

**A STUDY OF INEQUALITIES EMERGING FROM THE 2007
EMPLOYMENT LAWS**

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

By

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God bless you all.

Declaration

I, WANJIKU DAPHNE, do hereby declare that this research 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.

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

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Table of Contents

A STUDY OF INEQUALITIES EMERGING FROM THE 2007 EMPLOYMENT LAWS.....	i
Acknowledgments.....	ii
Declaration.....	iii
1. List of Case Law.....	vi
A. Kenyan Case law	vi
B. Indian Case law	vi
C. American Case law	vi
D. Canadian Case law.....	vi
E. South African Case law.....	vii
F. United Kingdom Case law	vii
2. List of Kenyan Statutes.....	viii
3. List of Abbreviations	ix
Summary.....	1
1. CHAPTER ONE	3
1.1 Introduction	3
1.2 Background	3
1.3 Statement of Problem.....	6
1.4 Statement of Objective.....	8
1.5 Research Questions.....	8
1.6 Justification of the study	8
2. CHAPTER TWO.....	9
2.1 Literature Review	9
3. CHAPTER THREE.....	12
3.1 Theoretical Framework.....	12
3.2 Methodology	13
4. CHAPTER FOUR	14
4.1 The Kenyan Case.....	14
5. CHAPTER FIVE.....	22
5.1 Equal Protection by the Law	22
5.1.1 Service Pay	23
5.1.2 Termination of Employment Contracts.....	27
5.1.3 Suspensions	30

6. CHAPTER SIX	34
6.1 Recommendations	34
Bibliography	36

1. List of Case Law

A. Kenyan Case law

1. Samuel G Momanyi v Attorney General & 2 others (2012)
2. Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR
3. Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014)
4. G M V Bank of Africa Kenya Limited [2013] eKLR
5. V M K v C U E A [2013] eKLR
6. Daniel Oluoch Oguta v the Hon. Attorney General ad another, Industrial Cause No. 1223 of 2012
7. Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR
8. James Kabengi Mugo V Syngenta East Africa Limited [2013] eKLR
9. Danish Jalang'o & another v Amicabre Travel Services Limited [2014] eKLR
10. Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR
11. Peterson Ndung'u & 5 Others v. KP&L Company Limited [2014]
12. Donald C. Avude v Kenya Forest Service [2015] eKLR
13. Shedd Dennies Simotwo v Speaker, Narok County Assembly & another [2015] Eklr
14. Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR
15. Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd Cause No. 64 of 2012

B. Indian Case law

1. Hamdardda Wakhama v Union of India AIR 1960

C. American Case law

1. Brown v. Board of Education of Topeka, 347 US 483 (1954).
2. Ross v. United States Postal Service, 664 F.2d 191, 192 (8th Cir. 1981)

D. Canadian Case law

1. Cabiakman V Industrial Alliance Life Insurance Co. [2004] 3 S.C.R. 195, 2004 SCC 55

E. South African Case law

1. Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721

F. United Kingdom Case law

1. Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA

2. List of Kenyan Statutes

Constitution of Kenya (2010)

Employment Act (2007)

Labour Institutions Act (2007)

Occupational Safety and Health Act (2007)

Work Injury Benefit Act (2007)

Industrial Relations Charter (1962)

3. List of Abbreviations

COTU-K – Central Organisation of Trade Unions- Kenya

ELRC- Employment and Labour Relations Court

FKE- Federation of Kenyan Employers

HIV/AIDS- Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome

HR- Human Resource

ICCPR- International Covenant on Civil and Political Rights

ILO- International Labour Organization

NSSF- National Social Security Fund

UDHR- Universal Declaration of Human Rights

Summary

The new Kenyan labour laws are constantly frustrating Kenyan employers as they continue grappling with negative effects of implementing the laws.¹ While this is seen as an advantage to employees who, almost always, have lower bargaining power compared to the employers. It is indeed a fact that changes have occurred within the local job market over the past few years as a result of structural adjustment, liberalization of the economy and technological innovation which called for the review of labour laws. The review of National Labour Laws have been indeed a concern to both the government and the people for a long time. However, the manner in which these laws were reviewed remains questionable.²

This dissertation seeks to assess and address the issue of unequal protection of employees and employers under the current employment laws in Kenya. The right of equal protection by the law is the right of all persons to have the same access to the law and courts, and to be treated equally by the law and courts, both in procedures and in the substance of the law.³

There are rising complaints by employers as well as employment law advocates that indeed employment has become a costly affair where terminating an employee is a costly process and failure to follow it leads to a huge penalty.⁴ This clearly demonstrates a situation of unequal protection by the law between employers and employees where the employees are more protected than the employers. The main areas on which this dissertation focuses are on the issues to do with service pay which has not been adequately provided for, laws on termination as well as suspensions. The Employment Act⁵ provides that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked at such rate as shall be fixed. The Act does not provide who fixes the rate of service pay, however, the courts have applied the rate for calculating redundancy to service pay. The Act also continues to list the exceptions to service pay in Kenya. The exceptions to service pay are compulsory to all employers which renders the provision for service pay obsolete.

¹ F.K.E et.al, Labour laws reforms in Kenya, 10th ed, Nairobi Kenya 2008.

² F.K.E et.al, Labour laws reforms in Kenya, 10th ed, Nairobi Kenya 2008.

³ < <http://legal-dictionary.thefreedictionary.com/equal+protection+of+the+law>> 10 February 2018

⁴William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁵ Section 35 (5), Employment Act (2007).

On suspensions, the various legislations on employment do not provide for suspensions, however suspensions can only be utilised when they are provided for in the Human Resource Manuals. The issues arising from the provisions on suspensions are whether the employee is entitled to a salary during the period of suspension. Courts have interpreted this differently in various cases where the argument has been that since the contract of employment is still in force then the employee is entitled to a salary. With the court having differing outcomes in different cases on the issue of whether to pay the employee on suspension or not, the employer is left at crossroads. If the employer pays the employee who is on suspension, there is an economic burden that he or she bears. The employer pays for no work done and over and above paying the employee on suspension, the employer has to hire someone else for the work to be done by the employee on suspension and still pay them again. This means that the employer and the employee are unequally protected by the employment laws.

On termination of the employment contract, the employer has to provide reasons for termination otherwise the termination shall be deemed to be unfair and the various penalties for unfair termination shall follow. On the other hand, when the employee wants to terminate the employment contract, they are only required to give a notice for termination at the appropriate time. This means that the employee is freely terminates their employment contract while the employer is required to bear the cost of providing for the reasons of termination of the employment contract and also afford a fair hearing to the employee whose contract has been terminated. This is a clear indication of unequal protection by the law to both employers and employees.

The recommendations to these findings is that all stakeholders in the employment market should seek to make legislation that protects all entities equally taking into account the bargaining powers of every entity.

1. CHAPTER ONE

1.1 Introduction

Employers and their respective employees are in a contractual relationship where the employer pays the employee for work done. With this relationship comes employment disputes involving breach of the contractual agreement, whether by non-performance, unlawful termination, discrimination, sexual harassment, work injury and other disputes relating to the employer-employee relationship. The Employment Act provides for employers and employees to form organisations so as to promote the interests of the members. It is in this context of employer-employee relationship as regards the law that this dissertation is centered. The 2010 Constitution of Kenya provides for the right of equal protection by the law for all people. This dissertation is going to examine whether both the employers and employees are equally protected by the law and if not provide recommendations on how equal protection for both employers and employees can be achieved.

1.2 Background

In October 1962, a landmark was established by signing of the Industrial Relations Charter by the government of Kenya, the Federation of Kenyan Employers and Kenya Federation of Labour, the forerunner of COTU (K) Central Organization of Trade Unions (Kenya).⁶ The Charter spelt out the agreed responsibilities of management and unions and their respective obligations in the field of industrial relations,⁷ it defined a model recognition agreement as a guide to the parties involved,⁸ and it set up a joint Dispute Commission. With the setup of an Industrial Court in 1964,⁹ one additional cornerstone was laid for the development of amicable conflict resolution in Kenya.

⁶<http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm
>9 January 2017.

⁷ Section 4, Industrial Relations Charter (1984).

⁸ Appendix A Industrial Relations (Charter 1984).

⁹<http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm
>9 January 2017.

In May 2001 a taskforce was appointed by the Attorney General under the gazette Notice number 3204 within an ILO project. The terms of the taskforce were:¹⁰

- 1) To examine and review all the labour laws including the Employment Act (Cap.226); the Regulation of Wages and Conditions of Employment Act (Cap. 229); the Trade Unions Act (Cap. 233), the Trade Disputes Act (Cap. 234), the Workmen's Compensation Act (Cap. 236), the Factories Act (Cap. 514) and make recommendations for appropriate legislation to replace or amend any of the labour law statutes;
- 2) To make recommendations on proposals for reform or amendment of labour laws to ensure that they are consistent with the Conventions and Recommendations of the ILO to which Kenya is a party.

Among the major concerns of the task force was to review possible limitations of excessive powers and influence of the Minister for Labour in industrial relations. In April 2004, the taskforce handed to the attorney general five texts of drafts that included: draft on Labour Relations Act, draft on Labour Institutions Act, draft on Employment Act draft on Occupational and Safety Act and draft on Work Injury Benefits Act.¹¹

The review of National Labour Laws by the 2001 taskforce have been indeed a concern to both the government and the people for a long time. However, the manner in which these laws were reviewed remains questionable.¹² The employment laws have had a share of their errors where some sections of the laws have been declared either unconstitutional or lead to a jumbled interpretation.¹³ Some of these sections include section 45(3) of the Employment Act which was declared unconstitutional in the case of *Samwel G Momanyi v Attorney General and 2 others*.¹⁴ In this case, the petitioner was employed as a project manager and after a three month probation

¹⁰<http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang-en/index.htm >9 January 2017.

¹¹<http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang-en/index.htm >9 January 2017.

¹² F.K.E et.al, Labour laws reforms in Kenya, 10th Ed, Nairobi Kenya 2008.

¹³William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹⁴ Samuel G Momanyi v Attorney General & 2 others (2012) Employment and Labour Relations Court.

period, he was confirmed in his employment. He then left his employment with Interfreight East Africa Limited, upon the enticement of the SDV Transami Kenya, and he served with dedication and diligence until his services were terminated before he was heard and without lawful reasons being given for that action. Samwel then sought to have a declaration that Section 45(3) of the Employment Act 2007 is unconstitutional. The section provided an employee who has been continuously employed for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. This is inconsistent with the provisions of the Constitution of Kenya on human dignity¹⁵, right to fair labour practices¹⁶, right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair¹⁷, access to justice for all persons¹⁸ and right to a fair hearing.¹⁹ The court in this case found the provision by the Employment Act to be unconstitutional persuaded by the reasoning in *Hamdardda Wakhama v Union of India*²⁰ where the court stated inter-alia that when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at.

The Employment Act²¹ provides that an employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. The subsection²² provides for a contract to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. The Employment Act goes ahead to provide for the exceptions to service pay, however, it does not provide for the aforesaid percentage of service pay. The Employment and Labour Relations Court has however given

¹⁵ Article 28 Constitution of Kenya (2010).

¹⁶ Article 41 (1) Constitution of Kenya (2010).

¹⁷ Article 47 Constitution of Kenya (2010).

¹⁸ Article 48 Constitution of Kenya (2010).

¹⁹ Article 50 (1) Constitution of Kenya (2010).

²⁰ *Hamdardda Wakhama v Union of India* AIR 1960.

²¹ Section 35 Employment Act (2007).

²² Section 35 (1) (c) Employment Act (2007).

percentages on service pay which have not been fixed as provided for by section 35 of the Employment Act. This is demonstrated in the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited*²³, where the respondent failed to pay the claimant part of his terminal dues after working for 25 years and further failed to remit the National Social Security Fund contributions consistently. Evidence adduced in court revealed that the Respondent had not remitted NSSF payments for a consecutive period of 5 years. The court held that the respondent was entitled to service pay, yet he was already on an NSSF Scheme which forms part of the exceptions given to persons entitled to service pay. In this case, the court ought to have ordered payment of the five years in which the employer did not remit the NSSF contribution rather than having to order for payment of service pay whose percentage is not provided for by the law. The Employment Act does not also stipulate who fixes the percentage of service pay.

The discrepancies raised by the law bring about unequal protection of employers and employees by the law therefore leading to an expensive affair by the employers to keep employees as well as to terminate their contracts before they end by efflux of time. These gaps in the law lead to the Employment and Labour Relations Court to appear lacking in impartiality which is one of the guiding principles of a tribunal as set out in the Kenyan Constitution.²⁴

1.3 Statement of Problem

This research seeks to assess and address the issue of unequal protection of employees and employers under the current employment laws in Kenya. The right of equal protection by the law is the right of all persons to have the same access to the law and courts, and to be treated equally by the law and courts, both in procedures and in the substance of the law.²⁵ It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness. The most famous case on this subject is *Brown v. Board of Education of Topeka*²⁶ in which Chief Justice Earl Warren, for a unanimous Supreme Court, ruled that separate but equal educational facilities for blacks was inherently unequal and unconstitutional since the segregated school system did not give all students equal rights under the law. It will also apply to other inequalities such as differentials in pay for the same work or unequal taxation. The law does not

²³ *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR.

²⁴ Article 159(2) Constitution of Kenya 2010.

²⁵ < <http://legal-dictionary.thefreedictionary.com/equal+protection+of+the+law>> 5 December 2016.

²⁶ *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

offer equal protection of both the employers and employees, for instance in the procedures laid out in the termination of employees²⁷, as it should as stipulated by the constitution.²⁸

There are rising complains by employers as well as employment law advocates that indeed employment has become a costly affair where terminating an employee is a process and failure to follow it leads to a huge penalty.²⁹ This clearly demonstrates a situation of unequal protection between employers and employees where the employees are more protected by the law than the employers. The Employment Act provides that in any dispute arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and when the employer fails to do so, the termination shall be deemed to be unfair.³⁰ The case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited*³¹ affirmed that the reason or reasons for termination must be addressed before termination notice is issued and subjected to a hearing to establish if the employee has a defense that is worth consideration. In delivering its verdict, the court commented that before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism. Where this procedure is followed an employer would have addressed the procedural requirements of notification and hearing before termination on grounds of misconduct as provided for by the Employment Act³² and any challenge that an employee may have would be with regard to substantive issues only.

²⁷ Section 35, Employment Act Kenya (2012).

²⁸ Article 20, Constitution of Kenya (2010).

²⁹ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

³⁰ Section 43(1), Employment Act Kenya (2007).

³¹ *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) Employment and Labour Relations Court.

³² Section 41 Employment Act Kenya (2007).

1.4 Statement of Objective

To establish whether both employers and employees are equally protected by the labour laws in Kenya.

1.5 Research Questions

1. What is the right of equal protection by law?
2. Have the labour laws in Kenya provided protection for employees?
3. Have the labour laws in Kenya provided protection for employers?
4. What are the inequalities emerging from employment laws?
5. How can the inequalities emerging from the employment laws be addressed?

1.6 Justification of the study

The purpose of carrying this study is to find out whether the employers and employees are protected equally before the law. This study is motivated by the rising concerns by litigation advocates who have complained that the employment laws in Kenya are inconsistent³³ leading to a jumbled interpretation and therefore make the Employment and Labour Relations Court to appear lacking in impartiality. Impartiality is one of the guiding principles of a tribunal as set out by the Kenyan Constitution.³⁴

This study seeks to assess the inequalities that emerge from employment laws and attempt to suggest ways to address the inequalities.

³³ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

³⁴ Article 159(2) Constitution of Kenya (2010).

2. CHAPTER TWO

2.1 Literature Review

A series of literature reviewed in this study goes to show that in implementing the employment laws, employees are mostly favoured by the laws as opposed to being neutral to both employers and employees. To gauge whether a law is good, its implementation should bring justice or should be seen to bring justice. This is not the case as demonstrated by this study.

A comparative study done on public-private sector wage differentials in Kenya under the ministry of labour, revealed that there existed wage difference in public and private sector with a magnitude difference of Kshs 7,150 per month for basic salary in favour of private institutions but when allowances are included, there is a gap of Kshs 7,032 in favour of civil service.³⁵ This difference is also in favour of state corporations, constitutional offices and local governments' subsectors. The problem identified by this comparative study was that employment policy in Kenya inadequately addresses issues around wage differences within the public sector and between the public and private policy.³⁶ The effect of the wage differentials was that the cost of labour is increased when salaries are increased especially in the public sector. The study recommended that the government should develop and implement a wage policy as a matter of policy.³⁷ This study goes to show that, in the public sector, the employer has an upper hand in determining the wage of the employee while in the private sector, the employee has an upper hand in deciding the wage that they would receive seen during negotiation of the employment contract. For the public sector, salaries are already determined by the job groups to which the employees fall into.

An analysis was done by COTU on the working and living conditions of workers in the transport sector in Kenya and the study revealed that minimum wages are not adhered to as 50% of employers do not expressly provide for that.³⁸ Workers are also exposed to long hours of work

³⁵ Kenya Institute for Public Policy Research and Analysis, 'A comparative study on Public-Private Sector Wage Differentials in Kenya' KIPPRA Policy Paper Number 5 2013.

³⁶ Kenya Institute for Public Policy Research and Analysis, 'A comparative study on Public-Private Sector Wage Differentials in Kenya' KIPPRA Policy Paper Number 5 2013.

³⁷ Kenya Institute for Public Policy Research and Analysis, 'A comparative study on Public-Private Sector Wage Differentials in Kenya' KIPPRA Policy Paper Number 5 2013.

³⁸ George Owidhi, 'Analysis of working and living conditions in the transport sector in Kenya' Central Organization of Trade Unions, Kenya December 2012.

where a worker can be at work for 60 to 90 hours a week as opposed to the maximum of 45 hours provided for by the employment act. On the issue of gender equality, only 14% of agreements offer equal promotion of women in the sector.³⁹ This study clearly showed an instance where the employer has an upper hand in determining the working conditions of their employees.

In an analysis of constructive dismissal in Kenya, constructive dismissal was defined from the Black Laws dictionary as termination of employment brought about by the employer making the employees working conditions so intolerable that the employee feels compelled to leave.⁴⁰ Constructive dismissal has not been provided for in the Employment Act. However, the case of *Emmanuel Mutisya Solomon v. Agility Logistics*⁴¹ serves as a common precedent in most Kenyan cases⁴² in defining the term and laying the principal elements that constitute constructive dismissal. The challenge of not statutorily providing for constructive dismissal shall lead to such claims facing the challenge of stare decisis since under case laws, courts may be tempted to behave myopically and neglect the fine details of each specific case. Courts are not always bound by a specific precedent; they can thus flexibly elude the application of certain principles without much uproar. This improperly grants the courts the forbidden authority to make laws.⁴³ This brings a situation where the employee is more protected by the law as they will only have to allege a ground of constructive dismissal and the burden of proof shall instantly shift to the employer to prove that they did not create conditions making it unfavorable for the employee to work.

On a study done on the efficacy of labour laws in addressing maternity leave in Naivasha and Nairobi districts in 2013 revealed that the law on maternity leave and protection of women just

³⁹ George Owidhi, 'Analysis of working and living conditions in the transport sector in Kenya' Central Organization of Trade Unions, Kenya December 2012.

⁴⁰ Okechi Dennis Chiruba, 'Constructive Dismissal; A Critical Analysis of its Legal Perspective in Kenya' Research Proposal Kenya University June/July 2014.

⁴¹ *Emmanuel Mutisya Solomon v. Agility Logistics* (2011) eKLR.

⁴² *Duncan Obiero v Fairview Hotel Limited* (2014) eKLR, *Peter Omare Nyangesera v Registered Trustees of Impala Club* (2013) eKLR, *Buenel Mariera v Awanad Enterprises Limited* (2014) eKLR.

⁴³ Okechi Dennis Chiruba, 'Constructive Dismissal; A Critical Analysis of its Legal Perspective in Kenya' Research Proposal Kenya University June/July 2014.

before and after child birth is not efficient.⁴⁴ The study recommended implementation of maternity leave provisions by employers and the civic education of women especially those working in flower companies so as to eliminate ignorance on the awareness of their right to maternity leave a secure job thereafter.⁴⁵ This study demonstrated an instance where the employers have an upper hand in determination of the maternity leave. Despite the fact that maternity leave has been provided for by the Employment Act, the employers choose not to implement them in taking advantage of ignorance of the law by some employees.

In his paper, *Current Trends in Employment Laws*, William Maema points out the top ten triggers of employment disputes especially now when there are more employment disputes in court more than ever in the history of Kenyan Courts.⁴⁶ Among the top ten triggers include: summary dismissal, conflicts with trade unions, work injury, discrimination, sexual harassment, service pay, termination for cause and suspension. The paper goes ahead to provide for ways in which the employment contract can be terminated amicably. The paper provides that the principal objective of any good law is to achieve equity and fairness yet that is the one element that lacks in the Kenyan employment laws.⁴⁷ The laws read like an employees' charter with virtually no protection whatsoever for employers against rogue employees while the heavy hammer of the law should fall with equal force both on the oppressive employer and the extortionist employee. The paper recommends that the 2007 labour laws to be reviewed with all stakeholders involved in the drafting of new laws or amending the existing ones.⁴⁸

⁴⁴ Rose Wasike, 'The Efficacy of the new Kenyan Labour Laws of 2007 in Addressing Maternity Leave: Women's Experiences in Nairobi and Naivasha Districts of Kenya' published LLM thesis University of Zimbabwe.

⁴⁵ Rose Wasike, 'The Efficacy of the new Kenyan Labour Laws of 2007 in Addressing Maternity Leave: Women's Experiences in Nairobi and Naivasha Districts of Kenya' published LLM thesis University of Zimbabwe.

⁴⁶ William Maema, *Current Trends in Employment Disputes- A Disturbing Trajectory*, IKM Advocates news articles, 7 October 2016.

⁴⁷ William Maema, *Current Trends in Employment Disputes- A Disturbing Trajectory*, IKM Advocates news articles, 7 October 2016.

⁴⁸ William Maema, *Current Trends in Employment Disputes- A Disturbing Trajectory*, IKM Advocates news articles, 7 October 2016.

3. CHAPTER THREE

3.1 Theoretical Framework

This research is under the theoretical framework of social justice that was developed by John Rawls. In his *A Theory of Justice*, John Rawls provides a modern sophisticated interpretation of a liberal theory of justice. In brief, he asks the following question: what are the minimum conditions in terms of rules and political institutions that a reasonable person, who is ignorant of what goals and preferences he or she may have and how successful in achieving them he or she will prove to be (a condition known as the 'veil of ignorance'), would set before agreeing to become a member of a society that had the power of coercion over its citizens?⁴⁹

Rawls' *A Theory of Justice* articulates what kind of insurance or minimum guarantees that a rational person would demand before willingly submitting himself or herself to a political association with the power of coercion. He argues that these guarantees would comprise firm protection for some individual rights and a fairly rudimentary criterion for steering the economy towards a pattern of welfare distribution that protects to some extent the position of the least well off.⁵⁰ These are the two principles of justice that he argues would emerge from rational deliberation.

- a) Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
- b) Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.⁵¹

Assuming (behind the veil of ignorance) that the rational person does not know whether he will be an employer, a worker, or unemployed, but he or she knows that in a market economy most people earn the necessary income to support themselves and their families by taking a job, and

⁴⁹Hugh Collin 'Theory of Rights as Justification for Labour Law'

<<https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/collins/ch9.pdf>> on 17 march 2017.

⁵⁰ Hugh Collin 'Theory of Rights as Justification for Labour Law'.

⁵¹ Hugh Collin 'Theory of Rights as Justification for Labour Law'.

that workers spend a large proportion of their time in the workplace and forge many of their social relations and opportunities through their experience in the workplace, what protective guarantees would the rational person insist upon?

In assessing the relevance of employment laws in Kenya, under this philosophy of justice, employers, employees and the government ought to go to “the original position” and rewrite the employment laws to determine their applicability in providing for equal protection of all under the law.

3.2 Methodology

The research methodology was both exploratory and descriptive desktop research. Desktop research was most preferred as there was more research and dissertations written on the topic and therefore most of the material was available online. Online sources such as jstor, Hein online, lexis library and other online repository sites provided by the Strathmore University Library formed the major sources of literature for this research. Other textbooks and journals available in the Strathmore University Library were also evaluated. Most of the labour laws examined were available in soft copy as well as the literature on the same. Other materials relating to labour law that exist in hard copy were also examined. The research was designed to be exploratory so as to search through the situation around labour laws and provide an understanding of the underlying phenomena. The format captured sufficient insight into labour laws and exercised subject to research done before this one by other researchers on the topic from various levels of education or occupation. The object of descriptive research design was to generate an accurate understanding of labour laws and their extent of protection to employers and employees.

In carrying out this research, case law from the Employment and Labour Relations Court in Kenya is discussed in detail to see the extent of application of the labour laws as well as other case law from other jurisdictions that is relevant to this research. Among the statutes examined is the Constitution of Kenya 2010, Labour Relations Act, Labour Institutions Act, Employment Act Occupational and Safety Act and Work Injury Benefits Act.⁵²

⁵²<http://www.iio.org/iiopdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm >9 January 2017.

4. CHAPTER FOUR

4.1 The Kenyan Case

The UDHR provides that all are equal before the law and are entitled without any discrimination to equal protection of the law.⁵³ The ICCPR on the other hand provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law and that in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵⁴ From the beginning, the words ‘equal protection of the law’ caused confusion and during debates on the draft of Declaration, one representative described the principle of equality of rights as a very ambiguous one while others claimed that it was a very clear principle which had been defined for centuries.⁵⁵ The right of equal protection as provided for by the UDHR embodies two concepts:⁵⁶

1. equality of all before the law
2. equal protection of the law without discrimination

Equality before the law means that everyone is entitled to the impartial application of the law, whatever that law may be. A statement that certain rights are to be equally enjoyed by everyone irrespective of race, sex, religion, or other status merely means that only those rights are to be enjoyed equally by all.⁵⁷

The equal protection formulation, on the other hand, has a much broader application and it means that the substantive provisions of the law should apply to everyone equally. This does not mean that everyone should be treated in exactly the same way but that they should not be discriminated against, i.e. treated differently on irrational, arbitrary grounds. The most famous

⁵³ Article 7 Universal Declaration of Human Rights, 10 December 1948, Resolution 217.

⁵⁴ Article 26 International Covenant on Civil and Political Rights, 16 December 1966, Resolution 2200A (XXI).

⁵⁵ Li Weiwei, ‘Equality and Non- Discrimination under International Human Rights Law’ Norwegian Centre for Human Rights, University of Oslo, Norway, 2004.

⁵⁶ Li Weiwei, ‘Equality and Non- Discrimination under International Human Rights Law’ Norwegian Centre for Human Rights, University of Oslo, Norway, 2004.

⁵⁷ Li Weiwei, ‘Equality and Non- Discrimination under International Human Rights Law’ Norwegian Centre for Human Rights, University of Oslo, Norway, 2004.

case on the equal protection formulation is *Brown v. Board of Education of Topeka*⁵⁸ where Linda, a nine-year-old, was denied admission to school on the basis that she was belonged to a different race. Chief Justice Earl Warren, for a unanimous Supreme Court, ruled that separate but equal educational facilities for blacks was inherently unequal and unconstitutional since the segregated school system did not give all students equal rights under the law. It will also apply to other inequalities such as differentials in pay for the same work or unequal taxation.

In this research, the right of equal protection is exploited from the first aspect among the two of the right which is impartial application of the law, whatever the law maybe.

The 2010 Kenyan Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.⁵⁹

The Kenyan constitution provides that a right or fundamental freedom in the bill of rights shall not be limited except by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁶⁰ Factors such as the nature of the right or fundamental freedom,⁶¹ the importance of the purpose of the limitation,⁶² the nature and extent of the limitation,⁶³ the need to ensure that the enjoyment of rights and fundamental freedoms of others and the relation between the limitation and its purpose⁶⁴ and whether there are less restrictive means to achieve the purpose should be considered while limiting a right or a fundamental freedom in the bill of rights.⁶⁵ The constitution also provides for rights that cannot be limited⁶⁶ and they include the freedom from torture and cruel, inhuman or degrading treatment or punishment;⁶⁷ freedom from slavery or servitude;⁶⁸ the right to a fair trial⁶⁹ and the right to a habeas corpus.⁷⁰

⁵⁸ *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

⁵⁹ Article 27 (1) Constitution of Kenya (2010).

⁶⁰ Article 24 (1) Constitution of Kenya (2010).

⁶¹ Article 24 (1) (a) Constitution of Kenya (2010).

⁶² Article 24 (1) (b) Constitution of Kenya (2010).

⁶³ Article 24 (1) (c) Constitution of Kenya (2010).

⁶⁴ Article 24 (1) (d) Constitution of Kenya (2010).

⁶⁵ Article 24 (1) (e) Constitution of Kenya (2010).

⁶⁶ Article 25 Constitution of Kenya (2010).

⁶⁷ Article 25 (a) Constitution of Kenya (2010).

The employees in Kenya are protected from exploitation by the employers as evidenced by the Employment Act which governs employment relationship under the principles of prohibition against forced labour⁷¹, protection from discrimination on any ground⁷² and protection from sexual harassment.⁷³ The Employment Act provides that no person shall use or assist any other person in recruiting, trafficking or using forced labour and a person contravening this is liable on conviction for a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both.⁷⁴ On discrimination, the Employment Act provides that no employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.⁷⁵ In the case of *GMV v Bank of Africa*,⁷⁶ an employee had been terminated on account of her pregnancy and the court held that the termination of service was based on her pregnancy, and therefore was discriminatory, unfair, unlawful, and in violation of the Employment Act, the Contract of Employment, and the Constitution of Kenya. In another case of *VMK v Catholic University of East Africa*,⁷⁷ the claimant had faced discrimination at the work place for a period of seven years for reasons of gender, pregnancy and HIV - AIDS status. The court held that the complainant was discriminated on account of her HIV-AIDS status, pregnancy and gender and went ahead to award her damages for the same.

Employees are also protected by the stringent regulations in the Occupational and Safety Act which provides for the ideal working conditions of an employee that should not put the health or

⁶⁸ Article 25 (b) Constitution of Kenya (2010).

⁶⁹ Article 25 (c) Constitution of Kenya (2010).

⁷⁰ Article 25 (d) Constitution of Kenya (2010).

⁷¹ Section 4, Employment Act (2007).

⁷² Section 5, Employment Act (2007).

⁷³ Section 6, Employment Act (2007).

⁷⁴ Section 4, Employment Act (2007).

⁷⁵ Section 5, Employment Act (2007).

⁷⁶ *G M V v Bank of Africa Kenya Limited* [2013] eKLR.

⁷⁷ *V M K v C U E A* [2013] eKLR.

the life of the employee at risk. Summarily the Act's purposes and goals are: securing a safe and health working environment⁷⁸, prevention of child labour especially where the child's health is exposed to risk⁷⁹, standards in regard to safety and health at the working environment⁸⁰, develop a safety and health conscious culture in the work place⁸¹, encourage reporting of injuries and accidents at the work place⁸². The Act seeks to achieve its purpose through creation of preventive measures⁸³, institutional frameworks that shall enforcement its objectives⁸⁴ and punitive measures.⁸⁵The duty of the employer according to the act is also stemmed from the common law principle of duty of care. However under the Act, the duty of care is not only placed on employers but also extended to occupier, the employees, designers, manufacturers and importers.

The Work Injury Benefits Act also protects the employee in a situation where they get injured at work and they may never be able to work again by providing for compensation for any injury suffered in the line of work.⁸⁶ The Labour Institutions Act also provides for the formation of labour unions through which employees are able to air their grievances and even enter collective bargaining agreements.⁸⁷ The Labour Institutions Act confers powers to the labour officer to institute proceedings for the recovery of sums due from an employer to an employee by reason of the failure of the employer pay to the employee the statutory minimum remuneration or provide an employee with the conditions of employment prescribed in the order.⁸⁸

One of the most controversial sections of the Employment Act is the provision on service pay. The Employment Act⁸⁹ provides that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked at such

⁷⁸Section 3 (1) (a), Occupational Safety and Health Act (2007).

⁷⁹ Section 97, Occupational Safety and Health Act (2007).

⁸⁰ Section 47-54, Occupational Safety and Health Act (2007).

⁸¹ Section 7, Occupational Safety and Health Act (2007).

⁸² Section 21, Occupational Safety and Health Act (2007).

⁸³ Section 47-82, Occupational Safety and Health Act (2007).

⁸⁴ Section 27, Occupational Safety and Health Act (2007).

⁸⁵ Section 109, Occupational Safety and Health Act (2007).

⁸⁶ Section 28, Work Injury Benefit Act (2007).

⁸⁷ Section 31, Work Injury Benefit Act (2007).

⁸⁸ Section 49, Labour Institutions Act (2007).

⁸⁹ Section 35 (5), Employment Act (2007).

rate as shall be fixed. This provision has resulted to confusion in the interpretation of the provisions relating to service pay.⁹⁰ Prior to 2007, the concept of service pay was only found in collective bargaining agreements and applied only to unionised staff.⁹¹ The idea was to provide employees who had served for a substantial period of time with some lump-sum payment upon the termination of their contracts by the employer, something akin to a gratuity or pension.⁹² The provision did not fix the rate or provide a formula of how it is to be fixed. In the case of *Daniel Oluoch Oguta v Attorney General and another*⁹³, the court held that the claimant was entitled to service pay for every year worked, the terms of which would be fixed and since no evidence had been placed before the court on the rate of calculating severance pay, the court was however guided by the provisions of the Employment Act with regard to redundancy and in particular applied a similar rate to that applicable to employees terminated on account of redundancy at the rate not less than fifteen days' pay for each completed year of service. The implication of the court's reasoning was to equate ordinary termination of employment to a redundancy which is completely incorrect and has huge financial implications on the employer.⁹⁴ It makes the termination of employment a very costly affair and lends credence to Federation of Kenyan Employers' often repeated argument that the 2007 labour laws are very expensive to implement.⁹⁵ Fortunately, of the Employment Act⁹⁶ attempts to water down the adverse implications of the requirement for service pay by listing down some exceptions to the rule, namely, that service pay would not be applicable where the employee is a member of a registered pension scheme or provident fund, gratuity or service pay scheme, any other scheme established

⁹⁰William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁹¹ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁹² William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁹³ Daniel Oluoch Oguta v the Hon. Attorney General ad another, Industrial Cause No. 1223 of 2012.

⁹⁴ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁹⁵ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁹⁶ Section 35 (6) Employment Act (2007).

by the employer whose terms are more favourable than the scheme established under the Employment Act or National social security fund. These exceptions, taken together, render the requirement for service pay almost meaningless. For instance, since National Social Security Fund is a mandatory registration which applies to all employees, it follows that no employee would qualify for service pay so long as the National Social Security Fund membership subsists. However, despite this very clear provision, the Employment and Labour Relations Court held that for this exception to apply, the employer must demonstrate that he has been making regular contributions to National Social Security Fund on behalf of the employee.⁹⁷ In the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited*,⁹⁸ the respondent failed to pay the claimant part of his terminal dues after working for 25 years and further failed to remit the National Social Security Fund contributions consistently. Evidence adduced in court revealed that the Respondent had not remitted National Social Security Fund payments for a consecutive period of 5 years. The court held that the employee was entitled to service pay less any benefits made from the National Social Security Fund. On the mode of computation of service pay, the court applied the rate for severance pay, noting that the decisions of the judges of the Industrial Court had 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. The court went on to state that employees who hold terms and conditions of employment without fixed terms on the service pay should not be discriminated, and that the court fully embraced decisions which have adopted the 15 days' salary for each completed year of service, whenever such default is present. The Employment Act⁹⁹ does not mention anything about contributions to NSSF or the regularity of such contributions but only refers to membership.

Another controversial section of the Employment Act¹⁰⁰ is the section on termination which provides that in any claim arising out of termination of a contract, the employer shall be required

⁹⁷ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

⁹⁸ *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR.

⁹⁹ Section 35 (6) Employment Act (2007).

¹⁰⁰ Section 43 (1) Employment Act (2007).

to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair.¹⁰¹ This provision means that while the employee is free to end the contract of employment at any time by simply tendering his resignation, the employer does not enjoy such a right to terminate a contract of employment unless he has a valid reason for doing so.¹⁰² The objective interpretation of the above provision is that reasons for termination are only required when a claim for unfair termination has been lodged by an employee who presumably argues that there existed some underlying reasons for the termination which, had they been disclosed to him, he would have explained and probably saved his job.¹⁰³ To the extent that the employer acted on such undisclosed reasons without giving the employee an opportunity to respond to them, the termination is unfair.¹⁰⁴ In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited*,¹⁰⁵ the court held that the reasons for termination must be given prior to and not after termination. The judge said that the reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The judge also commented that reasons should never be given after the termination has taken effect as this would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.

Further, in *James Kabengi Mugo v Syngenta East Africa Limited*,¹⁰⁶ the court stated that the Kenyan Employment Law no longer accepts that employers can fire employees at will, for any reason or no reason. The court expressed that the at will doctrine was the dominant termination law in Kenya prior to the advent of the Employment Act and that the Law had now been made unambiguous with the employment protections that came with the enactment of the Employment Act in 2007.

¹⁰¹ Section 45 Employment Act (2007).

¹⁰² William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹⁰³ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹⁰⁴ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹⁰⁵ *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR.

¹⁰⁶ *James Kabengi Mugo V Syngenta East Africa Limited* [2013] eKLR.

The scope of the provision on termination¹⁰⁷ is limited to summary dismissal and termination based on poor performance or physical incapacity, however, the ELRC seems to extend the scope of this provision to all kinds of termination. In the case of *Danish Jalang'o & another v Amicabre Travel Services Limited*¹⁰⁸ the court stated that there is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The court also stated that the only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. If the Employee has received notice of 7 days before termination, or is paid 7 days' wages before termination, there can be no further demands made on the Employer. The court commented that the employer retains the discretion whether to confirm, or not confirm an Employee serving under probation and therefore, the law relating to unfair termination does not apply in probationary contracts.

Lastly, the provisions on suspensions which is a much misunderstood concept in Kenya. The law does not provide for suspension of employees. It can, however, be sanctioned by either the employment contract or Human Resource Manual provided the terms of the HR Manual are incorporated by reference into the employment contract. Suspension is only lawful if: it is allowed under the contract or HR policies of the employer, it is for a relatively short period sufficient for completion of investigations, employee is paid his full pay for the duration of the suspension irrespective of the outcome of the investigation and suspension is not an end in itself and should not be used as punishment. In the case of *Thomas Sila Nzivo v Bamburi Cement Limited*¹⁰⁹ the court stated that the Employment Act outlines nine occasions when the Employer may deduct from the wages of an employee and that no provision under the law allows the employer to deny a suspended employee his monthly salary as a warning of the effect of losing his job and as a reminder to the employee that he would lose his job if he continued being indisciplined. The court also stated that withholding of an employee's salary cannot be a disciplinary sanction and that the salary remains protected under the Employment Act, even

¹⁰⁷ Section 41 (1) Employment Act (2007).

¹⁰⁸ *Danish Jalang'o & another v Amicabre Travel Services Limited* [2014] eKLR.

¹⁰⁹ *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR.

during suspension since the contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages. This stance was also supported by the case of *Peterson Ndung'u & 5 Others v KP&L Company Limited*.¹¹⁰ With this in mind, the economic effect on paying an employee who is on suspension lays heavily on the employer.

The above discussions show clearly how application of certain sections of the employment laws lead to a situation of unequal protection of the law whereby the employers are left with huge financial burdens upon application of the laws.

5. CHAPTER FIVE

5.1 Equal Protection by the Law

One of the major findings is that both the employers and employees are not equally protected by the law. This is demonstrated in different aspects which are not limited to the provisions on service pay, termination of the employment contract as well as the provisions on suspensions. Application of some of these provisions lead to a huge financial burden on the employer upon interpretation by the courts as demonstrated below.

¹¹⁰ *Peterson Ndung'u & 5 Others v. KP&L Company Limited* [2014].

5.1.1 Service Pay

The Employment Act¹¹¹ provides that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked at such rate as shall be fixed. The Employment Act¹¹² lists the exceptions to service pay as where the employee is a member of a registered pension scheme or provident fund, gratuity or service pay scheme, any other scheme established by the employer whose terms are more favourable than the scheme established under the Employment Act or National Social Security Fund. Contribution to NSSF by the employer is compulsory for every employee by the employer. Service pay, then becomes an obsolete provision since every employee is under the provident fund of NSSF. The Employment Act, also, does not stipulate the percentage of service pay but provides that the percentage shall be fixed. The Act does not provide who fixes the aforesaid percentage of service pay.

The provision on service pay is one of the most controversial sections of the Employment Act. The Employment Act¹¹³ provides that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked at such rate as shall be fixed. This provision has resulted to confusion in the interpretation of the provisions relating to service pay.¹¹⁴ Prior to 2007, the concept of service pay was only found in collective bargaining agreements and applied only to unionised staff.¹¹⁵ The idea was to provide employees who had served for a substantial period of time with some lump-sum payment upon the termination of their contracts by the employer, something akin to a gratuity or pension.¹¹⁶ The provision in the Employment Act does not fix the rate or provide a formula of how it is to be fixed as well as who fixes the rate of service pay.

¹¹¹ Section 35 (5), Employment Act (2007).

¹¹² Section 35 (6) Employment Act (2007).

¹¹³ Section 35 (5), Employment Act (2007).

¹¹⁴ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹¹⁵ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹¹⁶ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

The Industrial Court has interpreted the provision on service pay in ways that lead to termination of employees being an expensive affair. In the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited*,¹¹⁷ the respondent failed to pay the claimant part of his terminal dues after working for 25 years and further failed to remit the National Social Security Fund contributions consistently. Evidence adduced in court revealed that the Respondent had not remitted National Social Security Fund payments for a consecutive period of 5 years. The court held that the employee was entitled to service pay less any benefits made from the National Social Security Fund. On the mode of computation of service pay, the court applied the rate for severance pay, noting that the decisions of the Judges of the Industrial Court had 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. The court also stated that employees who hold terms and conditions of employment without fixed terms on the service pay should not be discriminated and that the Court fully embraces recent decisions which have adopted the 15 days' salary for each completed year of service, whenever such default is present. The Employment Act¹¹⁸ does not mention anything about contributions to NSSF or the regularity of such contributions but only refers to membership. The Employment Act also provides for another provident fund that is more favourable to the employee but it does not mention which type of the fund it is nor does it provide for who establishes the provident fund.

In the case of *Daniel Oluoch Oguta v Attorney General and another*¹¹⁹, the court held that the claimant was entitled to service pay for every year worked, the terms of which shall be fixed. Since no evidence had been placed before the court on the rate of calculating severance pay, the court was however guided by the provisions of the Employment Act with regard to redundancy and in particular Section 40 (a). The rate applied was similar to that applicable to employees terminated on account of redundancy which is the rate not less than fifteen days' pay for each completed year of service. The implication of the court's reasoning was to equate ordinary termination of employment to a redundancy which is completely incorrect and has huge financial

¹¹⁷ *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR.

¹¹⁸ Section 35 (6) Employment Act (2007).

¹¹⁹ *Daniel Oluoch Oguta v the Hon. Attorney General ad another*, Industrial Cause No. 1223 of 2012.

implications on the employer.¹²⁰ The Employment Act defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.¹²¹ With this definition, service pay and redundancy are two totally different concepts, however, the courts have applied the percentage for redundancy to apply for service pay since the Employment Act has not provided for the percentage of calculating service pay. Neither has the law provided who fixes the percentage of service pay. This makes the termination of employment a very costly affair and lends credence to Federation of Kenyan Employers' often repeated argument that the 2007 labour laws are very expensive to implement.¹²² Fortunately, the Employment Act¹²³ attempts to water down the adverse implications of the requirement for service pay by listing down some exceptions to the rule, namely, that service pay would not be applicable where the employee is a member of a registered pension scheme or provident fund, gratuity or service pay scheme, any other scheme established by the employer whose terms are more favourable than the scheme established under the Employment Act or National Social Security Fund. These exceptions, taken together, render the requirement for service pay almost meaningless. For instance, since National Social Security Fund is a mandatory registration which applies to all employees, it follows that no employee would qualify for service pay so long as the National Social Security Fund membership subsists. However, despite this very clear provision, the Employment and Labour Relations Court held that for this exception to apply, the employer must demonstrate that he has been making regular contributions to National Social Security Fund on behalf of the employee.¹²⁴

¹²⁰ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹²¹ Section 2 Employment Act (2007).

¹²² William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹²³ Section 35 (6) Employment Act (2007).

¹²⁴ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

By applying the rate for calculating redundancy to service pay makes service pay the two appear to be similar. The Employment Act has defined redundancy as any loss of employment, occupation, job or career by involuntary means through no fault of the employee involving termination of employment at the initiative of the employer, where the services of the employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.¹²⁵ On the other hand, service pay has not been defined by the Employment Act, however, it is provided that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked at such rate as shall be fixed. The Employment Act¹²⁶ lists the exceptions to service pay as where the employee is a member of a registered pension scheme or provident fund, gratuity or service pay scheme, any other scheme established by the employer whose terms are more favourable than the scheme established under the Employment Act or National social security fund. The Employment Act, however, does not stipulate the percentage of service pay but provides that the percentage shall be fixed. The Act, does not also provide who fixes the aforesaid percentage of service pay.

As seen in the case of *Daniel Oluoch Oguta v Attorney General and another*¹²⁷ the court went ahead to apply the rate of calculating redundancy to service pay as though the two are one and the same thing. The Employment Act has listed the exceptions to service pay as where the employee is a member of a registered pension scheme or provident fund, gratuity or service pay scheme, any other scheme established by the employer whose terms are more favourable than the scheme established under the Employment Act or National social security fund. In the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited*,¹²⁸ however, the employer had only failed to remit NSSF contributions for five consecutive years. The court went ahead to award service pay calculated at the rate of redundancy despite the employee having subscribed to NSSF which is one of the exceptions to being entitled to service pay. In this case, the court ought to have ordered the employer to remit the contribution to NSSF which he had not for the five

¹²⁵ Section 2 Employment Act (2007).

¹²⁶ Section 35 (6) Employment Act (2007).

¹²⁷ *Daniel Oluoch Oguta v the Hon. Attorney General ad another*, Industrial Cause No. 1223 of 2012.

¹²⁸ *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR.

consecutive years. This leaves the employer with huge financial implications thus the law is seen not to equally protect both the employer and employee.

5.1.2 Termination of Employment Contracts

The Employment Act¹²⁹ provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair.¹³⁰ This provision means that while the employee is free to end the contract of employment at any time by simply tendering his resignation, the employer does not enjoy such a right to terminate a contract of employment unless he has a valid reason for doing so.¹³¹ The objective interpretation of the this provision is that reasons for termination are only required when a claim for unfair termination has been lodged by an employee who presumably argues that there existed some underlying reasons for the termination which, had they been disclosed to him, he would have explained and probably saved his job.¹³² To the extent that the employer acted on such undisclosed reasons without giving the employee an opportunity to respond to them, the termination is unfair.¹³³ In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited*,¹³⁴ the court held that the reasons for termination must be given prior to and not after termination. The judge said that the Employment Act¹³⁵, reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.

¹²⁹ Section 43 (1) Employment Act (2007).

¹³⁰ Section 45 Employment Act (2007).

¹³¹ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹³² William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹³³ William Maema, Current Trends in Employment Disputes- A Disturbing Trajectory, IKM Advocates news articles, 7 October 2016.

¹³⁴ *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR.

¹³⁵ Section 43(2) Employment Act (2007).

Further, in the case of *James Kabengi Mugo v Syngenta East Africa Limited*,¹³⁶ the court stated that the Kenyan employment law no longer accepts that employers can fire employees at will, for any reason or no reason. The court also stated that the at will doctrine was the dominant termination law in Kenya prior to the advent of the Employment Act 2007 and the law has been made unambiguous, with the employment protections that came with the enactment of the Employment Act in 2007.

The scope of the provision on termination¹³⁷ is limited to summary dismissal and termination based on poor performance or physical incapacity, however, the ELRC seems to extend the scope of this provision to all kinds of termination.

In the case of *Danish Jalang'o & another v Amicabre Travel Services Limited*¹³⁸ the court stated that there is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days' wages before termination, there can be no further demands made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts.

Lawful termination of an employment contract will usually include either of the following;

1. Termination of employment by agreement: When the employer and employee agree to bring a contract of employment to an end in accordance with an agreement. This may be in case of

¹³⁶ James Kabengi Mugo V Syngenta East Africa Limited [2013] eKLR.

¹³⁷ Section 41 (1) Employment Act (2007).

¹³⁸ Danish Jalang'o & another v Amicabre Travel Services Limited [2014] eKLR.

terminating a contract of apprenticeship; where the period of training expires, then the contract will obviously come to an end.

2. Automatic termination: A contract of employment may be terminated automatically in circumstances such as death or loss of business of the employer.
3. Termination of employment by the employee/resignation: This happens when an employee due to material breach of the contract by the employer decides to resign from his/her employment.
4. Termination of employment by an employer: An employer may also terminate the employment of an employee but there is a need to comply with the provisions of the law and contract relating to termination.

For termination to be considered fair according to law, the employer has to have a valid reason for terminating employment of an employee. Apart from this valid reason of termination the employer must follow fair procedures for termination which include the requirement to give a reason for the termination otherwise it would be deemed as unfair.¹³⁹

The cost of giving reasons for termination and affording an employee a hearing before terminating an employee lays heavily on the employer. Beyond this, the employer has to allow for an appeal of such a decision and if the employee is not satisfied with the proceeding, they file a case against the employer in the ELRC. This means that the employee is better protected by the employment laws than the employer because the contract of employment will only be terminated where valid reasons for termination have been given. On the other hand, the employer who owns a business cannot fire an employee simply because the employee is too expensive to maintain for example an employee who is not in good health and takes several sick leaves a year. The employer cannot terminate the employment contract because this will be seen as discrimination and therefore unfair termination where the employer will be penalized for such.

It is expected that terms and conditions of employment may change from time to time and, therefore the Employment Act¹⁴⁰ provides where any matter in the employment contract

¹³⁹ Section 45 (2) Employment Act.

¹⁴⁰ Section 10 (5) Employment Act.

changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing. A decision taken 'in consultation with' another is one that's taken after a discussion with the other party about the thing that's being decided. If there's trade union involved, the Recognition Agreement and Collective Bargaining Agreement will no doubt outline the procedure of making changes to the contractual terms. This is not usually a problem if the proposed change is to the employee's benefit; the problem arises where the proposed change is to the employee's detriment; in such a case, the employer should not only consult but should also get the consent of the employee, if this is not done the results could lead to constructive dismissal. Constructive dismissal has been defined in the Black's Law Dictionary as a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave.

The economic burden of consulting the employee before effecting a change in the contract is borne by the employer and failure to consent to such changes leads to a situation of constructive dismissal. This means that then, the employer is penalized for constructive dismissal.

5.1.3 Suspensions

The Employment Act makes no provision for suspension, however, in the case of *Timon Otieno Mboga v Kenya Forest Service*¹⁴¹, the court held that the Employment Act, the Industrial Court Act or any other Labour Law for that matter, do not provide for suspension. The Employment Act however provides that every employer which employs more than 50 employees must have a statement on disciplinary rule.¹⁴² Issues such as interdiction and suspension therefore ought to be provided for in the statement of disciplinary rules. An employer who wishes to utilize suspension must ensure that suspension is provided for in the organization's policies. Suspension is, defined as the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay. An employee who voluntarily absents himself from the workplace, however, even due to a

¹⁴¹ *Timon Otieno Mboga v Kenya Forest Service* [2015] eKLR.

¹⁴² Section 12 Employment Act.

valid medical consideration, is not constructively suspended because the leave is not enforced as held in the American case of *Ross v. United States Postal Service*.¹⁴³

In Kenya, however, suspension can be sanctioned by either the employment contract or Human Resource Manual provided the terms of the Human Resource Manual are incorporated by reference into the employment contract. Suspension is only lawful if it is allowed under the contract or Human Resource policies of the employer. It is for a relatively short period sufficient for completion of investigations where the employee is paid his full pay for the duration of the suspension irrespective of the outcome of the investigation. Suspension is not an end in itself and should not be used as punishment. Suspension gives the employer an opportunity to carry out investigations into possible misconduct. In the case of *Shedd Dennies Simotwo v Speaker, Narok County Assembly & another*¹⁴⁴, the court held that for a suspension of an employee to be lawful, it must have either a contractual authority or statutory underpinning. This goes to show that if suspension is not provided for in the Human Resource Manual or under the statutes, for which case it is not, then such suspension is unlawful.

In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited*¹⁴⁵, the court held that a suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, or poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, under performance or the conditions leading to incapacity.

The controversial part of suspensions is whether the suspension should be on full pay, half pay or no pay. The position is not yet settled however the different views are that, one, as long as an employee has not been terminated, the employee is entitled to full pay. This is due to the principle of innocent until proven guilty. Secondly, the decision whether to pay the employee or not depends on the outcome of the disciplinary proceedings.

¹⁴³ *Ross v. United States Postal Service*, 664 F.2d 191, 192 (8th Cir. 1981).

¹⁴⁴ *Shedd Dennies Simotwo v Speaker, Narok County Assembly & another* [2015] eKLR.

¹⁴⁵ *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR.

In the case of *Donald C. Avude v Kenya Forest Service*¹⁴⁶, the court held that suspension should be for a determinate period where such suspension is without pay. Otherwise it would constitute inhuman treatment. In the case of *Paul Ngeno v Pyrethrum Board of Kenya Limited*¹⁴⁷, the claimant had been interdicted by the employer after being arrested and charged with stealing by servant. The interdiction was to subsist pending the courts determination on the offence of stealing by servant, however, the claimant was terminated from employment on account of redundancy. In determining whether an employee will be paid during the period of interdiction or suspension the court held that it would depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.

In another case of *Thomas Sila Nzivo v Bamburi Cement Limited*¹⁴⁸, the claimant was employed by the Bamburi Cement Company, on 1st February 2003 and later summarily dismissed by the on 2nd November 2012. At the time of dismissal, he worked in the position of Production Assistant earning Kshs. 110,932 per month. The claimant did not receive a salary during the period of suspension. The court held that no provision under this law allows the Employer to deny a suspended employee his monthly salary. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages. The case of *Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited*¹⁴⁹, held that the Court's understanding of the practice of withholding of Employee's emoluments during the disciplinary process, on close scrutiny, indeed has no foundation in the Employment Act. It has no legal validity.

It is difficult to justify the practice, as there is no specific legal provision under the Employment Act 2007, suggesting an employee whose contract of employment is still running, should forfeit his monthly salary while on preventive or administrative suspension.

¹⁴⁶ Donald C. Avude v Kenya Forest Service [2015] eKLR.

¹⁴⁷ Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR.

¹⁴⁸ Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR.

¹⁴⁹ Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited [2014] eKLR.

With the court having differing outcomes in different cases on the issue of whether to pay the employee on suspension or not, the employer is left at crossroads. If the employer pays the employee who is on suspension, there is an economic burden that he or she bears. The employer pays for no work done and over and above paying the employee on suspension, the employer has to hire someone else for the work to be done by the employee on suspension and still pay them again. This means that the employer and the employee are unequally protected by the employment laws.

Indefinite suspension without pay may justify the suspended employee to consider himself constructively dismissed. In the case of *Peter Omare Nyangesera v Registered Trustees of Impala Club*, the claimant was employed by the respondent on 1 January 2009 on a one year fixed contract set to expire on 31 December 2009, as a bar supervisor. On 23 April 2009 the claimant was suspended on allegations of theft of money amounting to Kshs 92,000/- which he disputed. The claimant was arrested but not charged and remained on indefinite suspension up to the time of the lapse of the contract. The claimant asserted that the suspension was in breach of the contract and therefore he was constructively dismissed. The claimant sought unpaid salary for the balance of the contract and two months' salary in lieu of notice. The respondent did not show any written notice he gave to the claimant of his intention to dismiss him or of the dismissal letter itself. The court, in determining whether the particular set of facts presented before the Court constituted a repudiatory breach of contract by the employer to entitle the claimant to claim constructive dismissal, quoted the case of *Western Excavating (ECC) Ltd v Sharp*¹⁵⁰ which set out the general principles of constructive dismissal. The claimant was suspended indefinitely without pay, and neither was the suspension letter presented before court. He was arrested but was not charged by the Police. Under the circumstances, the court found that the employer had rendered the continuation of the employment relationship intolerable and thus the employee was justified to consider himself constructively dismissed and thus entitled to the claim. The case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd*¹⁵¹ defined constructive dismissal making reference to the *South African case of Pretoria Society for the Care of the Retarded v Loots*¹⁵² as a situation in the workplace, which has been created by the

¹⁵⁰ *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA.

¹⁵¹ *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* Cause No. 64 of 2012.

¹⁵² *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721.

employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.

6. CHAPTER SIX

6.1 Recommendations

One of the major findings of this research is that employers and employees are not equally protected by the law. The constitution provides for equal protection by the law for all persons.¹⁵³ This unequal protection is shown in the instances of termination where the employer is required to give reasons for termination failure of which the termination is deemed unfair.¹⁵⁴ The employee on the other hand is not required to give reasons for leaving the employment which means that the employee is free to end an employment contract the moment they find a better job after giving a notice.

On suspensions courts have interpreted differently on the matter which is not legislated on by the employments laws. However, the courts have decided that suspensions can be sanctioned by the

¹⁵³ Article 20 Constitution of Kenya (2010).

¹⁵⁴ Section 40 Employment Act (2007).

Human Resource Manuals and only then are they legal.¹⁵⁵ The main issue with suspensions is whether the employee who has been sent on suspension is to receive full payment, half pay or no pay at all during the period of suspension. The courts have decided at some cases that retaining the employee's salary is a violation of fair labour practices and as such violates human rights and that as long as the employment contract has not been terminated, the employee is entitled to their full salary.¹⁵⁶ The courts have also decided in some cases that whether the employee is to receive a salary or not depends on the outcome of the disciplinary proceedings.¹⁵⁷ All this taken together means that the employer will incur costs in initiating disciplinary proceedings against the employee as well as paying them while they are not working or even having to hire someone else to do the work done by the employee who is on suspension. This leads to a situation where the employees are better protected by the law than employers.

One of the recommendations for the avoidance of the situation of unequal protection by the law is to rewrite the employment laws with the cooperation between the players in the labour market who include employers and employees under their respective unions as well as representatives from the government and economists. In writing the laws, the players should consider the economic effects of interpreting the laws so that all the players are equally protected by the law.

Under the philosophy of justice, employers, employees and the government ought to go to "the original position" where no one knows what they are going to become, whether employers or employee, and rewrite the employment laws to determine their applicability in providing for equal protection of all under the law.

In conclusion, the current labour laws ought to be revisited and changed to offer equal protection to both employers and employees.

¹⁵⁵ *Shedd Dennies Simotwo v Speaker, Narok County Assembly & another* [2015] eKLR.

¹⁵⁶ *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR.

¹⁵⁷ *Paul Ngeno v Pyrethrum Board of Kenya Ltd* [2013] eKLR.

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