between them as, the courts look beyond the label to the substantial relationship between the parties, and have always given effect to substance over form. The judge stated that employers might simply ensure that employees are always employed by an entity different to the entity in which the assets and activities that form a particular business are housed, which would defeat the employees' right to redress should their rights be breached by the employer. This means that employees who perform the same or similar work, or work of equal value, though that employed in separate legal entities may still form a basis for comparators, especially where it can be established through evidence in court that the entities have a relationship through a corporate group of companies.

¹²¹ *Harksen v Lane NO and Others* (1997), Constitutional Court of South Africa.

¹²² *DM Sithole and 18 Others v Dr Kenneth Kaunda District Municipality* (2017), Labour Court of South Africa.

¹²³ *Unitrans Supply Chain Solutions (Pty) and Another v Nampak Glass (Pty) Ltd and Others* 2014), Labour Court of South Africa.

Once the comparator is established, the court will confirm if the comparators perform work of equal value. This was evident in the case of *Louw v Golden Arrow Bus Service (Pty) Limited*, two-coloured males employed as buyers, contended, that they performed work of equal value to the work of a white warehouse supervisor. From the evidence provided, the wage gap between the complainants and the white supervisor increased from 53.3% in 1990 to 61.8% in 1998. In its defence, Golden Arrow Bus Services insisted that it had assessed the specific jobs of the employees in question, after benchmarking in the industry both locally and abroad, through a method referred to as the Peromnes job evaluation method. It was stated that it was through this method, in which factors like problem-solving, consequences of judgements, the pressure of work, knowledge, job impact, comprehension, educational qualification and training experience were analysed, and points allocated for each factor and from this, the job grades were developed. The Employer alleged that the basis of the unequal pay was that the job of buyers and supervisors were in two separate grades with the former job having less requirements than the latter, as the latter had a managerial component. The Court found in favour of the defendant that the two jobs compared did not qualify as work of equal value, and therefore they could not be remunerated equally and thus the claimant's suit failed at that point as there were fair reasons for the differences in pay since the work was not of equal value, thus no discrimination.¹²⁴

Kenya can learn from this case law and go further than just providing for gender pay equity as a principle, and provide rules that require the use of comparators in disputes of gender pay equity. The rules may specify that the comparators, as was specified in the case law above, should be specifically identified as a comparator in the same company or corporate group or affiliated companies, the relevant period for which the comparison is to be drawn as these factors would be critical in laying a factual foundation for any employee claiming that the work done by the comparator is equal work or work of equal value but there are differentiations in the pay which is devoid of any fairness or rationality and is thus based on a discriminatory ground which is a breach of the principle of gender pay equity.

¹²⁴ *Louw v Golden Arrow Bus Service (Pty) Ltd* (1999), Labour Court of South Africa.

4.3.5 Exceptions

The Employment Equity Act, 2013 provides particular exceptions to gender pay equity, namely affirmative action and inherent requirements of a job. The South African Labour Court has considered these exceptions on several occasions. The Court in its obiter in *Ntai v SA Breweries Ltd* did state that although the employer had no duty to apply affirmative action measures and somehow increase the salaries of the applicants, the application of an affirmative action measure was a defence that could be relied upon by an employer and does not constitute a right which an employee could utilise.¹²⁵

The scholars like Landman¹²⁶ have argued that in considering affirmative action in respect of designated groups, which includes, black people, women and people with disabilities as per Section 2 Employment Equity Act, 2013, it may be that designated employees are paid more than able-bodied white males, who are the only persons who do not belong to a designated group.¹²⁷ This indicates that an employer can apply affirmative action that may result in designated groups earning higher pay and the employer can rely on this as a defence however affirmative action is not a right for which an employee can seek court enforcement against the employer. Section 260 of the Constitution of Kenya, 2010 defines affirmative action as including any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom. The Employment Act, 2007 mentions affirmative action at Section 5 as an exception to pay equity but does not define the term nor give indications of its determination of implementation. There is a need for rules to be enacted which can give the criteria for affirmative action in respect of gender pay equity.

In respect of gender pay equity and inherent jobs requirements the court in *Chemical Workers' Industrial Union v Johnson & Johnson (Pty) Ltd*¹²⁸ made a general observation that there may be

¹²⁵ *Ntai & Others v South African Breweries Limited* (2001), Labour Court of South Africa.

¹²⁶ Landman AA, 'The Anatomy of Disputes about Equal Pay for Equal Work', *South African Mercantile Law Journal*, 341, 2002.

¹²⁷ Landman AA, 'The Anatomy of Disputes about Equal Pay for Equal Work', *South African Mercantile Law Journal*, 2002, 341 - <https://heinonline.org/HOL/LandingPage?handle=hein.journals/safrmerlj14&div=27&id=&page=>> on 2 October 2021.

¹²⁸ *Chemical Workers' Industrial Union v Johnson & Johnson (Pty) Ltd* (1997) 9 BLLR 1186 (LC)

serious difficulty finding a job which can be said to inherently require a worker to be a male or female in order to perform. The Labour Court has been faced with the issue of inherent jobs requirements in various matters including in *Lagadien v University of Cape Town*¹²⁹ where the Labour Court found that proven skills, experience and knowledge were indispensable requirements for a particular job and the refusal to appoint a person who lacked these qualities was permissible within the meaning of the inherent requirements of the job as espoused in section 6(2)(b) of the Employment Equity Act.

The case of *Whitehead v Woolworths* brings forth another consideration in respect of inherent job requirements which is, time to conduct a job or the employees' availability.¹³⁰ In this case, the employer was put to its defence in respect of a claim of that discrimination against a pregnant woman. The employer averred that it was justified in not appointing a pregnant woman to a permanent position as she would not be available for the same and availability was an inherent requirement of the particular job. The Court of appeal agreed with the employer that a distinction based on the inherent requirement of a job will not be regarded as discrimination and in this case the pregnant woman would not be available for the job which was an inherent requirement thus there was no discrimination. The cases above demonstrate that where an employer can prove that the employee does not possess an inherent job requirement such as skills, knowledge, experience and even availability then the employee cannot succeed in a claim on discriminations for not being accorded equal treatment including, gender pay equity, with other employees. This criterion for what constitutes inherent job requirements can be incorporated in Kenyan's rules on gender pay equity as a guide that will assist employers, employee, and the Ministry of labour in ensuring compliance with the principle of gender pay equity as the current Employment Act only provides inherent.

Family responsibility, which is defined in Section 2 of the Employment Equity Regulations of 2013, as the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support, seems to be

¹²⁹ *Lagadien v University of Cape Town* (C489/98) [2000] ZALC 107 (26 September 2000).

¹³⁰ *Woolworths (Pty) Ltd v Whitehead* (2000), Labour Appeal Court of South Africa.

an emerging exception to pay equity in South Africa. Section 6 of the regulations provides that no person may unfairly discriminate, directly or indirectly, against an employee, for family responsibility and other specified factors which have been discussed earlier in this chapter and Section 54 states that the Commission on Employment Equality on extraordinary measures to be taken in relation to persons with family responsibilities. The Court in *Co-operative Worker Association v Petroleum Oil and Gas Co-operative* considered the applicant's allegation that the respondent committed unfair discrimination based on the absence of family responsibility in that employees with family responsibility (dependent spouses and children) received a higher total remuneration than employees without family responsibility, which they argued was discriminatory.¹³¹ The Labour Court noted that the international community as well as the Employment Equity Regulations acknowledged the fact that workers with family responsibilities constituted a vulnerable group and are deserving of protection. The Labour Court agreed with the respondent's submission that the definition of family responsibility made it clear that only those employees with dependants may use Section 6(1) on the ground of family responsibility and the applicant could therefore not claim unfair discrimination on the basis of the absence of family responsibility and their claim was consequently dismissed.

It is evident from the above case law, that the Labour Court considers the presence or absence of family responsibility as a justification for paying different wages to employees and it can thus be termed as an exception to discrimination. Noting that the Kenyan Constitution, 2010 stipulates that the family is the basic unit of society and the fact that family responsibilities may determine total remuneration to employees (when remuneration considers pay and benefits given to employees and their dependants), there is a need for Kenya to have provisions in its rules on gender pay equity to define and allow family responsibilities as a permissible exception to the right of pay equity.

In addition to this exception, employers can rely on certain defences provided in the Employment

¹³¹ *Co-Operative Worker Association and Another v Petroleum Oil & Gas Co-Operative of SA and Others* (2006), Labour Court of South Africa.

Equity Regulations, 2013 where they are claiming they did not unfairly discriminate against an employee. As discussed earlier in this chapter Section 7 Employment Equity Regulations of South Africa, which provides for objective factors such as seniority of service, individual qualifications above minimum requirements, individual performance based on a performance evaluation system, demotion due to organisational restructuring, temporary jobs, the market value of skills where there is a shortage of certain skills and other relevant fair and non-discriminatory that should form the basis for remuneration. The factor of objective performance evaluation came into consideration in the matter of Mthembu v Claude Neon Lights in which the respondent instructed its local management to evaluate each employee and make recommendations as to whether the employee should receive an increase in pay based on merit and this was done for all save for two employees who did not receive a merit increase. These two employees moved to the Labour Court to seek enforcement of their right to pay equity against the employer. The Court held that discrimination was absent and that it would not be in the interests of employers or employees to order that an employer is not entitled to differentiate between employees based on their productivity.

The Court further held that an employer is entitled to reward an employee with a merit increase as that increases productivity. Thus, the case illustrates that pay differentiation based on a performance-based mechanism is not discriminatory as provided in Section 7 Employment Equity Regulations is not discriminatory. In providing rules on gender pay equity Kenya can learn from Section 7 of the Employment Equity Regulations, 2013 and above case law from Labour Court of South Africa and set out in its rules, similar to Section 7 Employment Equity Regulations in South Africa, that objective factors such as seniority of service, individual qualifications above minimum requirements, individual performance based on a performance evaluation system, demotion due to organisational restructuring, temporary jobs, the market value of skills where there is a shortage of certain skills and other relevant fair and non-discriminatory factors which can be the basis of differentiation in remuneration and that this is not discriminatory. This will assist in having not just prohibitive rules that state what employers should not consider in determining gender pay equity in their organisations but permissive or positive rules by providing employers with what they should consider in order to ensure remuneration objectivity and thus hopefully gender pay equity.

The principles in the case law above were applied by the Labour Court in the case of *Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others*¹³² in which the court set aside an arbitrator's award. In the case, Rebecca a black lady complained of discrimination on the basis of sex and race as she claimed that her white male colleague who was employed like herself as a surveillance auditor in a casino, had a higher salary due to his sex and race. The Court stated that where unfair discrimination is alleged it is the employer's responsibility to prove that what took place was rational and fair and therefore discrimination did not take place. As relates to the particular facts, the Court found that there was a legal requirement for the employer to ensure that employees are not paid different remuneration for work of equal value based on gender. The Court noted that the comparator chosen was graded at the same position, had the same job description, did the same work on a daily basis and reported to the same manager as the claimant therefore they performed the same work, but their remuneration was higher.

The Court went further and noted that from the evidence provided the comparator had more industry experience than the claimant and was already earning a much higher salary, therefore the current employer had to offer him a higher salary in order to recruit him to work for them. It was noted by the Court that the employer was relying on a market forces defence as provided in Regulation 7 of the Employment Equity Regulations which allows seniority, length of service and qualifications as factors that might serve to justify as fair, a differentiation in income between employees undertaking equal work or work of equal value. The Court concluded that in not considering this evidence the arbitrator failed to consider if the employer had a fair and rational defence for the remuneration differential which was not discriminatory, and this was found to be an error in law on the side of the arbitrator and his award was set aside. Though the arbitrator's award was set aside, the case is relevant to this thesis as it shows that where clear criteria are provided for evaluation parameters for gender pay equity as detailed in the South African law then this criterion is known to employers and employees and courts are able to apply this criterion to enforce the rights of parties in a dispute. Kenya would be well advised to learn from South Africa and move to develop criteria for the determination of gender pay equity.

¹³² *Sun International Limited v SACCAWU obo Rebecca Ramerafe and Others* (2019), Labour Court of South Africa.

4.4 Conclusion

From the jurisdictional comparison above this study has established that Kenya can learn from South Africa by going beyond just providing for the principle of pay equity by having rules similar to the South African Employment Equity Act, 2013, the Employment Equity Regulations, 2014 and the Code of Good Practice on Equal Pay /Remuneration for Work of Equal Value which provides criteria for implementing gender pay equity. These rules should contain provision similar to those in South Africa that require employers to carry out assessments in order to determine work of equal value, the fact that this assessment should be devoid of discriminatory grounds the employer can be required to assess jobs based on criteria for objective factors such as responsibility for people, finance and materials demanded in the work; skills and qualifications; the effort required whether physical mental or emotional and the conditions of work such as the physical environment, psychological conditions, time, and location of the work. The criteria should also require employers to deal with gender bias by having criteria that require employers to ensure the assessment methods do not undervalue female-dominated versus male - dominated jobs.

In addition to the above, Kenya should have rules similar to South Africa which specify justification for when employers may fairly and rationally differentiate terms and conditions of employment for employees performing work of equal value. This would ensure that differentiation is based on fair and objective factors such as seniority of service, individual qualifications above minimum requirements, individual performance based on a performance evaluation system, demotion due to organisational restructuring, temporary jobs, the market value of skills where there is a shortage of certain skills. Once the assessment of jobs is done as per the parameters above the rules in Kenya could also require employers to collect information on the pay equity in their institution. This information should also provide for employee feedback information on the same as in South Africa and the report generated from this information should be filed with government authorities, thus making the information accessible to employees and employee organisations, together with a plan (employment equity plan) on how the employer plans to address the gender pay inequity that may become evident in their institution.

Further, the rules should in Kenya similar to South Africa set out criteria for exceptions to the gender pay equity principle including objective factors such as rewarding of employees based on objective performance-based systems, due to performance, seniority of service, individual qualifications above minimum requirements, shortage of particular skills in the job market and clear definitions and criteria exceptions already provided in Kenyan law such as affirmative action and inherent job requirements.



5 CHAPTER 5: SUMMARY OF THE FINDINGS, RECOMMENDATIONS AND CONCLUSION.

5.1 Introduction

This chapter presents the findings, recommendations and a conclusion in respect of this thesis.

5.2 Summary of Findings

This study sought to demonstrate that current legislation in Kenya falls short of providing clear criteria on the implementation of gender pay equity by employers. In addition to this, a comparative study between Kenyan and South African law on gender pay equity and its implementation criteria has been conducted in this thesis. The thesis notes several findings including:

1. The Constitution, 2010 and the Employment Act, 2007 does place a duty on an employer to promote equal opportunity in employment, prohibit the employer from direct or indirect discrimination of employees and provide that an employer shall pay his employees equal remuneration for work of equal value all of which forms the basis for gender pay equity in Kenya.
2. However Kenyan law on gender pay equity as compared to South African law has several gaps as to does not have critical criteria on implementing gender pay equity, specifically:
 - a. There are no criteria provided in the law requiring employers to carry out objective jobs assessments in order to determine equal work or work of equal value without the influence of gender biases;
 - b. The laws fail to guide employers on fair and reasonable grounds which employers can rely in circumstances where these grounds lead to different remuneration or terms and conditions of employment for employees performing equal work or work of equal value
 - c. The reporting mechanisms for employers on employee matters to the labour office is weak as it does not provide for reporting on gender pay matrices and information

on differentiated remuneration or terms and conditions of employment for employees performing equal work or work of equal value. Also, the reporting requirements do not require employers, where there are unfair or unreasonable disproportionate remuneration differentials or differentials in terms and conditions of employment between male and female employee, to file a plan of how this will be progressively addressed with specific timelines. Further, neither is access provided to employees, employee associations in respect of any information filed by an employer in the Labour office nor is there an enforcement mechanism accorded to the Labour office to enforce compliance by employers to any plan that they should file.

- d. There is a need for clarity on exceptions to gender pay equity including affirmative action and inherent job requirement. This should include having rules that provide definitions in the case of inherent job requirements which is not defined and providing clear implementation criteria for these exceptions. Further the exceptions are narrow and do not cover normal employment issues such as rewarding of employees based on objective performance-based systems, seniority of service, individual qualifications above minimum requirements, shortage of particular skills in the job market and family responsibilities which may bring about remuneration differentials and maybe wrongly cited by employees as a breach of gender pay equity.

5.3 Recommendations

To make recommendations on the legislative reforms that may be undertaken to address the gaps identified in Kenya's legislation on gender pay equity implementation by employers

The author recommends that the Employment Act, 2007 should be amended to include rules that:

1. Provide specific criteria to guide employers in accessing work of equal value, which should be remunerated equally. This criterion should aim at having employers conduct job assessments that are devoid of bias as the assessments should be done based on objective factors such as responsibility for people, finance and materials demanded in the work; skills and qualifications; the effort required whether physical mental or emotional and the

conditions of work such as the physical environment, psychological conditions, time, and location of the work. Additional criteria should be included in the rules which provide that the employers should be aware of gender biases in job assessments and thus they have to carry out assessments using methods that ensure female-dominated jobs are treated equally to male-dominated jobs.

2. Provide justification for when employers may fairly and reasonably differentiate terms and conditions of employment for employees performing equal work or work of equal value. This can be based on seniority of service, individual qualifications above minimum requirements, individual performance through an employee performance evaluation system, demotion of an employee, temporary jobs, market value of skills and other relevant factors that are not discriminatory.
3. Provide a requirement that employers must report to the Labour Office on the remuneration received by employees in each occupational level of their workforce after job evaluations, and that this information should also include information on gender. In addition to this, employers should be required that, where there are disproportionate remuneration differentials or unjustifiable or discriminatory differentials in terms and conditions of employment between genders, the employer should file a plan for the steps it will take to progressively reduce these differentials with specific timelines. The filed plan should also be accessible to employees, employee associations and enforceable by the Labour office.
4. Provide for exceptions to the gender pay equity principle including objective factors such as rewarding of employees based on objective performance-based systems, seniority of service, individual qualifications above minimum requirements, shortage of particular skills in the job market, family responsibilities and clear definitions and criteria for current exceptions in the Employment Act, 2007, namely affirmative action and inherent job requirements.

5.4 Conclusion

This thesis analysed the current legislation in Kenya on gender pay equity and identified that this legislation only provides for the principle of gender pay equity but lacks clarity on what determines pay equity, which in turn makes this principle ambiguous and difficult to implement by employers, employees, employer, government, and court on the parameters of implementation of gender pay equity.

Overall, this thesis found that between Kenya and South Africa, there is near – concordance when it comes to legislation on the principle of pay equity. However, in Kenya this is the beginning and the end of the law on pay equity, while in South Africa the law is based on the principle of pay equity and goes further through the Employment Equity Regulations, 2014 and the Code of Good Practice on Equal Pay /Remuneration Statutes, which provide criteria for accessing gender pay equity through requiring employers to provide criteria for evaluating male- dominated and female-dominated jobs, requiring them to carry out objective job appraisals based on objective factors such as seniority of service, individual qualifications above minimum requirements, individual performance through an employee performance evaluation system among others; allowing employers to have fair and rational justification for differentials in remuneration and requiring not only reporting on the above but making employers responsible for progressively addressing discriminatory pay differentials through progressive plans submitted to the Labour office and accessible to employees and employee associations.

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6 CHAPTER 6: APPENDICES

6.1 Appendix A: Similarity Report



Document Information

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Similarity	7%
Analysis address	library.strath@analysis.urkund.com

6.2 Appendix B: Ethical Clearance Confirmation



18th November 2021
Ms Nduta, Yvonne
ynduta@strathmore.edu
Dear Ms Nduta,

RE: Equal Remuneration for Work of Equal Value: A Case for Employment Act Rules to Promote Gender Pay Equity in Kenya.

This is to inform you that SU-IERC has reviewed and **approved** your above **SU-master's** research proposal. Your application reference number is **SU-IERC0986/21**. The approval period is **18th November 2021 to 17th November 2022**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used.
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Fred Were".



for: Prof Fred Were,

Chairperson; SU-IERC

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