

**AN ANALYSIS OF THE LAW ON SERVICE PAY IN KENYA**

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

FEBRUARY 2018

**DECLARATION**

I, SHALMAR ESTHER NYAMBURA MAINA, do hereby declare that this dissertation is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: Esther Maina  
Date: 24/05/2018

This Dissertation has been submitted for examination with my approval as University Supervisor.

Signed:   
Date: 24/05/2018

ANNE KOTONYA.

## **Dedication**

I dedicate this dissertation to my family for their patience, love and support throughout my research period.

### **Acknowledgement**

I would like to express my deepest most heartfelt gratitude to God for his grace and favour throughout my research period, my family and friends for their patience and prayers, my supervisor for her guidance, insight, patience and attention and all the scholars who have provided wonderful insight through their research on service pay and gratuity. Thank you.

## **Abstract**

This dissertation analyses the current legal framework in Kenya with regard to service pay. In addition, it analyses the legal framework in other jurisdictions such as India, Sri- Lanka and the Gulf Cooperation Council countries with due regard to Kenya's legal system and methods. It highlights how other jurisdictions have properly and conclusively legislated on service pay and provides suggestions such as statutory reform in order to improve the law on service pay in Kenya.

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## CHAPTER ONE

### INTRODUCTION

#### Background

Service pay is the amount of money paid to an employee by an employer, whose contract of service to pay wages periodically at intervals of one month or exceeding one month, has been terminated.<sup>1</sup> Termination in this instance is when an employee is fired or resigns from his or her job.

Gratuity or service pay is paid to the employee by the employer to encourage long term service at work and to ease the difficulties faced by an employee after termination of a contract.<sup>2</sup>

Kenyan law is unclear on how to calculate it. It states that an employee is entitled to service pay for every year worked when their contract of service is terminated<sup>3</sup> and when he or she is not member of any form of pension scheme including the National Social Security Fund.<sup>4</sup>

Over the years, there have been several cases in the Kenyan Employment and Labour courts that have dealt with matters regarding service pay unclearly. This dissertation sheds light on the key issues revolving around this assertion.

#### Statement of the problem

Although the law is clear on the subjects of service pay, it is unclear on how it should be payed and the terms thereof.<sup>5</sup> This brings about numerous confusion and assumptions when the courts deal with matters regarding service pay.<sup>6</sup>

This dissertation analyses different ways to calculate service pay, the terms thereof and who should pay it with little or no detriment to the employer or the employee.

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<sup>1</sup> Section 35, *Employment Act* (CAP. 226 of 2007).

<sup>2</sup> <http://www.lincolnconsulting.co.ke/?p=433> on 26<sup>th</sup> September 2017.

<sup>3</sup> Section 35, *Employment Act* (CAP. 226 of 2007).

<sup>4</sup> Section 35, *Employment Act* (CAP. 226 of 2007).

<sup>5</sup> Section 35, *Employment Act* (CAP. 226 of 2007).

<sup>6</sup> Maema W, 'Current Trends in Employment Disputes in Kenya: A disturbing Trajectory,' Iseme, Kamau and Maema Advocates (2016).

### **Justification**

In the case of Daniel Oluoch v A.G and another the High Court held that the claimant was entitled to service pay.<sup>7</sup> However, due to the lack of a service pay rate in the Employment Act and other applicable Kenyan law, the court employed the severance pay rate in the Employment Act in making its decision.<sup>8</sup> The severance pay rate in the Employment Act is applicable to employees in case of redundancy and not service pay.<sup>9</sup>

In a different case, the court held that the claimant should be paid a service pay due to the inadequacy of National Social Security Fund and that the rate should be left to the Employer to fix.<sup>10</sup> In this case the court ignored the Employment Act CAP. 226 of 2007 which states clearly that an employee who is a member of any form of pension scheme including the National Social Security Fund is not entitled to service pay.<sup>11</sup>

This dissertation deals with the discrepancies in the law brought about by the above cases.

### **Objectives**

This dissertation analyses the current legal framework in Kenya with regard to service pay. In addition, it analyses the legal framework in other jurisdictions such as India, Sri Lanka and the Gulf Cooperation Council countries with due regard to Kenya's legal system and methods in order to highlight how other jurisdictions have dealt with service pay regulations. .

### **Research Questions**

1. What are the strengths and weaknesses in the law on Service Pay in Kenya?
2. What is the law on service pay in other jurisdictions such as India, Sri Lanka, and the Gulf Cooperation Council countries?
3. What can the Kenyan legal system draw from other jurisdictions in order to improve the law of service pay in Kenya?

### **Literature review**

In the book by Holzmann R, Pouget Yann, Vodopivec M and Weber M titled Reforming Severance Pay: An international Perspective, written in 2011, the author mentions Sri Lanka's Termination of Employment of Workmen Act of 1971 and the Gratuity Act No. 12 of 1983 as

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<sup>7</sup> Daniel Oluoch v Hon. Attorney General and Another [2012] eKLR.

<sup>8</sup> Daniel Oluoch v Hon. Attorney General and Another [2012] eKLR.

<sup>9</sup> Section 40, *Employment Act* (CAP. 226 of 2007).

<sup>10</sup> Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes limited [2014] eKLR.

<sup>11</sup> Section 35(6) (d), *Employment Act* (CAP. 226 of 2007).

prerequisite law after the termination of employment.<sup>12</sup> This is with regards to the service pay owed to the workers.

The Gratuity Act No. 12 of 1983 of Sri Lanka requires the companies with more than 15 employees to pay gratuity or in this case service pay.<sup>13</sup> This is to be paid upon termination of their employment if they have provided more than five years of service to employer.<sup>14</sup> The service payment amounts to one month's salary for each two years of service.<sup>15</sup>

The author depicts a legal system that has embraced service pay law in its entirety. There are no loopholes in this system as the author states. The employees to whom service pay is owed are aware of how the service pay is calculated. The employees are also aware of who owes them their service pay in case they are terminated from their contract of service.

This dissertation suggests the possibility of such informed law reform in Kenya as well.

In the book the *Practical guide to Payment of Gratuity* written in 2011 by H. L. Kumar, India's Payment of Gratuity Act 1971 is extensively discussed.

The author discussed the act to include passages such as the duty of an employer to pay gratuity.<sup>16</sup> According to the author, gratuity is a right that cannot be withheld or adjusted by the employer under any circumstance.<sup>17</sup> The author gave an example of where money is owed to the employer by the employee. In this circumstance, gratuity cannot be adjusted to pay for the employee's debt.<sup>18</sup>

In this book it is clear that the author understands service pay as a right. That the employer has a duty to ensure that that right is upheld. Service pay, according to the author, should be held in high regard.

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<sup>12</sup> Holzmann R, Pouget Yann, Vodopivec M and Weber M., 'Reforming Severance Pay: *An international Perspective*, ' World Bank Publications, .Chapter 2, 2011.

<sup>13</sup> Holzmann R, Pouget Yann, Vodopivec M and Weber M., 'Reforming Severance Pay: *An international Perspective*, ' World Bank Publications, .Chapter 2, 2011.

<sup>14</sup> Section 5, *Payment of Gratuity Act* (No. 12 of 1983) (Sri Lanka)

<sup>15</sup> Section 6, *Payment of Gratuity Act* (No. 12 of 1983) (Sri Lanka).

<sup>16</sup> H. L. Kumar, *Practical guide to Payment of Gratuity*, Universal Law Publishing Co. India, Sixth edition, (2011).

<sup>17</sup> Ram Ranjan Mukherjee v Mining and Allied Machinery Corporation Ltd [2001] LLR 297.

<sup>18</sup> Bhailal Kalidas Barot v Factory Manager, Jehangir Textile Mills Ltd [2003] LLR 616.

This view is opposite to the one held in the book *Gratuity: A Contextual Understanding of Tipping Norms from the Perspective of Tipped Employees* where gratuity is more of a tip than a right. In this book the author states gratuity as more of a gift than a right.

In the unpublished article the *Current Trends in Employment Disputes in Kenya- A disturbing Trajectory* by Maema W of Iseme, Kamau and Maema Advocates in 2016, the author depicts the situation in Kenya. He states that the law in Kenya, the Employment Act CAP. 226 of 2007 is silent on how the service pay should be fixed and who should fix it.<sup>19</sup> The author is also not sure whether the task should be taken up by the employee or the employer as either side will seek to get as much advantage as possible.<sup>20</sup> This shows the situation in Kenya as one that is in trouble. The lacuna in law according to the author is in need of reform to avoid confusion when dealing with various matters.

In the case of *Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited* heard in the industrial court of Kenya in Nairobi in the year 2014, the issue in dispute was terminal benefits of the plaintiff.

The claimant was employed as an Optical Technician about 1<sup>st</sup> December 1986. He applied for early retirement in 2011 on medical grounds and gave the respondent written notice of termination one month before. He had worked for 25 years in total. His N.S.S.F contributions were not made consistently by his employer this is because his employer failed to contribute for five years. The issue in this case was whether gratuity pay or service pay should be paid to the claimant by his employer. The court held that the basic membership to the N.S.S.F is not in itself a bar to an employee accessing service pay.<sup>21</sup> Failure to remit monthly contributions would lead to inferior social security benefits. Therefore the court ordered that the claimant shall be paid service pay by using severance pay calculation as provided for in the Employment Act.<sup>22</sup>

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<sup>19</sup> Maema W, 'Current Trends in Employment Disputes in Kenya: A disturbing Trajectory,' Iseme, Kamau and Maema Advocates (2016).

<sup>20</sup> Maema W, 'Current Trends in Employment Disputes in Kenya: A disturbing Trajectory,' Iseme, Kamau and Maema Advocates (2016).

<sup>21</sup> *Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited* [2014] eKLR.

<sup>22</sup> *Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited* [2014] eKLR.

The application of severance pay when it comes to service pay is detrimental to the whole application of the law as it is. This is because law on service pay should be used to deal with matters of service pay.

In another case of *Ben Panhill Sifuna v Kenyan Urban Roads Authority [2014] eKLR* the court applied the rate of 31% of a year's salary to calculate gratuity or service pay which is not provide for in the law.<sup>23</sup> The court in this instance yet again used a method that is not recognised by law to calculate service pay.

The Indian *Payment of Gratuity Act India 1972* amended on 6<sup>th</sup> May 2016 details about service pay. In this act an employee is any person other than an apprentice in any establishment, factory, mine, oilfields, plantation, port, Railway Comp

Any or shop, to do any skilled, semiskilled or clerical work, whether the terms of employment are expressed or implied.<sup>24</sup> The Act is applicable to any establishment in which ten or more persons are employed, or were employed on any day preceding twelve months.<sup>25</sup> An employee who has rendered at least five years of service becomes entitled to the benefit.<sup>26</sup>

The Indian payment of gratuity act provides for payment of gratuity of persons who have worked continuously for more than five years. The Kenyan Employment Act is silent and does not give a specific time or date in which a person is liable for payment of gratuity.

### **Theoretical framework**

This dissertation is based on commutative justice.

Commutative justice propounds that the exchanges between individuals in a contract should be fair and equal.<sup>27</sup> It was developed during the sixteenth and seventeenth century by the School of Salamanca based on Thomas Aquinas's works on justice and Aristotle's work on commutative and distributive justice.<sup>28</sup>

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<sup>23</sup> Ben Panhill Sifuna v Kenyan Urban Roads Authority [2014] eKLR.

<sup>24</sup> Section 2, *Payment of Gratuity Act* (No. 36 of 1972) (India).

<sup>25</sup> Section 2, *Payment of Gratuity Act* (No. 36 of 1972) (India).

<sup>26</sup> Section 4, *Payment of Gratuity Act* (No. 36 of 1972) (India).

<sup>27</sup> White, William R., 'The Natural Law and Commutative Justice,' *Catholic Lawyer*, Vol. 2, 1, (1956), 31.

<sup>28</sup> Hawthorne, Luanda, 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice,' *Studia Universitatis Babes-Bolyai Jurisprudentia*, Vol. 2015, No. 3 (2015), 5.

Aristotle stated that that commutative justice is the justice of coordination rather than justice of subordination since the parties involved face each other as equals.<sup>29</sup> In a contractual agreement such as employment, commutative justice should direct that an employee should receive a just wage for the labour they provided to the employer.

Aristotle states that a just wage should enable the employee to lead a good life.<sup>30</sup> A just wage should enable the employee to accumulate enough money to cater for old age, unemployment and sickness.<sup>31</sup>

Service pay is one of the methods of payment through which an employee can sustain themselves through old age, sickness and unemployment without burdening the society and the government and therefore realises the purpose of commutative justice in an employment contract.

### **Hypothesis**

I expect to find that service pay should be fixed by the law and be provided for by the law to avoid the confusion in court due to the lack of a formula on how to calculate service pay.

### **Research design and methodology**

This dissertation is a comparative case study.

A comparative case study aims at the analysis of the similarities and differences between two or more cases that share a common focus or goal in a way that will inform the objective of a research question.<sup>32</sup>

The comparative research design in this dissertation aims at collecting information from foreign case law, articles, statute and books and compare it with Kenya law on service pay

The foreign laws I intend to use are from jurisdictions such as India, South Africa, Sri Lanka and the Gulf Cooperation Council countries with due regard to Kenya's social, political and economic position.

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<sup>29</sup> Hawthorne L., 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice', 5.

<sup>30</sup> Hawthorne L., 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice', 5.

<sup>31</sup> Class presentation by Dr. Peter Kwenjera on 17 September 2017.

<sup>32</sup> Goodrick, Delwyn, 'Comparative Case Studies: Methodological Briefs,' *Impact Evaluation No. 9, Methodological Briefs No. 9* (2014), Abstract.

This is because these jurisdictions have successfully legislated methods to calculate service pay which have been applied in Employment law cases in their various courts.

**Limitation**

1. Use of foreign laws to inform the discrepancies in Kenyan law with regard to service pay may not entirely favour Kenya's social, political and economic position.

## CHAPTER TWO

### THEORETICAL FRAMEWORK

#### COMMUNITATIVE JUSTICE AS THE PHILOSOPHICAL FOUNDATION OF SERVICE PAY

##### Introduction

Thomas Aquinas defines justice as the constant and permanent determination to give someone his or her due.<sup>33</sup> Justice implies a situation where there is harmony and order. There are three elements that must be present while defining justice; they are:-

- a) *Alteritas* which means that justice is not self-centred. Justice refers to other people,
- b) *Debitum* which means that justice is concerned with what is owed to another person,
- c) *Equalitas* which means that justice requires that a person gives another what is owed to them up to the point of equality.<sup>34</sup>

There many types of justice which are categorised according to what they intend to achieve. They are:-

##### a) Legal Justice

Legal justice takes place when an individual or a citizen of a particular country gives his or her country its due for example in form of paying taxes and other levies and following the law of the land faithfully.<sup>35</sup>

##### b) Social Justice

Social justice involves a situation where an individual participates in the social and cultural life and structures of the community.<sup>36</sup> Such is the case when a person pays a subscription fee to a society, for example, the fees paid by Advocates to the Law Society of Kenya would amount to a situation where social justice is realised.

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<sup>33</sup> Thomas Aquinas, '*Summa Theologica*,' Question 58: Justice, Art 1, Objection 1.

<sup>34</sup> Email from Dr. Peter Kwenjera on Fundamental Principles of Business Ethics on 17 September 2017.

<sup>35</sup> Email from Dr. Peter Kwenjera on Fundamental Principles of Business Ethics on 17 September 2017.

<sup>36</sup> Rodes, Robert E. Jr, 'Social Justice and Liberation,' *Notre Dame Law Review*, Vol. 71, Issue 4(1996), 619.

c) **Commutative Justice**

Commutative justice's object is to give everyone what belongs to them; where individual has to give another individual his/her due.<sup>37</sup> It is found between transactions between individuals.<sup>38</sup> For example, an employer has to pay an employee a just wage for labour provided by the employee.<sup>39</sup>

d) **Distributive Justice**

Distributive justice involves what the state or generally, a civil society ought to give an individual that is a citizen of the state.<sup>40</sup> It regulates the duties of the state towards a citizen such as the state's duty to provide public facilities and amenities to all citizens.<sup>41</sup> It also includes allowing the citizen to vote, to exercise rights and participate in the common good. It deals with the relationship between the supreme authority and the subjects.

e) **Vindictive Justice**

Vindictive Justice is a type of justice that is a combination of legal and distributive forms of justice. An example of this form of justice is when a criminal gives himself to the state or comes before the state (legal justice) and the state gives the criminal his or her due of a fair punishment (distributive justice) in accordance with the law.<sup>42</sup>

With due regard to all forms of justice, commutative justice is more inclined to the issues that are realised as a result of the laws of service pay in Kenya. This is because commutative justice refers to that which is owed between individuals in a contract or a business relationship for example an employer and an employee contractual relationship.<sup>43</sup>

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<sup>37</sup> Martin Thomas Owen, 'Justice,' Catholic University Law Review, Vol.2, Issue 2 (1951-1952), 61

<sup>38</sup> White, William R., 'The Natural Law and Commutative Justice,' Catholic Lawyer, Vol. 2, 1, (1956), 31.

<sup>39</sup> Martin Thomas Owen, 'Justice,' Catholic University Law Review, Vol.2, Issue 2 (1951-1952), 61

<sup>40</sup> White, William R., 'The Natural Law and Commutative Justice,' Catholic Lawyer, Vol. 2, 1, (1956), 31.

<sup>41</sup> White, William R., 'The Natural Law and Commutative Justice,' Catholic Lawyer, Vol. 2, 1, (1956), 31.

<sup>42</sup> Email from Dr. Peter Kwenjera on Fundamental Principles of Business Ethics on 17 September 2017.

<sup>43</sup> <https://definitions.uslegal.com/c/commutative-justice/> on 14 December 2017.

### **Commutative Justice**

Commutative justice involves the exchanges between individuals that ought to be fair and equal.<sup>44</sup> It was developed coherently during the Sixteenth and Seventeenth century by the School of Salamanca based on Thomas Aquinas's works on justice and Aristotle's work on commutative and distributive justice.<sup>45</sup>

The concept of commutative justice, as mentioned above, was propounded by Aristotle under the broad banner of justice as requiring two factors or goods, for example labour and wage, that lead to a fair transaction.<sup>46</sup> Aristotle opined that commutative justice is the justice of coordination rather than justice of subordination since the parties involved face each other as equals.<sup>47</sup>

James Gordley explains the Aristotelian theory of commutative justice in his work and write up titled, "*The Philosophical Origins of Modern Contract Doctrine*." He states that the justification of contract law is found when the transaction involved enable an individual to live a good life.<sup>48</sup> It is not enough for there to be a fair exchange in order to realise commutative justice, it has to lead to a good life due to the Aristotelian view of happiness as the highest good and purpose in life.<sup>49</sup>

Mr. Del Vecchio, in his article on justice mentions that, commutative justice is a transaction between the individuals that ought to be just, such that each individual is given their due.<sup>50</sup> For example, if an accident occurs and the person who is injured is forced to recuperate at home for two weeks, commutative justice directs that a reimbursement equivalent to the injured

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<sup>44</sup> Yale Law Journal, 103, no. 3 (December 1993), 861.

<sup>45</sup> Hawthorne Luanda, 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice,' *Studia Universitatis Babes-Bolyai Jurisprudentia*, Vol. 2015, No. 3 (2015), 5.

<sup>46</sup> Anton-Hermann Chroust and David L. Osborn: Aristotle's Conception of Justice, 17 Notre Dame Law Review. 1942, <http://scholarship.law.nd.edu/ndlr/vol17/iss2/2> on 14 November 2017.

<sup>47</sup> Ibid.

<sup>48</sup> Gordley James, '*The Philosophical Origins of Modern Contract Doctrine*,' Clarendon Law Series, (1993), 54.

<sup>49</sup> Gordley James, '*The Philosophical Origins of Modern Contract Doctrine*,' Clarendon Law Series, (1993), 54.

<sup>50</sup> Hawthorne Luanda, 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice,' *Studia Universitatis Babes-Bolyai Jurisprudentia*, Vol. 2015, No. 3 (2015), 5.

person's two week wage would be just. The notion of equalization as well as the concept of leading a good life are important and key to the philosophic concept of commutative justice.<sup>51</sup>

Darryn Jensen wrote that commutative justice accounts look upon the state as a body which has come into existence to secure individual entitlements.<sup>52</sup> The state is important as it ensures that the parties involved have a fair and equal outcome in their transactions. The state acts like a third party according to Jensen. It comes into existence so as to secure those entitlements for all in a more orderly and effective fashion than individuals could secure them for themselves.<sup>53</sup> The state does this through statute and other regulations for example Employment law. In order to ensure that an employee gets their due in an employment contract, the state fashions a statute to ensure both the employer and employee get their due.

In labour law, commutative justice directs that the labour provided by an employee must be equal to the wage given by the employer and enable the employee to lead a good life. Commutative justice is therefore focussed on the individual's well-being and how this is affected by interactions with others.<sup>54</sup>

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<sup>51</sup> Hawthorne, L., '*Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice*', 5.

<sup>52</sup> Darryn Jensen, '*Proprietary Remedies: Distributive or Commutative*', 38 U.W. Australian Law Review, (2014), 8.

<sup>53</sup> Darryn Jensen, '*Proprietary Remedies: Distributive or Commutative*', 38 U.W. Australian Law Review, (2014), 8.

<sup>54</sup> Michael Cockfield J., '*Commutative Justice in Tort: Towards a Pure Rights-Based Theory*', 3 King's Student Law Review, 53 (2011) 62.

### **Commutative Justice of Service Pay**

Commutative justice calls for a situation in Employment law where the employee is given his or her due with regard to wages. When an employee receives a just wage she or he will be able to effectively perform his or her duties to the employer and consequently live a good life.

Everyone has the right to fair labour practices and every worker has the right to a fair remuneration and reasonable working conditions.<sup>55</sup> In order to fulfil this constitutional right it is important for the employee to receive a just wage.

A just wage apropos of commutative justice should be fair and equal to the labour provided by the employee.<sup>56</sup>It should also consider various factors including:

- a) The salary should enable the employee to sustain life in a dignified manner such that the employee is able to meet his or her personal needs and the needs of his family,<sup>57</sup>
- b) The salary should be as a function or a crucial part fulfilling the common good.<sup>58</sup> The common good is realised when people are working for the benefit of the society as a whole.<sup>59</sup> Therefore, the salary should enable an employee to meet his or her obligations in the society for the common good such as self-sustenance in old age so that the employee does not become a burden to society.
- c) The salary should factor in the employee's personal contribution of his or her work or input towards production.<sup>60</sup> If the employee works for more than the agreed contractual hours, they should be entitled to a bonus pay.
- d) The salary should enable the employee to accumulate enough money or a fair amount of money to cater for old age, unemployment and sickness.<sup>61</sup> This is where commutative justice of service comes into play because service pay is one of the methods of payment through which an employee can sustain themselves through old age, sickness and unemployment without burdening the society and the government.

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<sup>55</sup> Article 41, *Constitution of Kenya* (2010).

<sup>56</sup> Martin Thomas Owen, 'Justice,' *Catholic University Law Review*, Vol.2, Issue 2 (1951-1952), 61

<sup>57</sup> Class presentation by Dr Peter Kwenjera on 17 September 2017.

<sup>58</sup> Class presentation by Dr Peter Kwenjera on 17 September 2017.

<sup>59</sup> Morris Grant, 'Recovering the Common Good,' *Victoria University of Wellington Law Review*, Vol. 44, 2, (September 2013), 313-318.

<sup>60</sup> Class presentation by Dr Peter Kwenjera on 17 September 2017.

<sup>61</sup> Class presentation by Dr Peter Kwenjera on 17 September 2017.

Provision of a just wage is important; both the employer and employee are happy when it is provided.

Commutative justice takes this angle as it is closely affiliated to natural law theorist such as Aristotle and Thomas Aquinas. Natural law theorist propound that law should be based on ethics and morality<sup>62</sup> contrary to what positivist propound, that law should be based on positive norm such as statute or case law.<sup>63</sup> Aristotle states that a just wage should enable the employee to lead a good life.<sup>64</sup> In addition, Aristotle opined that the highest good is happiness. These two concepts merge to the form the assertion; in order for an employer to be happy they ought to give a just wage; in order for an employee to be happy at work they ought to receive a just wage.

Commutative justice in service pay shows that an employer has a moral and ethical duty to provide a just wage to an employee.

### **Challenges of commutative justice**

Commutative justice is based on an Aristotelian theory and partly, a Thomian theory both of which are inclined to natural law. Natural law theorist propound that law should be based on ethics and morality<sup>65</sup> contrary to what positivist propound, that law should be based on positive norm such as statute or case law.<sup>66</sup> Legal positivist do not use ethics or morality to justify law such as happiness and leading a good life as result of commutative justice. With regard to service pay, positivist may propound that wages based on commutative justice should be equal to the labour provided and not necessarily lead to happiness or a good life. Therefore positivist may not be entirely sold to the importance of service pay in addition to the wages of the employee.

Commutative justice assumes that the parties involved in a transaction are equal or have equal bargaining power for example in an employment contract, it assumes that the employer and the

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<sup>62</sup> May, William E., 'The Meaning and Nature of the Natural Law in Thomas Aquinas,' *American Journal of Jurisprudence*, 22 (1977) 168-189.

<sup>63</sup> <http://www.iep.utm.edu/legalpos/> on 17 December 2017.

<sup>64</sup> Hawthorne L., '*Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice*', 5.

<sup>65</sup> May, William E., 'The Meaning and Nature of the Natural Law in Thomas Aquinas,' *American Journal of Jurisprudence*, 22 (1977) 168-189.

<sup>66</sup> <http://www.iep.utm.edu/legalpos/> on 17 December 2017.

employee have equal bargaining power.<sup>67</sup> However, it is clear and evident that parties to a contract are rarely equal or rarely have equal bargaining power.<sup>68</sup> If one employee goes on strike due to poor wages, the employer might end up terminating his or her employment contract rather than negotiating with the employee. This shows that the employer has the upper hand in an employment contract most of the time. Employees often subscribe to various trade unions and associations so that they are able to have equal bargaining power to the employer.

### **Conclusion**

Due to the nature of exchange between an employer and an employee such that an employee receives wages in exchange of labour, an employment relationship can correctly be inferred from the concept of commutative justice.

When commutative justice is realised or applied to an employment relationship both the employer and employee are able to receive their due. Commutative justice propounds that an employee receives a just wage that is able to sustain him or her even after the employment relationship is over either through termination or retirement.

When an employee receives service pay in accordance to that law, one can correctly assume that the concept of commutative justice has been realised. If there are any doubts on how, when and what to pay an employee with regard to service pay, then one can correctly assume that concept of commutative justice is not realised. Therefore, the current service pay laws in Kenya do not compound the concept of commutative justice.

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<sup>67</sup> Luanda Hawthorne, 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice,' 2015 SUBB Jurisprudentia, 5, (2015), 7.

<sup>68</sup> Luanda H., 'Equality and the Law of Contract: The Possible Impact of Aristotle's Theory of Commutative Justice', 7.

## CHAPTER THREE

### ANALYSIS OF SERVICE PAY IN THE KENYA

#### Introduction

The public sector in Kenya comprises of the central government, local government, development partners and public corporations<sup>69</sup>. The public sector's function is to provide basic goods or services that either are not or cannot be provided efficiently by the private sector. The public sector consists of state-owned institutions, including nationalized industries and services provided by local authorities.<sup>70</sup> The functions of the previously known local government in Kenya are now carried out by the County Governments therefore the public sector under the 2010 constitution comprises of the county and national governmental institutions.

The private sector in Kenya comprises of privately owned institutions, companies, associations, businesses and co-operations. The private sector is a major contributor to Kenya's GDP, employment and exports making it a key player in Kenya's economic growth and stability.<sup>71</sup>

Both the private sector and public sector contribute to employment and ought to follow the principles, rights and responsibilities entrenched in the Constitution of Kenya and all other applicable laws.

According to the Constitution of Kenya 2010, the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them:-

- a) Applies the constitution,
- b) Enacts, applies or implements any law,
- c) Makes or implements any public policy decisions.<sup>72</sup>

These national values include are not limited to patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection

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<sup>69</sup> <http://fortuneofafrica.com/kenya/public-sector/> on 4<sup>th</sup> August 2017.

<sup>70</sup> <http://fortuneofafrica.com/kenya/public-sector/> on 4<sup>th</sup> August 2017.

<sup>71</sup> 'Kenya Private Sector Alliance: Private Sector Development in Kenya,' World Bank Group, 12 February 2005, <http://siteresources.worldbank.org/INTKENYA/Resources/psd.pdf> on 17 December 2017.

<sup>72</sup> Article 10, Constitution of Kenya (2010).

of the marginalised, good governance, integrity, transparency, accountability and sustainable development<sup>73</sup>.

The public sector should essentially offer guidance to the private sector with regard to employment, procurement, dispute resolution and other institutional undertakings.

The difference between employment in the public and employment in the private sector is minimal. Most of the employment regulations and policy in the Employment Act CAP 226 and other written laws cut across both public and private sectors.

Nevertheless, it is important to examine both sectors with regard to service pay in order to determine whether there are any differences and what these sectors can borrow from each other.

### **Nature of employment in the public and private sector**

Employment is key to all public and private sectors around the world. This is because employment enables all employers:-

- a) To acquire qualified people who are the driving force in the various public and private institutions,
- b) To spearhead the development of the country's economy with its work force,
- c) To create job opportunities for its citizens,
- d) To include its citizens in its decision making and many other reasons.

All institutions have a mandate to follow the law before, during and after an employee is employed.

An employee is a person employed under a contract of service for wages or a salary and includes an apprentice and indentured learner<sup>74</sup>. The employment relationship foreseen by the Employment Act CAP. 226 in Kenya is contractual in nature<sup>75</sup>.

The contract can either be oral or written depending on the institution and its particulars of employment. Most of the institutions however draw up written contract. These contracts of service basically contain:-

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<sup>73</sup> Article 10, Constitution of Kenya (2010).

<sup>74</sup> Section 2, Employment Act CAP 226 (2007).

<sup>75</sup> Section 8, Employment Act CAP 226 (2007).

- a) the name, age, permanent address and sex of the employee;
- b) the name of the employer;
- c) the job description of the employment;
- d) the date of commencement of the employment;
- e) the form and duration of the contract;
- f) the place of work;
- g) the hours of work;
- h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
- i) the intervals at which remuneration is paid; and
- j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and
- k) Any other prescribed matter.<sup>76</sup>

With regard to the topic of discussion, service pay or gratuity may be indicated in the written contract between an employer and employee.

**Service pay in the public and private sector**

Undoubtedly, service pay in the public and private sector raises a lot of questions. This is because, all employees in the public sector are required to be members of the National Social Security Fund which means they do not qualify for Service pay in Kenya<sup>77</sup>. Most of the employees in the private sector subscribe to a pension fund or are also members of the National Social Security Fund.

However, contrary to the statute law and its specifications, Kenyans have borne witness to various cases where executive members of the government, members of parliament and other employees in the public sector are send off with fat cheques after their tenure is over. They have also borne witness to employees who receive little or no gratuity pay or any other form of pension to sustain them after their contract of employment is terminated.

After much research, it has become clear that gratuity or service pay is more of a bare statutory minimum than a last resort requirement by law.

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<sup>76</sup> Section 10, Employment Act CAP 226 (2007).

<sup>77</sup> Section 35, Employment Act CAP 226 (2007).

James Rika J in the case of Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR stated that,

*“Decisions of the Honourable Judges of the Industrial Court have in the recent past viewed the payment of service pay as a bare statutory minimum, and enforced the provision even in the absence of express fixed terms of service pay, based on the minimum 15 days’ salary for every completed year of service given under the redundancy law, and which is also the floor in most industrial wage orders on severance, gratuity or service pay. Employees who hold terms and conditions of employment without fixed terms on the service pay should not be discriminated, and the Court fully embraces recent decisions which have adopted the 15 days’ salary for each completed year of service, whenever such default is present.”<sup>78</sup>*

This goes to show that over the years, gratuity has been accepted as a norm due to the following reasons cited in various court decisions:-

**1. To ensure employees do not enter retirement without social security**

The Employment Act Cap 226 states that an employee whose contract of service, is to pay wages or salary periodically at intervals of or exceeding one month, has been terminated shall be entitled to service pay for every year worked<sup>79</sup>.

This goes to show that the law makers envisioned a situation where an employee might not be a member of any social security fund which would lead to many employees suffering after retirement or termination of contract of service.

Service pay ensures that an employee is receives a lump sum of money that would and should sustain him or her after retirement. This helps the government reduce the poverty rate in the country.

**2. To ensure employees have a proper pay after termination of a contract of service**

In the case of Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR. The claimant applied for early retirement in 2011 on medical grounds after working for 25 years in total. He was to receive his Social Security Fund, however, his N.S.S.F contributions were not made consistently.

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<sup>78</sup> Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes limited [2014] eKLR.

<sup>79</sup> Section 35(5), Employment Act CAP 226 (2007).

The issue was whether gratuity pay or service pay should be paid to the claimant. The court held that the basic membership to the N.S.S.F is not in itself a bar to an employee accessing service pay.<sup>80</sup> The fact that the employer failed to remit consistent monthly contributions to the National Social Security Fund would lead to inferior social security benefits.<sup>81</sup>

The court is very particular on issues revolving retirement and termination of contracts of service. The sufficiency of a social security fund is more important than solely having any social security fund.

### **Gratuity provisions**

Gratuity provisions in public and private sector employment are contained in one of the following:-

- a) In a contract
- b) In Statute

#### ***a) In a contract***

Section 35 of the Employment Act CAP. 226 alludes to the fact that terms of service pay or gratuity should be fixed<sup>82</sup>. It is not clear who exactly should fix the service pay or gratuity pay term but the courts often allude that the employer ought to include it in the contract of service.

In the case of **Joseph Gitonga Ndegwa v Rift Valley Sport Club [2015] eKLR** Stephen Radido J stated that,

*“Gratuity must either have a contractual or statutory basis. The Appellant founded his claim for gratuity on contract.”<sup>83</sup>*

In this case Clause 13 of the Terms and Conditions of Service of Rift Valley Sports Club Nakuru entitled administrative staff to payment of gratuity however the appellant did not prove that he was part of the administrative staff and rightfully the head of claim was rejected<sup>84</sup>.

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<sup>80</sup> Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes limited [2014] eKLR.

<sup>81</sup> Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes limited [2014] eKLR.

<sup>82</sup> Section 35, Employment Act CAP 226 (2007).

<sup>83</sup> Joseph Gitonga Ndegwa v Rift Valley Sport Club [2015] eKLR.

<sup>84</sup> Joseph Gitonga Ndegwa v Rift Valley Sport Club [2015] eKLR.

In some instances gratuity pay can be implied from the conduct of the employer. In the case of **George Karanja v Coastal Bottlers Limited Mombasa SRMCC No, 2652 of 2008** gratuity was not a term of the contract of service between the defendant and its employees.

However, the court allowed the plaintiff's claim on the basis that from the conduct of the defendant in the past of paying gratuity to employees in the same bracket as the plaintiff when they left its employment, payment of gratuity was thereby implied. This case was appealed twice and the applicant lost.<sup>85</sup>

This case brought in the idea of implied gratuity payments from the way the employer treated his or her to past employees

In the case of **Wilfred Samson Mutua v Kenya Wildlife Service [2014] eKLR** The Claimant admitted that his contract did not provide for gratuity. He however alleged that gratuity was later incorporated into his contract. Lady Justice Maureen Onyango also checked the Kenya Wildlife Service employee manual which provided that employees on fixed term contract were to be paid a consolidated remuneration package inclusive of base salary and benefits, which is what the Claimant's contract provided for.

Clause 1 of the Claimant's contract expressly provided that he was to receive a consolidated all-inclusive remuneration package of Kshs.230,000/= per month, and will **NOT** be entitled to any other benefits such as housing, medical, pension, gratuity. The claimant was not entitled gratuity<sup>86</sup>. This is because his contract did not provide for payment of gratuity.

Gratuity or service pay is also provided in statute.

***b) In statute***

**Employment Act CAP 226**

The Employment Act Cap 226 states that an employee whose contract of service, is to pay wages or salary periodically at intervals of or exceeding one month, has been terminated shall be entitled to service pay for every year worked<sup>87</sup>.

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<sup>85</sup> Coastal Bottlers Limited v George Karanja [2015] eKLR

<sup>86</sup> Wilfred Samson Mutua v Kenya Wildlife Service [2014] eKLR.

<sup>87</sup> Section 35(5), Employment Act CAP 226 (2007).

### **Regulation of Wages (Protective Security Services) Order, 1998.**

Regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998 provides for gratuity at the rate of eighteen days' pay for each completed year of service after five years' service with an employer.

In the case of *George Onyango Akuti Vs G4s* The Claimant served for 10 years and therefore would be entitled to gratuity as provided for in the said Regulation of Wages Order.

### **Conclusion**

Gratuity or service pay is embedded in the Kenyan public sector so much so that an employee who is a member of a pension fund or N.S.S.F is paid service pay which is against the law. In addition, due to lack of a proper method to calculate it, the courts have faced numerous uncertainty and confusions in that regard. In addition to the legal disadvantages, lack of a proper law on gratuity negates the theory of commutative justice which seeks to give everyone their due. This lacuna in the law makes it difficult for the courts to calculate service pay. Its importance as discussed in this chapter, makes it crucial to legislate a proper method to calculate service pay to prevent any and all injustices that take place due to lack of it.

## CHAPTER FOUR

### ANALYSIS OF SERVICE PAY IN OTHER JURISDICTIONS

#### Introduction

In order to shed light on the alternatives available to Kenya due to the lack of conclusive service pay regulations, it is important to analyse regulations from other countries that have implemented legislation on service pay successfully. This analysis has been done with due regard to the social, cultural, political and economic differences experienced by different countries.

There are many countries that have conclusive service pay laws with a high success rate in implementation, however, the focus of this analysis shall be limited to India, Sri-Lanka and the Gulf Cooperation Council countries. These countries have successfully implemented law on service pay making service pay a statutory obligation. This step enables the court to focus on solving disputes with regard to service pay due to proper law.

#### India

##### Nature of employment in India

Employment law is very important in India as it is in most parts of the world. Due to the large population in India and consequently a large group of people who are wage earners, it is important for the government to regulate the employment sector fairly and efficiently.<sup>88</sup>

The employment law in India is partly influenced by English law as India was a British colony. Due to its similar colonial history to Kenya, it is possible to find that India and Kenya share in some legal aspects with regard to employment regulation and other regulations as well. In addition, India has influenced the Kenya legal system since Kenya has picked some of its legislation from India, some even verbatim.

Labour legislation in India can be traced back to the early thirties, immediately after the abolition of slavery.<sup>89</sup> Many British Colonies including Kenya turned to Indian labourers to offer cheap labour supply in the construction of infrastructure many Indians began to

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<sup>88</sup> Das Rajani Kanta, 'Labour Legislation in India,' *International Labour Review*, Vol. 22, No. 5 (November 1930), 599-622.

<sup>89</sup> Das Rajani K. 'Labour Legislation in India,' 599-622.

immigrate.<sup>90</sup> Since then there are over fifty national laws and many more state level laws that are meant to regulate employment in India.<sup>91</sup>

An employee according to Indian law is a person other than an apprentice, employed for wages in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied.<sup>92</sup>

An employee need not be under a written contract of service, the terms of his or her agreement may be implied.

Under the Constitution of India, An employee has the right to:-

- a) Equality of opportunity in matters relating to employment or appointment to any office under the State,<sup>93</sup>
- b) Not to be discriminated on the grounds of religion, race, caste (the hereditary classes in the Hindu society<sup>94</sup>), sex, descent, place of birth or residence in respect of employment,<sup>95</sup>

Employment disputes in India fall under the Industrial Disputes Act of 1947 which provides for various avenues that have the jurisdiction to adjudicate on employment disputes.<sup>96</sup> These avenues include conciliation, labour courts and industrial tribunals.<sup>97</sup>

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<sup>90</sup> Das Rajani K. 'Labour Legislation in India,' 599-622.

<sup>91</sup>[http://adapt.it/adapt-indice-a-z/wp-content/uploads/2014/09/Labour\\_Employment\\_Laws\\_India.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2014/09/Labour_Employment_Laws_India.pdf) on 14 December 2017.

<sup>92</sup> Section 2, *Payment of Gratuity Act*, ( No. 36 of 1972) (India)

<sup>93</sup> Article 16(1), *Constitution of India* (2007) (India).

<sup>94</sup> <http://www.dictionary.com/browse/caste> on 18 December 2017.

<sup>95</sup> Article 16(2), *Constitution of India* (2007) (India).

<sup>96</sup> Mathias Steven and Debjani Aich: *Employment and Labour Law in India*, 'Lexology. 24 November 2017, <https://www.lexology.com/library/detail.aspx?g=fa2fb547-5828-419a-bd3b-4ef01b612643> on 18 December 2017.

<sup>97</sup> *Industrial Disputes Act*, (No. 14 of 1947) (India).

### **Service pay in India**

Service pay is widely known as Gratuity in India. Gratuity is a retirement benefit paid to an employee as a form of gratitude for providing their labour to their employers continuously, for at least five years, as an incentive to work efficiently.<sup>98</sup>

It is regulated by the Payment of Gratuity Act of 1972. The Act provides for rules for the payment of gratuity and a formula to calculate gratuity which is owed to all employees in all establishments employing ten or more employees.<sup>99</sup> This laws conform to the theory of commutative justice as it ensures a worker is given their due after termination of their employment contract.

The Act states that gratuity shall be payable to an employee on termination of his employment, after he has rendered continuous service for not less than five years, when the employee retires, when his or her contract of employment is terminated or upon his or her death.<sup>100</sup>

The Payment of Gratuity Act of 1972 defines continuous service as a when an employee works for a period of time uninterrupted with an exception of an interruption as a result of sickness, accidents, leave, lay-offs, strikes, lockout or cessation of work that is not caused by the employee.<sup>101</sup> The service pay regulations in India leave no room for questions as they tackle calculation, applicability, forfeiture and punishments.

#### **a) Calculation of Service Pay or Gratuity in India**

The Payment of Gratuity Act of 1972 provides for a formula to calculate gratuity. The employer ought to pay the employee gratuity within thirty days from the date of retirement. Death or termination of employment, an amount equal to the last wages paid to the employee multiplied by 15 days out of the 26 working days of the month multiplied by the number of years of service.<sup>102</sup> The years of service should always be rounded up to the next full year.<sup>103</sup>

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<sup>98</sup>Dhruv Dikshit: What is Gratuity, Pleaders Intelligent Legal Solutions, 20 September 2015, <https://blog.iplayers.in/payment-of-gratuity-act/> on 14 December 2017.

<sup>99</sup>[http://adapt.it/adapt-indice-a-z/wp-content/uploads/2014/09/Labour\\_Employment\\_Laws\\_India.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2014/09/Labour_Employment_Laws_India.pdf) on 14 December 2017.

<sup>100</sup> Section 4, *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>101</sup> Section 2A (1), *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>102</sup> Dhruv Dikshit: What is Gratuity, Pleaders Intelligent Legal Solutions, 20 September 2015, <https://blog.iplayers.in/payment-of-gratuity-act/> on 14 December 2017.

<sup>103</sup> Dhruv Dikshit: What is Gratuity, Pleaders Intelligent Legal Solutions, 20 September 2015, <https://blog.iplayers.in/payment-of-gratuity-act/> on 14 December 2017.

There is no clear reason as to why the country chose this mode of calculation, however it is clear that it provides a clear basis on how to calculate service pay and the courts can focus on its main goal of application of the law.

**b) Applicability of Service Pay in India**

Gratuity is applicable to employees who are defined as persons other than an apprentice, employed for wages in any establishment, factory, mine, oilfield, plantation, port, railway-company or shop, to do any skilled, semi-skilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied.<sup>104</sup> This weeds out all who are not to benefit from service a pay and can resort to other forms of termination benefits such as pension.

Employees that work in a shop or an establishment have to be ten or more than ten and have to be employed on any day of the preceding twelve months.<sup>105</sup>

In the case **University of Delhi v Sh. Surinder Kumar and others**, the respondents were employees of the appellant University of Delhi for 37 years.<sup>106</sup> The appellant disputed the applicability of the payment of Gratuity Act because it had its own Gratuity Rules under the Delhi University Act and Statutes. Consequently, the applicants did not pay the respondents their gratuity.<sup>107</sup> The High Court of Dehli held that the act applied to the appellant and as well as its employees because the exemption claimed by the University of Delhi was rejected by an order dated 21st January 2015 that was made by the Government of India.<sup>108</sup> The court also cited the case of **H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Limited** where the Supreme Court of India held that the payment of gratuity, “did not lie in the domain of discretion but it is a statutory compulsion.”<sup>109</sup> The benefits provided under the Payment of Gratuity Act cannot be denied by anyone.<sup>110</sup> Employees on retirement have the right to be paid gratuity without undue delay.<sup>111</sup> This is because delay is unfair to the former

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<sup>104</sup> Section 2, *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>105</sup> Section 2, *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>106</sup> *University of Delhi v Sh Surinder Kumar and ors* [2015] LPA 810/2013 & 538/2014.

<sup>107</sup> *University of Delhi v Sh Surinder Kumar and ors* [2015] LPA 810/2013 & 538/2014.

<sup>108</sup> *University of Delhi v Sh Surinder Kumar and ors* [2015] LPA 810/2013 & 538/2014.

<sup>109</sup> *H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Limited* [2003] LLJ 1119.

<sup>110</sup> *H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Limited* [2003] LLJ 1119.

<sup>111</sup> *H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Limited* [2003] LLJ 1119.

employee and can cause unforeseen harm due to financial restraint. In addition it is contrary to the principle of justice in general, as the famous saying goes, justice delayed is justice denied.

**c) Failure to Pay Service Pay in India**

Payment of Gratuity can be forfeited wholly or partially if an employee's contract was terminated:-

- a) For disorderly conduct or any other act to violence in the course of his or her employment.<sup>112</sup>
- b) For an act which constitutes an offence involving moral turpitude in the course of his or her employment.<sup>113</sup>

Forfeiture provides recourse to the employer in cases where they have an employee that constantly misbehaves. An employer is saved from rewarding bad behaviour especially bad behaviour that resulted in damages or caused another employee harm.

**d) Punishments and Legal Avenues available**

If an employer does not have a legal reason to forfeit payment of gratuity, he or she is obligated by law to pay it.

An employer who fails to make gratuity payments to his or her employee, shall be punished with an imprisonment for a term which shall not be less than six months or with a fine which may extend to ten thousand rupees, or both.<sup>114</sup>

An employee may file their complaint to the Controlling Authority who shall issue a certificate for the amount due to the collector who shall recover the money.<sup>115</sup> The employee can also approach the Labour Courts for relief and justice.

Sanctions enable the employer to pay the employee the full amount without delay and in good faith.

**Provisions on Gratuity in India**

Provisions on payment of Gratuity are contained in the Payment of Gratuity Act 1972 and as such payment of gratuity is a statutory obligation as was held in the case of **H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Limited**. A contractual agreement

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<sup>112</sup> Section 4 (6) (b), *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>113</sup> Section 4 (6) (b), *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>114</sup> Section 9 (1), *Payment of Gratuity Act*, (No. 36 of 1972) (India).

<sup>115</sup> Section 8, *Payment of Gratuity Act*, (No. 36 of 1972) (India).

or rules of an institution cannot vitiate or alter the obligations on payment of gratuity contained in the act. Due to the nature of this exchange, the concept of commutative justice is inferred and realised as the employer gives the employee their due, able to sustain him or her even after termination of employment or retirement.

## **Sri-Lanka**

### **Nature of employment in Sri Lanka**

The employment relationship in Sri-Lanka is based on the common law contractual relationship between an employer and an employee to which the consideration is the fee awarded to an employee for his or her services.<sup>116</sup>

This contractual relationship has led to the establishment of numerous labour laws in a bid to protect the employee's rights especially during termination of an employment contract.<sup>117</sup>

Employment law and labour relations legislation in Sri Lanka can be divided into seven categories:-

- a) Laws on Social Security;
- b) Laws on Welfare and Well- being of Employees;
- c) Occupational safety and health and Workmen's compensation;
- d) Laws relating to terms and conditions of Employment;
- e) Labour relations;
- f) Law relating to Plantations and Estate labour and
- g) Foreign Employment.<sup>118</sup>

Service pay or payment of gratuity can be categorised under the laws on Social Security.

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<sup>116</sup> 'R. K. S. Suresh Chandra: Sri Lanka the Employment Relationship (Scope) in Sri Lanka' International Labour Organisation, [http://ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205382.pdf](http://ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205382.pdf) on 27 December 2017.

<sup>117</sup> 'R. K. S. Suresh Chandra: Sri Lanka the Employment Relationship (Scope) in Sri Lanka' International Labour Organisation, [http://ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205382.pdf](http://ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205382.pdf) on 27 December 2017.

<sup>118</sup> C. A. Sri Lanka: Employment Related statutes including dispute resolution and collective agreements' <https://www.casrilanka.com/casl/images/stories/EDBA/labour%20law%201.pdf> on 12 December 2017.

The social security of the employees in Sri Lanka is tackled by the Employees' Provident Fund, Employees' Trust Fund and the Gratuity Fund which enable an employee to secure financial assistance upon termination of an employment contract.<sup>119</sup>

Sri-Lanka does not have a direct connection to Kenyan law, however they have a sophisticated and highly effective labour law system that Kenya legislatures could borrow from. India and Sri Lanka are fairly similar and therefore, arguably, Kenya has an indirect connection to the labour laws in Sri-Lanka.

### **Service pay in Sri Lanka**

Service pay is widely known as Gratuity in Sri Lanka. Gratuity is a lump sum of money that is paid to an employee by an employer in recognition of their services upon termination of their contractual obligation.<sup>120</sup> Service pay and gratuity conforms to the concept of justice because through its regulations a worker is able to get his due.

It is regulated by Sri Lanka's Payment of Gratuity Act of 1983 under the amendment to the Land Acquisition Act, the Land Reform Law and the Industrial Disputes Act. The Act provides for various statutory obligations such as a formula to calculate gratuity owed to all employees who have worked for more than 5 years in an establishment that has employed fifteen or more employees in the twelve months preceding the termination of the employee in question.<sup>121</sup> It also provides for gratuity payment for workers in the plantation sector who ceased to be employed upon the take-over of estates which were earlier vested in the Land Reform Commission.<sup>122</sup>

The Act states that gratuity is payable to an employee on termination of his employment, after he has rendered his services for more than five years, when the employee retires, when his or her contract of employment is terminated or upon his or her death to his heirs.<sup>123</sup>

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<sup>119</sup> C. A. Sri Lanka: Employment Related statutes including dispute resolution and collective agreements' <https://www.casrilanka.com/casl/images/stories/EDBA/labour%20law%201.pdf> on 12 December 2017

<sup>120</sup> C. A. Sri Lanka: Employment Related statutes including dispute resolution and collective agreements' <https://www.casrilanka.com/casl/images/stories/EDBA/labour%20law%201.pdf> on 12 December 2017

<sup>121</sup>Section 2, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>122</sup> Section 2, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>123</sup> Section 2, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

**a) Calculation of Service Pay or Gratuity in Sri Lanka**

Gratuity is payable in different rates. For an employee who receives monthly wages, the employer must pay an employee an amount equivalent to half a month's wages or salary for each year of completed, within a period of thirty days after the termination of their employment.<sup>124</sup> For an employee who is paid at the end of a working day, the employer must pay an employee an amount equivalent to fourteen days salary for each year of completed service, within a period of thirty days after the termination of their employment.<sup>125</sup>

The amount of wages that are considered when calculating gratuity is the last month's wage drawn by an employee.<sup>126</sup> In the case **Coca- Cola Beverages Sri Lanka v Commissioner General of Labour and others**, the Court of Appeal interpreted Section 20 of the payment of Gratuity Act 1983 that defines wage or salary as the basic or consolidated wage or salary, the Cost of living allowance, special living allowance or other similar allowance and Piece rates.<sup>127</sup>

**b) Applicability of Service Pay in Sri Lanka**

The Payment of Gratuity Act of 1983 provides for a rate of payment of gratuity. It states that an employee is entitled to gratuity or service pay if he or she has rendered their services for more than five years prior to the termination of their employment.<sup>128</sup>

For an employee to be eligible for gratuity they have to have provided a complete service as defined in the Act as an uninterrupted service which includes service interrupted by an approved leave on any ground whatsoever, a strike or lock-out or cessation of work not due to any fault of the employee<sup>129</sup> as was held in the Supreme Court case of **Brown and Company Limited v Commissioner of Labour and Others**.<sup>130</sup>

The Payment of Gratuity Act of 1983 Act provides for two types of employees who are subject to its statutory conditions.

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<sup>124</sup> Section 3, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>125</sup> Section 3, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>126</sup> Section 3, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>127</sup> *Coca- Cola Beverages Sri Lanka v Commissioner General of Labour and others* [2009] C.A 382/2009 (Writ)

<sup>128</sup> Section 2, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>129</sup> Section 20, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>130</sup> **Brown and Company Limited v Commissioner of Labour and Others** [2011] SC APPEAL No. 84/2011, SC (Spl) LA 194/2010 , C. A. Application No. 777/20,

Part I of the Act applies to workers on any agricultural land or estate land that vested in the Land Reform Commission by the operation of the Land Reform Law.<sup>131</sup>

Part II of the Act applies to every employer who has more than 15 employees in their place of business during the 12 month period preceding the termination of their employees' contract.

The Payment of Gratuity Act of 1983 does not apply to a domestic servant, personal chauffeur in a private household, an employee that is entitled to a pension under any non-contributory pension scheme,<sup>132</sup> Workmen known as Indian Repatriates<sup>133</sup> and an employee in a firm with less than 15 workers during the twelve month period preceding the termination of their employment contract.<sup>134</sup>

### **c) Failure to Pay Service Pay in Sri Lanka**

An employee may forfeit payment of gratuity or service pay when the employment contract was terminated for reasons of fraud, misappropriation of funds of the employer, wilful damage to property of the employer or causing the loss of goods, articles or property of the employer.<sup>135</sup> However, such forfeiture is not absolute. Forfeiture of gratuity is allowable to the extent of the damage or loss caused to the employer by the former employee.<sup>136</sup>

### **d) Punishments and Legal Avenues available**

If an employer does not have a legal reason to forfeit payment of gratuity, he or she is obligated by law to pay it.

An employer who fails to make gratuity payments to his or her employee, shall be punished with an imprisonment for a term which shall not be less than six months or fine not exceeding five hundred rupees, or both.<sup>137</sup>

### **Provisions on Gratuity in Sri Lanka**

Provisions on payment of Gratuity are contained in the Payment of Gratuity Act 1983, and as such, payment of gratuity is a statutory obligation in Sri Lanka; at the core of employment

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<sup>131</sup> Section 2(1), *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka)

<sup>132</sup> Section 9, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>133</sup> Section 2(4), *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>134</sup> Section 5, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>135</sup> Section 13, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>136</sup> Section 13, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

<sup>137</sup> Section 15, *Payment of Gratuity Act*, (No. 12 of 1983) (Sri Lanka).

rights. Such payment also conforms to the theoretical concept of justice as a form of coordination between the employer and the employee when each receive their due.<sup>138</sup>

### **Gulf Cooperation Council countries**

#### **Nature of employment in Gulf Cooperation Council countries**

Gulf cooperation countries such as Saudi Arabia, Kuwait, Qatar, Bahrain and Oman are famous for some of the most questionable employment issues in the world. For example, many Kenyan women who work as domestic help in Saudi Arabia are tortured and some killed.<sup>139</sup> On the other hand the region has the least number of women employed.<sup>140</sup> However, due to its flexible employment laws, the region attracts many workers from all over the world.<sup>141</sup> Employment law in this region provides some important insights that would help Kenya in formulating a proper service pay law.

#### **Service pay in the Gulf Cooperation Council countries**

Service pay is known as Gratuity or End of Service Gratuity in the Gulf Cooperation Council countries. Gratuity is an amount of money payed an employee who has a completed continuous employment for more than one year upon termination of their contractual obligation in each of the Gulf Cooperation Council countries such as United Arab Emirates.<sup>142</sup>

It is regulated by the DIFC Employment Law as amended in 2012. The Act provides for various statutory obligations owed to employees who are nationals of the Gulf Cooperation Council countries.

The Act states that gratuity is payable to an employee upon termination of their employment contract, after he has rendered his services for more than one year.<sup>143</sup> It conforms to the theory

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<sup>138</sup> Anton-Hermann Chroust and David L. Osborn: Aristotle's Conception of Justice, 17 Notre Dame Law Review. 1942, <http://scholarship.law.nd.edu/ndlr/vol17/iss2/2> on 14 November 2017.

<sup>139</sup> Otieno B., 'Saudi Arabia Torture Victims, Senator Ask Senate to Shut down Recruitment Agencies' *The Star Newspaper*, 16 January 2015, <http://allafrica.com/stories/201501160737.html> on 25 January 2018.

<sup>140</sup> Shediak R., Haddad Chucrallah, Klouche M., 'The Case for Flexible employment in GCC Countries' Booz and Company (2010), 6.

<sup>141</sup> Shediak R., Haddad Chucrallah, Klouche M., 'The Case for Flexible employment in GCC Countries' Booz and Company (2010), 6.

<sup>142</sup> Section 62, *DIFC Employment Law Amended Law*, (No. 3 of 2012) (Gulf Cooperation Council Countries).

<sup>143</sup> Section 62, *DIFC Employment Law Amended Law*, (No. 3 of 2012) (Gulf Cooperation Council Countries).

of commutative justice as the employee is legally given their due after the contract of employment is terminated.

**a) Calculation of Service Pay or Gratuity in the Gulf Cooperation Council countries**

The DIFC Employment Law 2012 provides the rate at which Gratuity may be calculated. It is different from India and Sri Lanka as it is based on the Countries' social and economic interests.

It states that an employer ought to pay an amount equal to 21 days' basic wage multiplied by the number of years of service for the first five years of service<sup>144</sup> and 30 days' basic wage for each additional year of service, provided that the total of the gratuity shall not exceed the wages of two years of service.<sup>145</sup>

The employer has the right to deduct from the gratuity any amounts owed to him or her by the employee.<sup>146</sup> This enables the employer to truly give the employee their due without experiencing loss.

In the event that the termination takes place before the end of any full year of employment, the gratuity payment shall be rounded off to the next full year.<sup>147</sup> The law foresees a situation where a contract of employment may be terminated prior to the end of a full year and quickly mitigates the problem.

**b) Applicability of Service Pay in the Gulf Cooperation Council countries**

The DIFC Employment Law 2012 is applicable to an employee who has completed continuous employment for more than one year prior to the termination of his or her employment contract in one of the Gulf Cooperation Council countries.<sup>148</sup> The law is not clear on the meaning of continuous service which may be disadvantageous to employees who go on leave legally. The employer may use the issue of leave to argue that continuous service was not provided.

**c) Failure to Pay Service Pay in the Gulf Cooperation Council countries**

An employee is not entitled to a gratuity or service pay when his employment is terminated for a cause meaning his or her conduct warrants termination in the eyes of a reasonable employer or employee who would have terminated the employment in that circumstance.<sup>149</sup> This section

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<sup>144</sup> Section 62 (2a), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

<sup>145</sup> Section 62 (2b), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

<sup>146</sup> Section 62 (2b), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

<sup>147</sup> Section 62 (3), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

<sup>148</sup> Section 62 (1), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

<sup>149</sup> Section 59 (4), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

does not warrant enough protection to the employee as it is quite vague. It gives room for the employer to determine what conduct warrants termination which may be unfair to the employee. An employee is also not entitled to Service pay when the employer has established a pension scheme to his employees.<sup>150</sup> However the employer ought to have given an employee the option choose between participating in the pension scheme and receiving the end of service gratuity payment.<sup>151</sup>

**d) Punishments and Legal Avenues available**

The DIFC Employment Law 2012, as amended, does not provide for any legal avenue. However, prior to the amendment, employment complaints were made to the director of the DIFC Authority,

**Provisions on Gratuity in the Gulf Cooperation Council countries**

Provisions on payment of Gratuity are contained in the DIFC Employment Law 2012 and as such payment of gratuity is a statutory obligation in Gulf Cooperation Council countries. These provisions clearly need reform, especially where vague, however it is a clear step towards properly regulating service pay which should be applauded.

**Conclusion**

It is clear that the countries mentioned above have a clear cut way of dealing with service pay. They deal with the calculation of service pay, the applicability and non-applicability of service pay, the forfeiture of service pay and the offences related to lack of payment of service pay. These laws are unique to the employment system and methods in each of the countries; laws that ooze of the cultural, social, economic and historical experiences of the aforementioned countries. These laws clearly apply the concept of commutative justice and ensure that there is recourse when an individual is not given their due.

Although these laws are not perfect and may contain many defects, they, at the very least, have ensured that there is no lacuna experienced due to lack of legislation with regard to gratuity or service pay. They have also ensured that this fundamental employment right is available to all employees as a statutory obligation.

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<sup>150</sup> Section 62 (5), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

<sup>151</sup> Section 62 (5), *DIFC Employment Law Amended Law*, (No. 3of 2012) (Gulf Cooperation Council Countries).

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

This dissertation entails and details regulations regarding service pay otherwise known gratuity or end of service gratuity in different jurisdictions. These jurisdictions include Kenya, India, Sri Lanka and the Gulf Continental Countries. Each country has different way of dealing with matters relating to service pay.

In Kenya, gratuity or service pay is provided under the Employment Act in Kenya to an employee who is not a member of a pension fund or N.S.S.F as a benefit after termination of their employment. It is can be a contractual provision meaning it can be drawn as a contractual term or as a result of a statutory obligation.

Due to the lack of a proper method to calculate it and the lack of properly detailed legal obligations on service pay in Kenya, contrary to other countries, Kenyan courts have faced numerous uncertainties and challenges when dealing with cases regarding service pay. They have been forced on some occasions to play the role of legislators in a bid to fill the gap created by the Employment Act with regard to service pay.

In other countries such as India, Sri Lanka and the Gulf Continental Countries, regulation on service pay is detailed and specific. Service Pay or Gratuity is a statutory obligation in these countries. Its statutes detail the rate at which service pay or gratuity ought to be paid in different employment circumstances, the applicability and non-applicability of service pay, the forfeiture of service pay and the offences related to lack of payment of service pay. The regulations are different and specific to the cultural, social, economic and historical experiences in each of the countries.

Each jurisdiction faces its own challenges, therefore, one cannot conclusively state that a particular jurisdiction has succeeded in tailoring a proper piece of legislation with regard to service pay. However, countries such as India and Sri Lanka have ensured that there is no lacuna experienced due to lack of legislation with regard to gratuity or service pay such that its courts can properly deal with matters related to gratuity or service pay. They have also ensured that this fundamental employment right is available to all employees as a statutory obligation unless denied by law.

### **Purpose of the Analysis of service pay in Kenya**

The purpose of the analysis of service pay in Kenya as well as other jurisdictions such as India, Sri-Lanka and the Gulf Cooperation Council countries is to shed light on the statutory deficiencies in Kenya's Service Pay laws and to show the need for amendment in that regard.

Other jurisdiction contain statutory practices which Kenya can borrow from and apply in employment contractual provisions or in a statutory amendment of the Employment Act 2007 on service pay.

### **Importance of the Analysis of service pay In Kenya**

Service pay is important as:-

- a) It ensures employees do not enter retirement without social security. Service pay ensures that an employee is receives a lump sum of money that would and should sustain him or her after retirement. This helps the government reduce the poverty rate in the country,
- b) It enables the employee to sustain life in a dignified manner such that the employee is able to meet his or her personal needs and the needs of his family even after employment,<sup>152</sup>
- a) It enables the employee to accumulate enough money or a fair amount of money to cater for old age, unemployment and sickness.<sup>153</sup>

Its analysis is equally important as:-

- a) It is able to shed light on the statutory deficiencies in Kenya's Service Pay laws and the legal lacuna created as a result. Kenyan law does not have a proper and elaborate rate to calculate service pay, elaborate laws on applicability of service pay, elaborate laws in cases of forfeiture of service pay and offences due to the lack of payment of service pay,
- b) It is able to shed light on cases where the Kenyan courts have been forced to make law with regard to service pay due to the statutory deficiencies experienced with Kenya's service pay law, and

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<sup>152</sup> Class presentation by Dr Peter Kwenjera on 17 September 2017.

<sup>153</sup> Class presentation by Dr Peter Kwenjera on 17 September 2017.

- c) It is able to shed light on jurisdictions such as India, Sri Lanka and the Gulf Continental Countries that have successfully implemented service pay law that has an elaborate rate to calculate service pay, elaborate laws on applicability of service pay, elaborate laws in case of forfeiture of service pay, legal avenues available to employees when their employers do not pay their service pay and offences due to the lack of payment of service pay.

### **Recommendations**

The changes that are required with regard to service pay regulation in Kenya are statutory. There is a deep need for the amendment of the Employment Act 2007.

However, due to the current statutory and contractual nature of service pay in Kenya, it is possible to make some contractual changes within an employment contract.

These contractual changes should be made to include contractual terms that detail:-

- a) The rate at which service pay or gratuity ought to be paid in different employment circumstances for example gratuity payments to monthly wage works, daily workers, workers who are hired for a particular term, farmers and industrial workers,
- b) The applicability and non-applicability of service pay such that it details the number of years an employee ought to have worked, the number of employees required for gratuity payment to be viable, and the circumstances in which service pay is not payable for example to a domestic worker or a chauffeur as is the case in Sri Lanka,
- c) The forfeiture of service pay which is when the employee can fail to pay Service pay for example when an employee's contract is terminated due to fraud and misconduct or when the employee is a member of a pension scheme,
- d) And a dispute resolution options in case of default in payment of service pay.

Although this would be an efficient way to deal with the issues regarding service pay in Kenya, it is almost given that most companies will fail to follow through. In addition, too much leeway given to the employer may lead to exploitation of the right due to the employee. Therefore a statutory amendment would be the most efficient way to deal with the issue regarding service pay in Kenya conclusively.

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