



**Strathmore University**

**Law School**

INVESTIGATING LEGAL FRAMEWORKS: A COMPARATIVE STUDY OF THE  
OUTSOURCING OF SOCIAL MEDIA CONTENT MODERATION IN KENYA AND  
INDIA

Submitted in partial fulfilment of the requirements of the Bachelor of Laws degree,  
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By

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## Declaration

I, **KAHIGA ABIGAIL NJOKI**, 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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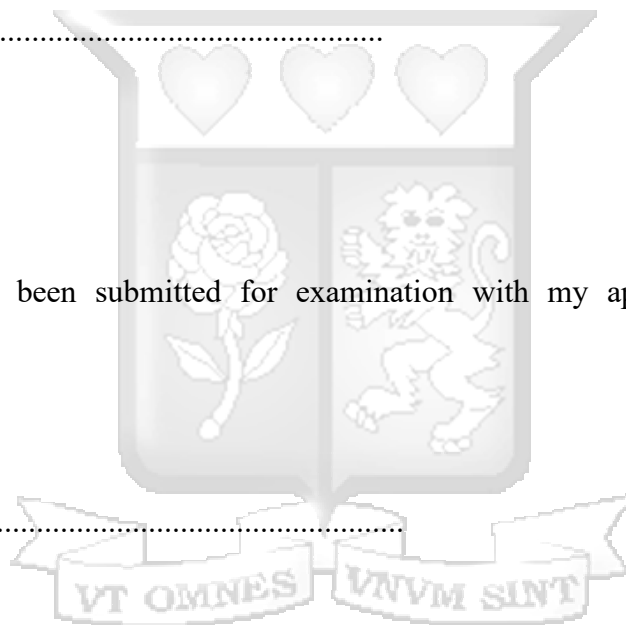
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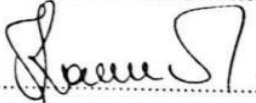
**Declaration**

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## **List of Kenyan Legal Instruments**

*Constitution of Kenya* (2010).

*Employment Act* (Act No. 11 of 2007).

*Occupational Safety and Health Act* (2007).

*Work Injuries Benefits Act* ( Act No.13 of 2007).

*Labour Relations Act* (Act No 14 of 2007).

*Civil Procedure Rules* (Legal Notice 151 of 2010).

## **List of Indian Legal Instruments**

*The Information Technology Act* (No. 21 of 2000).

*The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules*, (2021).

*The Industrial Disputes Act* (Act No 14 of 1947).

*The Code on Wages* (Act No 29 of 2019).

*The Sexual Harassment of Women (Prevention, Prohibition, and Redressal) Act* (Act No 14 of 2013).

*The Occupational Safety, Health, and Working Conditions Code*, (Act No 37 of 2020).

## **List of Cases**

*Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

*Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

*Shreya Singhal v Union of India* (2015), The Supreme Court of India.

*Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

### **List of Abbreviations**

**BPO** - Business Process Outsourcing.

**ITES** - IT Enabled Services.

**SLA** - Service Level Agreement.

**ILO** - International Labour Organisation.

**TER** - Triangular Employment Relationship.

**SER** - Standard Employment Relationship.

**NSW** - Non-Standard Work.

### **Definition of Terms**

**BPO** - refers to the contracting of non-primary activities to a third party provider and is part of a cost saving measure for any organisation.

**ITES** - refers to the outsourcing of certain business processes or functions to tech companies that have the required IT infrastructure and resources to efficiently carry out those processes and functions.

## **Abstract**

Social media content moderation involves the removal of harmful content and promotion of accurate information aiming at providing to the users a healthy environment for interactive discourse. To ensure that moderation is done effectively, social media platforms tend to outsource this function to third party contractors, who then hire the moderators. Kenya has become the hub for content moderation outsourcing, in the Sub-Saharan Africa region, because of several reasons: the high level of training in the IT Sector, the country has one of the best internet connectivity in the region, and the high number of people who use social media daily.

The social media platforms outsourcing content moderators in Kenya are mainly Facebook, TikTok, and X, formerly known as Twitter. The Business Process Outsourcing (BPO) and the IT-Enabled Services (ITES) are methods utilised by third party contractors responsible for hiring content moderators. The risk that this model creates is that it exposes the outsourced moderators to unfair working practices and leaves them uncertain as to whom to hold liable in case of infringement of their rights. The question this study seeks to address is what kind of legal regime governs the BPO and ITES models and what employment protections are available for content moderators. The study will compare Kenya to India because there exists similar legal systems between the two countries and the recognition of India as a global tech hub.

This study employs the use of qualitative research to analyse legislation and literature review, seeking to establish which kind of legal regime governs the contractors operations in the country and whether Kenyans employed in this industry are being protected by the law or not. This study will use the principle of proportionality as its theoretical framework due to its ability to resolve conflicts between a right and a competing right or interest.

## CHAPTER ONE

### 1.0. INTRODUCTION

#### 1.1 Background.

Outsourcing is the practice of using outside firms both to handle work, normally performed by or within a company,<sup>1</sup> which involves delegating a company's business process to third parties or external agencies.<sup>2</sup> As a result, companies and organizations focus on their core business competencies, hence improving productivity and saving money.<sup>3</sup> The term, "outsourcing" was first used in the 1980s to describe the contracting out of information systems.<sup>4</sup> Today, its use has expanded to include any business function that can be contracted to an external provider,<sup>5</sup> which includes content moderation.

In the 1990s, there was an increase in the commercial application of the internet, alongside an expansion of internet-based services. This presented a need to monitor and screen the commercial services. Services such as email, hotmail.com, Yahoo, classified advertisement like Craigslist, dating sites such as Match.com, and peer-to-peer file sharing services, were monitored and controlled according to local company standards.<sup>6</sup> It means that they are only governed by American laws and do not follow laws in other jurisdictions. In the mid 2000s, more social technologies began to emerge, which led to a shift from social network sites to social media platforms.<sup>7</sup>

Consequently, more concrete policies were developed by these platforms to monitor the content generated by its users. To ensure that these policies are complied with, content moderators are

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<sup>1</sup> Kiyeng P C, 'Developments and Challenges of Business Process Outsourcing Sector in Kenya', *European Journal of Business and Management*, 36, 2015, 196.

<sup>2</sup> Chebelyon K.K, 'Outsourcing Risks in the Telecommunication Industry in Kenya', Published LLM Thesis, University of Nairobi, Nairobi, 2014, 3.

<sup>3</sup> Maigua A, 'Information Technology Outsourcing and Employee Perceptions at Keswick Books and Gifts Limited in Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2015, 3.

<sup>4</sup> Chebelyon K.K, 'Outsourcing Risks in the Telecommunication Industry in Kenya', Published LLM Thesis, University of Nairobi, Nairobi, 2014, 3.

<sup>5</sup> Chebelyon K.K, 'Outsourcing Risks in the Telecommunication Industry in Kenya', Published LLM Thesis, University of Nairobi, Nairobi, 2014, 3.

<sup>6</sup> Ahmad S, 'Who moderates my social media? Locating Indian workers in the global content moderation practices' in Strippel C, Paasch-Colberg S, Emmer M, & Trebbe J (eds), *Challenges and perspectives of hate speech research*, Digital Communication Research, Open Access Repository, Berlin, 2023, 113.

<sup>7</sup> Ahmad, 'Who moderates my social media? Locating Indian workers in the global content moderation practices', 113.

hired. As the platforms are accessed and used globally, they have resulted in outsourcing moderators. In fact, they outsource Kenyan workers, as well as content moderators from other Sub-Saharan African countries from Kenya. That is why Kenya has become the tech hub in the African region. Their work involves filtering harmful content and misinformation,<sup>8</sup> which is crucial to platforms as it enhances their advertising revenue and protects their brand.<sup>9</sup> Content moderators are required to sign non-disclosure agreements (NDAs), which makes content moderation practices and outsourcing of labor hard to access for independent researchers and journalists.<sup>10</sup> In addition, they are not informed of the risks involved in this line of work until during induction training. At that point, it is often too late for the moderators, who relocate to Kenya from other developing countries, while others are lured to be moderators despite applying for different positions.<sup>11</sup> There is also inconsistency in content moderation policies in dealing with misinformation and recognition of cultural differences, which results in locking out policy non-offenders, for example, activists, which leaves them vulnerable.<sup>12</sup> Apart from the secrecy of labour services, social media platforms assert assertive control over information regarding their technical infrastructure,<sup>13</sup> which impedes policy evolution.

Business Process Outsourcing (BPO) refers to the contracting of non-primary activities to a third party provider and is part of a cost saving measure for any organisation.<sup>14</sup> Globally, this sector has evolved from low-skill functions, such as data entry, to more sophisticated BPO's such as Knowledge Process Outsourcing involving customer profiling, social media management and graphic design.<sup>15</sup> In Kenya, this industry began in the 1990s and has grown to make Nairobi the East Africa Technology Hub.<sup>16</sup> Information Technology Enabled Services (ITES) refers to the outsourcing of certain business processes or functions to tech companies that have the required IT infrastructure and resources to efficiently carry out those processes

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<sup>8</sup> Gongane U. Vaishali, Munot V. Mousami, Anuse D. Alwin, "Detection and moderation of detrimental content on social media platforms: current status and future directions", 5 September 2022, 30.

<sup>9</sup> Ahmad S, "'It's Just the Job': Investigating the Influence of Culture in India's Commercial Content Moderation Industry' Published LLB Thesis, Oxford Internet Institute University of Oxford, Balliol, 2018, 7.

<sup>10</sup> Ahmad, 'Who moderates my social media? Locating Indian workers in the global content moderation practices', 115.

<sup>11</sup> Odanga Madung, "Dark reality of content moderation: META sued for poor working conditions", Monday March 20, 2023, <https://nation.africa> > Home > Business, on March 20 2023.

<sup>12</sup> O'Shea L, 'Judgement of Paris: Facebook v the Communards', Baffler Foundation, 2021, 10.

<sup>13</sup> Parks L, 'Dirty Data: Content Moderation, Regulatory Outsourcing, and the Cleaners', University of California Press, 2019, 16.

<sup>14</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES), 2018, 1.

<sup>15</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES), 2018, 1.

<sup>16</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES), 2018, 1.

and functions.<sup>17</sup> Both of these services have been crucial to content moderation in Kenya and India as they are being utilised by outsourcing companies.

The BPO and ITES sectors have been highlighted as priority sectors in Kenya. Vision 2030 has singled out BPOs as one of the six pillars to drive the country to a medium developed economy.<sup>18</sup> To achieve this goal, various initiatives are being implemented such as, improving universal access to ICTs, promotion of the BPO/ITES, capacity building, roll out of e-government services, and development of the ICT industry, among others.<sup>19</sup> Due to these efforts, Kenya has acquired a highly skilled workforce. Coupled with proficiency in the English language, it has attracted foreign investments.<sup>20</sup> In India, however, the success of this sector's development is due to the state's technological and educational infrastructure in the 1960s and 1970s and activities of the private sector initiated through a harmony of foreign and domestic firms.<sup>21</sup>

The companies that utilize BPOs and ITES, in content moderation, have to sign a legal contract with the parent social media company, which indicates the obligations and responsibilities of each party.<sup>22</sup> The process is facilitated by service level agreements (SLAs), which are established between social media companies in the Global North and the outsourcing companies.<sup>23</sup> The main social media companies outsourcing in Kenya must follow the procurement process as governed by the Public Procurement and Disposal Act (2005) and the Public Procurement and Disposal Regulation (2006).<sup>24</sup> The procedure provided for in the laws

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<sup>17</sup> <https://businessprocessxperts.com/sops-for-ites-industry>

<sup>18</sup> Kimuyu P, Ngui D, 'Prospects for Information and Communications Technology-Enabled Services in Kenya: The Case of the Mobile Money Transfer Industry' in Newfarmer S.R, Page J and Tarp F (eds) *Industries Without Smokestacks: Industrialization in Africa Reconsidered*, 1ed, Oxford University Press, Finland, 2018,215.

<sup>19</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES),2018,5.

<sup>20</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES),2018, 1.

<sup>21</sup> Noronha E, D'Cruz P, 'The Indian IT Industry: A global production network perspective' Institute for International Political Economy Berlin, Working Paper Number 134/2020 13-14, [https://www.ipe-berlin.org/Working\\_Papers/i...](https://www.ipe-berlin.org/Working_Papers/i...), on March 2020.

<sup>22</sup> Noronha E, D'Cruz P, 'The Indian IT Industry: A global production network perspective' Institute for International Political Economy Berlin, Working Paper Number 134/2020 12, [https://www.ipe-berlin.org/Working\\_Papers/i...](https://www.ipe-berlin.org/Working_Papers/i...), on March 2020.

<sup>23</sup> Ahmad, 'Who moderates my social media? Locating Indian workers in the global content moderation practices'.117.

<sup>24</sup> Gitau C W, 'Factors Affecting the Growth of Business Process Outsourcing Firms in Kenya' Published LLM Thesis, University of Nairobi, Nairobi,2014,22.

should be complied with when sourcing for a service provider in cases of outsourcing employment.<sup>25</sup>

The benefits of BPOs and ITES in outsourcing include reduction of costs, improving quality and customer service, aid in staffing and learning better quality techniques.<sup>26</sup> It creates new employment opportunities, which has lifted some people out of poverty. Some of the challenges it faces are high cost of BPO technology and bandwidth, especially for startups, high attrition of the number of people working in BPO due to the number of youths that want regular jobs, lack of a specific BPO policy, lack of a BPO strategy and a weak monitoring and evaluation framework for the BPO industry.<sup>27</sup>

One of the notable companies engaging in outsourcing content moderators in Kenya is Sama Kenya Limited (formerly Samasource). It was established in San-Francisco<sup>28</sup> in 2008. It is a non-profit Impact Sourcing company that outsources digital workers in Kenya, Uganda, Haiti, South Africa, India and the United States. Impact sourcing refers to a new interest for business to include corporate social responsibility in their practices. It claims to promote employment for high potential but disadvantaged people in the service sector.<sup>29</sup> It is estimated that they have reached a workforce of about five thousand people. Some of the emerging trends in the BPO and ITES sectors are; organizations shifting to contracting temporary, independent workers to accomplish specific tasks, crowdsourcing which relies on a group of persons instead of specific suppliers and fixed contracts, and the rise of machine learning and artificial intelligence (AI).<sup>30</sup> AI is emerging in the content moderation field to help in censoring misinformation and harmful content. However, they are limited in recognising the cultural context as hate groups have by-passed keyword-based machine detection through several methods such as clever combinations of words, misspellings, and the constant change of hateful expressions which is complex for AI to understand.<sup>31</sup>

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<sup>25</sup> Gitau C W, 'Factors Affecting the Growth of Business Process Outsourcing Firms in Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2014, 22.

<sup>26</sup> Kiyeng P C, 'Developments and Challenges of Business Process Outsourcing Sector in Kenya', 196.

<sup>27</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES), 2018, 12-13.

<sup>28</sup> Hellerstein E, 'Silicon Savanna: The workers taking on Africa's digital sweatshop' Coda story, 16 October 2023, <https://www.codastory.com/kenya-content-moderators>, on 16th October 2023.

<sup>29</sup> Otieno V.O., 'Strategies Adopted by Sama Kenya Limited in Impact Sourcing', Published LLM Thesis, University of Nairobi, Nairobi, 2023, 3.

<sup>30</sup> Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES), 2018, 11.

<sup>31</sup> Udupa S, Maronikolakis A, Wisiosek A, 'Ethical scaling for content moderation: Extreme speech and the (in)significance of artificial intelligence', 10, Big Data and Society, 1, 2023, 2.

Though outsourcing companies claim to be beneficial in creating new employment opportunities for skilled workers who have almost no other options, the risks their outsourced workforce face indicate that there must be challenges at the level of their contracting model. or at the regulatory level.

## **1.2 Statement of the Problem**

Content moderation was considered an automated task until journalists and scholars highlighted the prevalence and importance of human content moderation.<sup>32</sup> Social media platforms such as Facebook, Tiktok, and X, tend to outsource content moderators from third party contractors, through the BPO and ITES methods in many developing countries. Kenya and India seem to be some of their preferred outsourcing markets.<sup>33</sup> However, both countries have seen the emergence of cases, where these third party contractors, who operate on behalf of the digital platforms, seem to have violated the rights and freedoms of content moderators.<sup>34</sup> This study will examine the legal regime that governs the outsourcing of content moderation, its nature, and the employment protection available to the new type of workforce that has emerged from the BPO and ITES sectors.

## **1.3 Aim of the Study**

This study seeks to establish whether the employment model, used in outsourcing content moderators, ensures protection and promotion of the workers rights and freedoms.

## **1.4 Research Objectives**

1. To explore the existing legal frameworks of Kenya and India governing the outsourcing of content moderators.
2. To examine how the courts in Kenya and India have adjudicated conflicts involving the contractual system of hiring content moderators.

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<sup>32</sup> Ahmad S, Krzywdzinski M, 'Moderating in Obscurity:How Indian Content Moderators Work in Global Content Moderation Value Chains' in Graham M and Ferrari F, (eds) Digital Work in the Planetary Market,1, The MIT Press, Cambridge, Massachusetts, 2022,78.

<sup>33</sup> Ahmad, 'Who moderates my social media? Locating Indian workers in the global content moderation practices', 116.

<sup>34</sup> for example, *Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others* (2023) eKLR.

3. To present the findings and propose recommendations on how the outsourced content moderators' rights and freedoms can be better protected.

## **1.5 Research Questions**

1. How can the Kenyan and Indian legal frameworks protect their new workforce in the outsourcing of content moderation?
2. What is the contractual model followed by the social media platforms in outsourcing content moderators in Kenya and India?
3. How have the Kenya and India courts interpreted the law to solve conflicts arising from outsourcing content moderation services?

## **1.6 Hypothesis**

The research is premised on the hypothesis that while on one hand, social media platforms claim that the impact sourcing model caters for content moderators, on the other, there is uncertainty on whether there are sufficient protections in the law for this new type of employment.

## **1.7 Justification**

The infringement of the rights and freedoms of outsourced content moderators has been highlighted by journalists and independent researchers. Cases have emerged in Kenya and India where content moderators are suing the outsourcing companies that hired them for violation of their rights. However, there has been limited research done on the contracting model used in hiring content moderators in Kenya and India, and how it disrupts local employment systems. This research hopes to contribute to the existing literature by examining the contractual model used in hiring content moderators.

## **1.8 Conceptual Framework**

The conceptual framework chosen for this study is the principle of proportionality due to its ability to demonstrate how to balance between rights and interests.

### **1.8.1. Principle of Proportionality**

The principle of proportionality is a legal doctrine that ensures measures taken by a governing body or employer are not excessive and are appropriate to achieve their intended legitimate objective.<sup>35</sup> It is meant to restrict governments and other public authorities' abuse of authority and violations of human rights and freedoms to the bare minimum required under the circumstances.<sup>36</sup>

This principle finds its legal origin in the nineteenth century in Prussian administrative law. It limited the police's authority to violate someone's property or freedom.<sup>37</sup> One of the authors who has supported the application of this principle is Kai Moller. He opines that proportionality is a doctrinal tool used to resolve disputes between opposing rights and interests. It is primarily in the balancing stage where the right is weighed against the conflicting right or interest.<sup>38</sup> He also states that proportionality is a test to determine whether an inference with a prima facie right is justified.<sup>39</sup>

Over the years, it evolved to become a public law principle. The Canadian court in the case of *R v Oakes* established a three-stage proportionality test: the measure adopted must be rationally connected to the justifiable objective it aims to achieve, the measure must be the least detrimental option to the right or freedom in question, and there must be proportionality *stricto sensu* between the harms caused by the measure and the benefits of achieving the important objective.<sup>40</sup>

Kenyan courts have adopted the principle in resolving disputes. In the constitutional petition of *SBM & another v Attorney General (2022)*, a matter of equality and discrimination, the court used the principle to interpret Section 73(2) of the Marriage Act<sup>41</sup> in the following terms: that stricter conditions imposed by the State should be justified by weightier reasons, such as the preservation of the institution of marriage.<sup>42</sup> It also introduces a four-tier approach in testing proportionality in the case: rationality with minimal impairment, proportionality and the

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<sup>35</sup> Engle E, 'The History of the General Principle of Proportionality' X:1 *The Dartmouth Law Journal*, 2012,,8.

<sup>36</sup> Guy D, Pnina A.S., 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' 59 *McGill Law Journal* 2, 2013, 2.

<sup>37</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 2.

<sup>38</sup> Moller K, 'Proportionality: Challenging the critics' 10 *International Journal of Constitutional Law* 3, 2012, 710.

<sup>39</sup> Moller K, 'Proportionality: Challenging the critics', 710.

<sup>40</sup> *R v Oakes* (1986), The Supreme Court of Canada.

<sup>41</sup> Section 73(2), Marriage Act, 2014.

<sup>42</sup> *SBM & another v Attorney General (2022)*, eKLR.

relative weight accorded to interests and considerations in the challenged legislation, the heightened scrutiny test, and whether it was plainly implicit in the notion that fundamental rights once identified as such deserves enhanced protection.<sup>43</sup>

### **1.8.2. Principle of proportionality and Outsourcing**

The companies that carry out outsourcing of content moderators are private actors. It has been argued that the principle of proportionality should be extended to apply to private actors such as corporations as they hold significant power as well.<sup>44</sup> Due to this, these powers should be limited in a manner that protects the weaker party, in this context being the outsourced workers, as the employment relationship is characterised by the power imbalance between the parties.<sup>45</sup>

The principle of proportionality offers a uniform approach to analysing the relationship between the social media platforms, the outsourcing company, and the content moderators. This is from the perspective of finding an equilibrium between the interests of these parties in a manner that does not infringe on the moderators' rights and freedom. Also, the three-stage structure offers a new lens through which the existing frameworks are able to protect the interests of the outsourced content moderators.

### **1.9. Literature Review**

Many scholars consider content moderation as a necessity in the daily operations of social media platforms globally.<sup>46</sup> It has been established that social media platforms prefer to outsource this function to third party contractors, who prefer to hire moderators from developing countries such as Kenya and India. The consensus among scholars is that social media platforms outsource moderators as it is cost effective.<sup>47</sup>

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<sup>43</sup> *SBM & another v Attorney General*, 2022, eKLR.

<sup>44</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts', 28.

<sup>45</sup> Bacharuddin A, Hijrah L, Asdar A, 'Legal Protection of the Rights of Outsourced Workers in Termination of Employment Relations 7 Jurnal Ilmu Sosial dan Pendidikan (JISIP) 4, 2023, 4.

<sup>46</sup> Steiger M, Bharucha J. T, Venkatagiri S, Riedl J. M, Lease M "The Psychological Wellbeing of Content Moderators: The Emotional Labor of Commercial Moderation and Avenues for Improving Support", May 2021,2.

<sup>47</sup> Parks L, 'Dirty Data: Content Moderation, Regulatory Outsourcing, and the Cleaners', University of California Press, 2019, 16.

In Kenya and India, the BPO and ITES are utilised in hiring content moderators. They are facilitated by SLAs<sup>48</sup> and companies resort to impact sourcing in scouting for the moderators.<sup>49</sup>

Chloe Nurik has observed that there is a culture of secrecy surrounding content moderation practices, which seems to be deliberate. This manifests itself through the signing of NDAs by the moderators prior to their employment among other measures. As a result of this culture, the moderators' rights and freedoms are more likely to be infringed on as the nature of their work is isolated from the public view.<sup>50</sup>

Observing what happens in Kenya, Peter Kimuyu and Diana Ngui Muchai have described the BPO and ITES sectors as still developing.<sup>51</sup> As a result, the debate is centered around growth and development of these sectors aiming at achieving Kenya Vision 2030 Economic and Macro pillar. The impact sourcing model used in sourcing these moderators is viewed from the perspective of how it enables the growth of the outsourcing companies, and enables them to remain competitive.<sup>52</sup> Little attention is drawn to how such a methodology shapes the treatment of content moderators in the workplace, and how to address the conflicts that ensue as a result.

India is regarded as one of the most successful countries in the ITES and BPO sectors globally.<sup>53</sup> Some of the factors that have led to this success are: the explosion in global demand for high skill and low wage software professionals, activities of the private sector through a symbiosis of foreign and domestic firms, and the liberalization of the economic environment through state policies among others.<sup>54</sup> In 1988, the National Association of Software and Services Companies (NASSCOM) was established as an umbrella organisation for all IT-ITES firms. Its mandate includes the duty to negotiate with the government for favourable policies

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<sup>48</sup> Ahmad, 'Who moderates my social media? Locating Indian workers in the global content moderation practices', 117.

<sup>49</sup> Otieno V.O., 'Strategies Adopted by Sama Kenya Limited in Impact Sourcing', Published LLM Thesis, University of Nairobi, Nairobi, 2023, 3.

<sup>50</sup> Nurik C, "Facing Contracting Issues: The Psychological and Financial Impacts of Facebook Outsourcing Content Moderation" 171, *University of Pennsylvania Law Review* 5, 2023, 1564.

<sup>51</sup> Kimuyu P, Ngui D, 'Prospects for Information and Communications Technology-Enabled Services in Kenya: The Case of the Mobile Money Transfer Industry', 215

<sup>52</sup> Otieno V.O., 'Strategies Adopted by Sama Kenya Limited in Impact Sourcing', Published LLM Thesis, University of Nairobi, Nairobi, 2023, 11.

<sup>53</sup> Soebbing E.T, 'A Legal Comparison of the India Software Law and the Software Law of Germany' 10 *India Journal of Law and Technology* 1, 2014, 133.

<sup>54</sup> Noronha E, D'Cruz P, "The Indian IT industry: A global production network perspective", Institute for International Political Economy Berlin, Working Paper 134/2020, 13 [https://www.researchgate.net > ... > Industry](https://www.researchgate.net/.../Industry) on 8 October 2020.

to the ITES sector and to assist in sourcing foreign markets.<sup>55</sup> Some of the laws that affect this sector include: *The Trade Union Act 1926*, *The Payment of Gratuity Act*, and the *Minimum Wages Act 1948*.<sup>56</sup> However, the IT/ITES and the BPO sectors have been exempted from the *Standing Orders Act 1948*, which has brought about controversy.<sup>57</sup>

Although India is regarded as one of the most popular outsourcing destinations for content moderation, questions have been raised on how cultural differences affect moderation. In Sarah Roberts work, “Behind the Screen: The Hidden Digital Labor of Commercial Content Moderation”, American based moderators argued that outsourcing content moderation tasks in India decreases the quality of the work done, which leads to a negative perception of the workers there.<sup>58</sup> For example, Indian moderators have a different view on sexuality which is different from the Western norms hence the moderation of sexual content could differ.<sup>59</sup> This is mainly narrowed down to either a lack of proper training and the Indian culture being too different to conform to the set standards of moderation.<sup>60</sup> However, Sabrina Ahmad argues that these accusations are over simplistic and do not reflect the nuance that the Indian moderators engage in while moderating.<sup>61</sup>

This discussion brings out the dominance of the European and American policies and culture in content moderation.<sup>62</sup> India has tried to move away from this hegemony by drafting its own moderation policies through the legislature, for example the *Intermediary Liability Rules of 2021 and 2022*.<sup>63</sup> They have faced criticism as they give government officials and regulators

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<sup>55</sup> Kleibert J.M., Mann L, “Capturing Value amidst Constant Global Restructuring Information-Technology-Enabled Services in India, the Philippines and Kenya European Journal of Development Research,2020,1067 <https://www.researchgate.net/publication/34065995...> on April 2020.

<sup>56</sup> Jain S, “Indian Labour Laws and Its Impact on BPO-IT/ITES Industry”, TaxGuru, 25 April 2023, <https://taxguru.in/corporate-law/indian-labour-laws-i...> on 25 April 2023.

<sup>57</sup> Noronha E, D’Cruz P, “The Indian IT industry: A global production network perspective”,16.

<sup>58</sup> Roberts S, ‘Behind the Screen: The Hidden Digital Labor of Commercial Content Moderation’ Published PHD Dissertation, University of Illinois, Urbana-Champaign,2014, 132,164.

<sup>59</sup> Sabrina Ahmad, ‘Don’t Blame Your Indian Content Moderators’, Council on Foreign Relations, 17 January 2019, <https://www.cfr.org/blog/dont-blame-your-indian-c...> on 17 January 2019.

<sup>60</sup> Roberts S, ‘Behind the Screen: The Hidden Digital Labor of Commercial Content Moderation’ Published PHD Dissertation, University of Illinois, Urbana-Champaign,2014,132, Ahmad S, “It’s Just the Job”: Investigating the Influence of Culture in India’s Commercial Content Moderation Industry’ Published LLB Thesis, Oxford Internet Institute University of Oxford, Balliol, 2018, 12.

<sup>61</sup> Ahmad S, “It’s Just the Job”: Investigating the Influence of Culture in India’s Commercial Content Moderation Industry’ Published LLB Thesis, Oxford Internet Institute University of Oxford, Balliol, 2018, 41.

<sup>62</sup> Bartkowski L, ‘Caring for the Internet: Content Moderators and the Maintenance of Empire’ 4 Journal of Working-Class Studies 1,2019,73.

<sup>63</sup> Gorwa R, ‘The Politics of Platform Regulation:How Governments Shape Online Content Moderation’ 1ed, Oxford University Press, United States of America, 2024,154.

more leeway in obtaining content takedowns. This would force social media firms to censor activists, journalists and those opposing the Hindu-nationalist government.<sup>64</sup>

Melissa Muindi, Elizabeth Muli, and Dr. Gichuki Njaramba have argued that it is important to understand the employment status of outsourced workers, as it affects the granting and enjoyment of their rights.<sup>65</sup> Outsourcing has been regarded as a non-standard form of work that involves three parties namely the outsourced worker, the outsourcing company which is a labor intermediary, and the client enterprise.<sup>66</sup> In the context of this research, a client enterprise refers to the social media platforms that outsource content moderators in Kenya and India. Therefore, this creates a triangular situation of employment establishing a power relation giving the outsourcing company and the social media platform an upper hand over the outsourced workers.<sup>67</sup>

Kenyan case law recognises the existence of an employment relationship between the outsourcing company and the outsourced workers.<sup>68</sup> However, despite the significant control the social media company exercises over the outsourced worker, no employment relationship exists between them.<sup>69</sup> In *Arendse & 42 others v Meta Platforms, Inc & 3 others*, the court held that META was the “primary or principle employer(s)” of the applicants while Sama, the outsourcing company, was only acting as its agent in Kenya. The court establishes a relationship between the social media platforms and the outsourced workers beyond the outsourcing company. This is because the workers were highly integrated into the actual work for META while the outsourcing company’s role was limited to provision of the physical workspace and human resources.<sup>70</sup>

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<sup>64</sup> Gorwa R, ‘The Politics of Platform Regulation: How Governments Shape Online Content Moderation’, 154-155.

<sup>65</sup> Muindi M, Muli E, Gichuki N, ‘Unravelling the Triangle: Clarifying the Employment Status Within Outsourcing Triangular Employment Relationships in Kenya’ *International Journal of Law and Policy*, 2021, 1067 [10.47604/ijlp.1291](https://doi.org/10.47604/ijlp.1291) on June 2021.

<sup>66</sup> Muindi M, ‘An Analysis of the Legal Regulation of Outsourcing Triangular Employment Relationships in Kenya’ Published PHD Thesis, University of Nairobi, Nairobi, 2023, 97.

<sup>67</sup> Muindi M, Muli E, and Gichuki N, ‘Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya’ *Journal of cmsd*, 2021, 41 [https://papers.ssrn.com/sol3/papers](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4111111) on 10 June 2021.

<sup>68</sup> *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR.

<sup>69</sup> *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* (2016) eKLR.

<sup>70</sup> Gautam B, ‘Meta, Labour Law, and the Constitution: The Judgement of the Kenyan Employment and Labour Relations Court, Constitutional Law and Philosophy, 9 June 2023, <https://indconlawphil.wordpress.com/2023/06/09/m...> on 9 June 2023.

Various International Labor Organizations (ILO) Conventions are applied in both Kenya and India. This is the case as one of the aims of the ILO is to protect workers who fall outside standard employment relationships (SER).<sup>71</sup> Ahmad Sana states that the rules governing outsourcing relationships and labour processes are designed to create opacity around content moderation practices.<sup>72</sup>

Caroline Wanjiku is of the view that the relationship between the social media companies and the third party contractors is unequal. This is because the policies under which the moderators operate are determined by the social media platforms.<sup>73</sup> However, due to the lack of direct contact between the moderators and the platforms, the platforms can evade accountability when the moderators rights and freedoms are violated. Therefore, Nurik argues that the function of content moderation should be done by the platforms themselves to prevent them from evading accountability.<sup>74</sup>

The intent of the measure is noble, there could be better alternatives. For instance, in the case of *Daniel Motaung v Samasource*, the court held that Facebook should be included as a party in the suit.<sup>75</sup> This judgement is crucial as it holds the platforms liable while ensuring that the outsourcing industry remains intact as it gives many people an avenue to earn a living. The standard the court sets in this case ensures that the outsourcing companies are held accountable for their actions.

### **1.10 Research Methodology**

This study will utilise desk-based qualitative analysis. It will use both doctrinal and comparative methods in analysing the legal framework pertaining to outsourcing of content moderators, as well as the contractual model used for hiring content moderators in Kenya and India. The research will rely on primary sources such as the Constitutions of Kenya and India, and various statutes from Kenya and India such as the *Employment Act 2007*. Further, it will

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<sup>71</sup> Muindi M, Muli E, Gichuki N, 'The International Labour Standards on Outsourcing Triangular Employment Relationships: Implications for Kenya' 8 Kenya Law Review 1, 2020, 2.

<sup>72</sup> Ahmad S, 'Who moderates my social media? Locating Indian workers in the global content moderation practices' .116.

<sup>73</sup> Gitau C W, 'Factors Affecting the Growth of Business Process Outsourcing Firms in Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2014, 22.

<sup>74</sup> Nurik C, "Facing Contracting Issues: The Psychological and Financial Impacts of Facebook Outsourcing Content Moderation", 1567.

<sup>75</sup> *Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others* (2023) eKLR.

rely on secondary sources such as books, chapters in books, journal articles, working papers and other internet resources.

### **1.11 Limitations of the research**

There exists the challenge of gathering and incorporating field research due to time constraints. Field research in this sense consists of interviews and questionnaires with content moderators and outsourcing companies based in Kenya and India. Therefore, the study will exclusively depend on qualitative data, providing a comprehensive depiction of the research problem.

### **1.12 Chapter Breakdown**

Chapter one is the introduction to the research. It presents the background of outsourcing of content moderation in Kenya and India, the statement of the problem, the research objectives and research questions, the conceptual framework, literature review as well as the methodology and justification of the research.

Chapter two will cover the principle of proportionality which will provide the lens through which the research objectives will be analysed.

Chapter three will examine the research objective concerning the legal frameworks that govern the outsourcing of content moderators in Kenya and India.

Chapter four will compare the contractual model existing between the social media platforms, outsourcing companies and content moderators in Kenya and India so as to determine how it affects the treatment of content moderators in the workplace.

Chapter five will examine how the courts in Kenya and India have adjudicated conflicts involving the contractual system of hiring content moderators so as to demonstrate the nuance of the protection and promotion of the moderators' rights and freedoms.

Chapter six will serve as a conclusion to this dissertation and will present the findings and subsequent recommendations of how the outsourced content moderators' rights and freedoms are to be better protected.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK: THE CONCEPT OF PROPORTIONALITY

The conceptual framework selected for the analysis of the study's objectives is the concept of proportionality. It refers to a principle observed in international and domestic law to determine the legality of an action by first establishing the balance between objectives, means, methods and consequences of the action.<sup>76</sup> The principle of proportionality is selected as it is adequate in addressing conflicts arising from the practice of outsourcing content moderators within the context of digital employees recruitment.

#### 2.1 Evolution of the Principle of Proportionality

The principle refers to a proper balance between two or more items and to the avoidance of exaggeration or excess in one of them.<sup>77</sup> "It directs that state action must be a rational means to a permissible end, which does not unduly invade fundamental human rights." It has existed in different forms in different cultures from the early civilisations.<sup>78</sup> For example, Aristotle is

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<sup>76</sup>Albert Camus, 'The Practical Guide to Humanitarian Law' <https://oxcon.ouplaw.com › abstract › law-mpeccol-e38>.

<sup>77</sup>Porat I, 'Proportionality', Oxford Constitutional Law, <https://oxcon.ouplaw.com › abstract › , law-mpeccol-e38>

<sup>78</sup>Chung Wai Man F, 'Proportionality and Margin of Appreciation' in Chung Wai Man F(ed), *The Concept of Proportionality in Public Law*, 1, City University of Hong Kong Press, Hong Kong, 2020, 69.

credited as the first person to advocate for proportionality in ancient Greece, and it was recognised as a legal principle in the 19th Century Prussian administrative law.<sup>79</sup>

During the modern era, this principle is said to originally evolve in Germany and refined by the German Constitutional Courts who then applied it in the public law domain.<sup>80</sup> Throughout the years, it became a central and binding public law principle of the member-states of the European Union.<sup>81</sup> Today, it is commonly adopted in both common and civil law.<sup>82</sup> Furthermore, it has gradually become applicable in private law to prevent the excessive and unjustified use of power by contracting parties.<sup>83</sup>

Proportionality has been deemed to be a key legal principle due to it being a structured approach to balancing fundamental rights and interests in the best way.<sup>84</sup>

Proportionality entails a four-stage test: the legitimate goal test, the sustainability test, the necessity test, and the balancing test.<sup>85</sup> Kai Moller states that in essence, the proportionality test aims to solve conflicts between a right and a competing interest or right.<sup>86</sup> However, before engaging in the resolution at the balancing stage, Moller asserts that it is crucial to prove that there is an actual conflict between the right and a pertinent competing interest, which cannot be resolved in a less restrictive way.<sup>87</sup>

## 2.2 Principle of Proportionality Applied to Labour Law

Employers in many countries have been granted a “managerial prerogative” to make unilateral decisions concerning the workplace. It means that they are free to make managerial decisions as long as the contract with the employees does not prohibit a given decision, despite the

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<sup>79</sup> Guy D, Pnina AS, ‘Applying the Principle of Proportionality in Employment and Labour Law Contexts,’ 2.

<sup>80</sup> Dr Debnath D, ‘The Principle of Proportionality, A Tool to Restrict Administrative Carte Blanche: An Analysis of the Principle with Special Reference to Restricted Internet Availability in Jammu and Kashmir’, 108.

<sup>81</sup> Kardava E, ‘Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law’ *Journal of Law* 1, 2017, 175.

<sup>82</sup> Engle E, ‘The History of the General Principle of Proportionality’ X:1 *The Dartmouth Law Journal*, 2012, 3.

<sup>83</sup> Kardava E, ‘Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law,’ 175.

<sup>84</sup> Pecaric M, ‘A Bayesian Improvement of the Proportionality Principle’ 35 *Ratio Juris* 4, 2022, 420.

<sup>85</sup> Moller K, ‘Proportionality: Challenging the critics’ 10 *International Journal of Constitutional Law* 3, 2012, 711-715.

<sup>86</sup> Moller K, ‘Proportionality: Challenging the critics’ 10 *International Journal of Constitutional Law* 3, 2012, 711.

<sup>87</sup> Moller K, ‘Proportionality: Challenging the critics’ 10 *International Journal of Constitutional Law* 3, 2012, 711..I

consequences it may have to the employees.<sup>88</sup> Consequently, a power imbalance between the employer and employee is created.

Labor law has goals that it seeks to achieve, which are classified as selective and universal goals. Selective goals imply the intention to help a specific subject of labour relations - employees and the universal goal advance the interests of the society at large and employers.<sup>89</sup> Although the principle of proportionality originally applies to governmental or public authorities, it can also be extended to labour law as employers exert control over their employees as much as public authorities do.<sup>90</sup>

The use of the principle has been suggested in some contexts of labour relations and employment based on basic motives such as employers' relations with their employees. Its application stresses its legal and analytical merits within contemporary legal doctrine in advancing legal coherence.<sup>91</sup>

Although labour law already imposes limitations on the abuse of power by the employer, the principle of proportionality is necessary as it offers a principled way to analyse a problem through the proportionality test.<sup>92</sup> It also accommodates the dynamic nature of employment relations, which demands adaptations over time.<sup>93</sup> The principle has been used by some countries in their employment and labour law.

Despite the importance of this principle, there are critiques to its application in this context. Firstly, the relatively open-ended standard could be difficult to enforce.<sup>94</sup> It is argued that this measure would lead to higher disparity between workers, as it would only be beneficial to high level employees with legal advice and resources.<sup>95</sup> Nevertheless, the aim of this principle is to avoid unnecessary or excessive harm to employees. This is by ensuring that the employers

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<sup>88</sup> Guy D, 'The Principle of Proportionality in Labor Law and its Impact on precarious workers' 34 *Comparative Labor Law & Policy Journal* 1, 2012,70.

<sup>89</sup> Kardava E, 'Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law', 173.

<sup>90</sup> Kardava E, 'Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law', 176.

<sup>91</sup> Kardava E, 'Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law', 176.

<sup>92</sup> Kardava E, 'Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law', 176 .

<sup>93</sup> Kardava E, 'Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law', 177.

<sup>94</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 31.

<sup>95</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 31.

change their decision-making process to consider the impact on employees which would benefit the low- income employees as well.<sup>96</sup>

Additionally, applying the principle of proportionality, especially the balancing test, obligates adjudicators to do the task of balancing and weighing different variables. It is considered problematic in the private sector where the employers are the decision makers who are considered better suited to conduct such an analysis. Their discretion should not be replaced by the adjudicators' discretion.<sup>97</sup> In response to this, courts are already required to engage in balancing when applying the law. Proportionality analysis includes minimal intervention in the choice of goals, whereby employers still have very broad discretion in choosing them.<sup>98</sup> In terms of the balancing test, it has been suggested that the level of scrutiny varies depending on the type of decision that is in question. For example, when fundamental rights are at stake, stricter scrutiny is more appropriate compared with the protection of other interests.<sup>99</sup>

### **CHAPTER THREE**

#### **LEGAL FRAMEWORK GOVERNING OUTSOURCING OF CONTENT MODERATORS IN KENYA AND INDIA**

This chapter presents the legal framework that governs outsourcing of content moderators in India and Kenya respectively. It examines the BPO and ITES sectors in the respective countries as they supply content moderation services. The discussion begins with an examination of India's legal framework because the country has an advanced regulatory system for this sector, providing optimum conditions for its growth in benefit of the locally outsourced workforce. In addition, Kenya has used the status of the BPOs and ITESs in India as a benchmark.

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<sup>96</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 31-32.

<sup>97</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 32.

<sup>98</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 32.

<sup>99</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law,' Contexts,' 32.

### 3.1 International Law on the Outsourcing of Content Moderators

Outsourcing is considered a non-standard form of work (NSW) as it involves a third party company acting as a labour intermediary to hire outsourced workers, and avail them to a client enterprise.<sup>100</sup> In the case of the study, the client companies are social media platforms. A triangular employment relationship (TER) is created involving three parties as opposed to a standard employment relationship (SER) involving two parties.<sup>101</sup> From the perspective of International Law, so far, there are no conventions or treaties on the practice of outsourcing content moderators. In 1998, a convention was proposed concerning contract labour, which included outsourced workers. It was a step towards codifying the protection of outsourced workers in the international scene but it was never adopted.<sup>102</sup> Some of the reasons why it wasn't adopted is because some parties to the negotiations were skeptical about the creation of a new category of workers, while others wanted clarification on the scope of the workers the convention sought to protect.<sup>103</sup> Some of the parties proposed amendments to this convention, for example on the definition of workers, taking into account the different legal systems and languages that exist. They agreed to table the issues that arose on the agenda for a future session for further discussions, and invite experts to contribute on the issues that cropped up in the Committee deliberations.<sup>104</sup> As the situation stands, there has been no further discussions on the matter, hence the outsourcing of content creators on social media platforms is governed by two main policies issued by the International Labour Organisation (ILO): *International Labour Standards (ILS)* and *Employment Relationship Recommendation 2006*.

ILO acknowledges the increase of NSWs over the past two decades. It has led to a decrease in employment protections, because NSWs are associated with atypical, precarious employment relationships.<sup>105</sup> Due to this, the ILO has worked to strengthen the protection of atypical

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<sup>100</sup> Muindi M, 'Unravelling the Triangle: Clarifying the Employment Status Within Outsourcing Triangular Employment Relationships in Kenya' 1067.

<sup>101</sup> Muindi M, 'Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya' 41.

<sup>102</sup> Muindi M, 'The international labour standards on outsourcing triangular employment relationships: Implications for Kenya' 1, 20.

<sup>103</sup> *Report of the Committee on Contract Labour*, ILC 86th Session Geneva, 1998, <https://webapps.ilo.org/realm/ilc/ilc86/com-cont>.

<sup>104</sup> ILC, *Report of the Committee on Contract Labour*.

<sup>105</sup> Muindi M, 'The international labour standards on outsourcing triangular employment relationships: Implications for Kenya' 4.

workers by drafting agreements that specifically target these NSW groups to add onto the *International Labour Standards (ILS)*.<sup>106</sup> They consist of eight fundamental conventions which deal with employment rights and obligations namely: the freedom of association and its constituent right to collective bargaining; the freedom from forced labour; the elimination of child labour; and the freedom from employment discrimination.<sup>107</sup> This is due to the niche challenges facing non-standard workers due to the nature of their contracts.

The *Employment Relationship Recommendation* 2006 highlights the importance of national labour rights to the establishment of an employment relationship.<sup>108</sup> Yet, in situations where it is difficult to establish an employment relationship, the workers' rights may be violated where they shouldn't be.<sup>109</sup> Outsourced content moderators are divided on who they consider to be their employer as some consider the outsourced company to be and others consider the social media platform as their employer.<sup>110</sup> According to the recommendation, national policies of member states ought to guarantee that all contractual agreements, including TERs, are subject to the labor standards. Furthermore, member states are urged by article 5 of the recommendation to guarantee that workers who are uncertain of their employment status are adequately protected.<sup>111</sup>

## Findings

1. There are no existing conventions or treaties that cater to the outsourced workers.
2. Consequently, it creates a problem whereby outsourced workers cannot appeal to a higher jurisdiction whenever they have a dispute with their employer.

## 3.2 Rules Governing the BPO and ITES sectors in India in terms of Outsourcing Content Moderators

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<sup>106</sup> Muindi M, 'The international labour standards on outsourcing triangular employment relationships: Implications for Kenya' 4.

<sup>107</sup> Muindi M, 'The international labour standards on outsourcing triangular employment relationships: Implications for Kenya' 11.

<sup>108</sup> Preamble, *Employment Relationship Recommendation*, 2006, ILO R198.

<sup>109</sup> Muindi M, 'Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya' 42.

<sup>110</sup> Muindi M, 'An Analysis of the Legal Regulation of Outsourcing Triangular Employment Relationships in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2023, 147.

<sup>111</sup> Article 5, *Employment Relationship Recommendation*.

The *IT Act* of 2000 laid out the main regulatory framework impacting the companies operating under user generated content platforms. It offered protection for intermediaries unless they could be found to have ‘actual knowledge’ of certain content being illegal.<sup>112</sup> This provision gave firms broad discretion to regulate their services and create standards in accordance with their commercial goals.<sup>113</sup> The regulation ensures that the platforms are not given a disproportionate mandate to proactively monitor and censor user-generated content in a scope beyond its control. Furthermore, it ensures that the users rights are not infringed upon, and liability is only placed where they encourage illegal content, which is proportionate to the risks the platforms take in providing an avenue to exercise the freedom of speech and expression.

In 2008, an amendment to the law was made to tighten the existing framework, by mandating providers to remove illegal content in the 36 hours following a complaint. However, this provision was loosened in 2015, after a Supreme Court ruling held that only a judicial court order should be considered ‘actual knowledge’ by a platform.<sup>114</sup>

*The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules* of 2021-2022 issues guidelines to be followed by intermediaries, including social media intermediaries. As BPO and ITES companies offer content moderation services for social media platforms, they fall under the intermediary definition. The guidelines stipulates: “the deployment of mandatory automated content screening tools, pressure on end-to-end encrypted services to institute new technical features that would allow investigators to determine the originator of certain widely shared messages, mandating firms to comply with takedown requests for content issues by various non-judicial government actors, among others.”<sup>115</sup> This legislation demonstrates India’s ambition to push the boundaries on the extent to which a secure encrypted platform can be operated, and aims at circumventing the judicial limitations put in place.<sup>116</sup> Provisions of this code as well as its constitutionality are challenged by activists due to the power it grants the state in interfering with the work of the platforms and its

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<sup>112</sup> Section 72, *The Information Technology Act* (No. 21 of 2000).

<sup>113</sup> Gorwa R, ‘The Politics of Platform Regulation:How Governments Shape Online Content Moderation’,155.

<sup>114</sup> Gorwa R, ‘The Politics of Platform Regulation:How Governments Shape Online Content Moderation’,155.

<sup>115</sup> *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules*, (2021).

<sup>116</sup> Gorwa R, ‘The Politics of Platform Regulation:How Governments Shape Online Content Moderation’,156.

moderators.<sup>117</sup> The dissent is because the government has a tendency to restrict and shutdown communications networks in response to protests against it.<sup>118</sup>

*The Industrial Disputes Act* of 1947 is applicable to the BPO and ITES sectors as they fit the definition of an industry according to the Act.<sup>119</sup> Through this legislation, employees are provided with various incentives such as enhanced work benefits and dispute settlement mechanisms. The Act-controlled industries must establish a Work Committee in locations with 100 or more employees.<sup>120</sup> The committee is mandated to settle any dispute between the management and workers, and when the dispute is not resolved, it is then referred to a Conciliation officer. The dispute is only referred to the National Tribunal/Industrial Tribunal/Labour Court if it remains unresolved.<sup>121</sup>

*The Code on Wages 2019* is a labor code that consolidates regulations pertaining to minimum wages, bonuses, and equitable compensation, in addition to wage payment legislation. It includes the *Payment of Wages Act 1936*, the *Minimum Wages Act 1948*, the *Payment of Bonus Act 1965*, and the *Equal Remuneration Act 1976*.<sup>122</sup> The code applies to all sectors, industries and affects all workers, whether they are employees or not. As content moderation is crucial for the survival of the social media platforms, it is prudent to adequately compensate them for their labour. From the viewpoint of the principle of proportionality, the social media platforms and the outsourcing companies seek to maintain cost efficiency and generate profit, while content moderators seek to earn a living from their work. As the companies have more power compared to the workers, they are capable of denying the workers their fair share hence it comes in to ensure that they are protected.

The *Contract Labour (Regulation and Abolition) Act 1970* arised to protect contract workers from exploitation and abuse from their employers.<sup>123</sup> The Act covers any principal employer that employs a minimum of 20 contract labourers.<sup>124</sup> It requires contractors to get licensed and the principal employer to be registered. Also, it empowers the government to abolish contract

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<sup>117</sup> Gorwa R, 'The Politics of Platform Regulation:How Governments Shape Online Content Moderation',156.

<sup>118</sup> Gorwa R, 'The Politics of Platform Regulation:How Governments Shape Online Content Moderation',157.

<sup>119</sup> Section 2, *The Industrial Disputes Act* (Act No 14 of 1947).

<sup>120</sup> Section 3, *The Industrial Disputes Act* (Act No 14 of 1947).

<sup>121</sup> Section 7, 7A, 7B, *The Industrial Disputes Act* (Act No 14 of 1947).

<sup>122</sup> Jain S, "Indian Labour Laws and Its Impact on BPO-IT/ITES Industry", TaxGuru, 25 April 2023, <https://taxguru.in/corporate-law/indian-labour-laws-i...> on 25 April 2023.

<sup>123</sup> Mitra SB, Ghosh P, 'Engaging Contract Labour: Learnings from Landmark Judgements', 98.

<sup>124</sup> *The Contract Labour (Regulation and Abolition) Act* (Act No 37 of 1970).

labour in specified operations or processes in an establishment.<sup>125</sup> The measures above are meant to protect this form of labour from being exploited by the employers and regulate the employees' working conditions.<sup>126</sup> Although the Act is meant to bridge the power gap between the contract labourer, the contractor and the principal employer, the employers often misuse certain provisions to escape other restrictive labour practices.<sup>127</sup>

The *Sexual Harassment of Women (Prevention, Prohibition, and Redressal) Act*, 2013, applies to the BPO and ITES sectors as women as known as a dominant workforce in the field of content moderation.<sup>128</sup> This is important as women are considered a vulnerable population in India, due to cultural reasons which expects them to fall into the roles of marriage and motherhood.<sup>129</sup> As a result, they cannot, for example, work on the night shift due to their safety.<sup>130</sup> The principle of proportionality ensures that decisions on outsourcing do not unnecessarily subject women to hazardous or exploitative working environments, while ensuring that the platforms are able to remain competitive. Additionally, measures aimed at preventing sexual harassment must be applied uniformly to all employees, internal and outsourced.

The BPO and ITES sectors employ numerous workers as they are an attractive destination for outsourcing of services globally. Thus, the *Occupational Safety, Health, and Working Conditions Code*, 2020 applies as it employs more than fifty contract workers.<sup>131</sup> Better working conditions, benefits for occupational safety and health, and other advantages are provided by this act, which is advantageous to the outsourced workers.

## Findings

The analysis of India's legal framework governing the BPO and ITES sectors has garnered the following findings:

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<sup>125</sup> Section 10, *The Contract Labour (Regulation and Abolition) Act* (Act No 37 of 1970).

<sup>126</sup> Mitra SB, Ghosh P, 'Engaging Contract Labour: Learnings from Landmark Judgements', 98.

<sup>127</sup> Mitra SB, Ghosh P, 'Engaging Contract Labour: Learnings from Landmark Judgements', 100.

<sup>128</sup> Jain S, "Indian Labour Laws and Its Impact on BPO-IT/ITES Industry", TaxGuru, 25 April 2023, <https://taxguru.in/corporate-law/indian-labour-laws-i.....> on 25 April 2023.

<sup>129</sup> Ahmad S, "It's Just the Job": Investigating the Influence of Culture in India's Commercial Content Moderation Industry' Published LLB Thesis, Oxford Internet Institute University of Oxford, Balliol, 2018, 27-28.

<sup>130</sup> Ahmad S, "It's Just the Job": Investigating the Influence of Culture in India's Commercial Content Moderation Industry' Published LLB Thesis, Oxford Internet Institute University of Oxford, Balliol, 2018, 26.

<sup>131</sup> Section 22, *The Occupational Safety, Health, and Working Conditions Code*, (2020).

1. The current legal framework provides legislation which directly impacts the outsourced content moderators by ensuring that their rights to fair wages and good working conditions are not unduly violated.
2. The outsourced moderators have options on how they wish to resolve disputes between themselves and their employers in case of a dispute. At first instance, they can go to the Working Committee, then to the Conciliation Officer, then to the Labour Tribunal or to the court.
3. The only factor that the current framework seems not to have provided for is mental health. This loophole is likely to put the outsourced moderators at risk as the type of work they do involves significant mental strain.

### **3.3 The Kenyan Legal Regime**

This section investigates the legal framework governing the BPO and ITES sectors in Kenya. Firstly, this discussion highlights how the outsourcing companies gain legal standing to operate in Kenya and proceeds to examine the legislations that govern the outsourced content moderators.

#### **3.3.1 Laws Governing the Incorporation of Outsourcing Companies in Kenya**

For outsourcing companies to operate in Kenya, they are required to be registered under the *Companies Act 2015*.<sup>132</sup> It is the main legislation regulating companies in the country. Section 44 of the *Occupational Safety and Health Act, 2007* mandates that a workplace has to be registered prior to using it.<sup>133</sup> *The Companies (General Regulation) 2015* lays down the rules on how companies are to be registered in Kenya, as well as outlines the undertakings of a subsidiary company.<sup>134</sup> This is important as BPO and ITES companies that provide outsourcing services can be foreignly owned. For Sama, formerly Samasource, which a US company registered in San Francisco, to be operational in Kenya, it had to register a Kenyan subsidiary according to section 15 of the *Companies Act 2015*.<sup>135</sup>

The *Kenya Information and Communications Act 2011* regulates the communications sector in Kenya. Social media platforms enable communication through the posting and interaction

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<sup>132</sup> *Companies Act* (Chapter 486).

<sup>133</sup> Section 44, *Occupational Safety and Health Act, 2007*.

<sup>134</sup> *The Companies (General Regulation) 2015*.

<sup>135</sup> Section 15 *Companies Act 2015*.

of the content by watching, commenting or both. Section 84D of the Act prohibits the publishing and transmitting obscene information in electronic form.<sup>136</sup> This provision establishes an obligation to moderate this type of content to avoid legal liability. It is in line with the employers' interest of preserving their brand by enabling a conducive environment for user interaction.

### 3.3.2 Rules Governing the Protection of Outsourced Workers in Kenya

Article 41 of the *Constitution of Kenya* (2010) states that every person has the right to fair labor practices.<sup>137</sup> These include the right to fair remuneration, to reasonable working conditions among others. However, it is not an absolute right.<sup>138</sup> Furthermore, Article 27 provides for equality and freedom of discrimination on any basis listed under article 27(4),<sup>139</sup> while Article 28 acknowledges the inherent dignity of each person and provides for it to be respected.<sup>140</sup> This is important as it provides a foundation under which outsourced content moderators' are acknowledged as content moderation is considered an emerging field in Kenya.

Due to the emerging nature of content moderation as a new form of digital employment, the need to classify content moderators became apparent. Moreover, outsourced moderators are governed by two authority figures: the outsourcing firm which has legal control while the social media platform exercises day-to-day control.<sup>141</sup> This is important as under the current employment legal framework, employment protections are only granted to employees to the exclusion of independent contractors.<sup>142</sup> There is no specific regulation in Kenya that confers employment status to the outsourced content moderators. Case law has filled this gap by establishing the outsourcing companies as their employers. However, classifying such new forms of digital employment can result in misclassification and hinder them from acquiring their legally mandated rights, as the current classification is geared towards SERs.<sup>143</sup> Content moderators are not considered employees under the *Employment Act* 2007, as their terms are

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<sup>136</sup> Section 84D, *Kenya Information and Communications Act* (Chapter 411A) 2011.

<sup>137</sup> Article 41, *Constitution of Kenya* (2010).

<sup>138</sup> Article 27, *Constitution of Kenya* (2010).

<sup>139</sup> Article 27(4), *Constitution of Kenya* (2010).

<sup>140</sup> Article 28, *Constitution of Kenya* (2010).

<sup>141</sup> Muindi M, 'Unravelling the Triangle: Clarifying the Employment Status Within Outsourcing Triangular Employment Relationships in Kenya' 1067.

<sup>142</sup> Muindi M, 'An Analysis of the Legal Regulation of Outsourcing Triangular Employment Relationships in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2023, 173.

<sup>143</sup> Nurik C, 'Facing contracting issues: The psychological and financial impacts of Facebook outsourcing content moderation' 1551.

defined by the contract of employment instead of a contract of service that falls under the Act's protection.<sup>144</sup> This is detrimental as a contract of employment can lead to an exploitative relationship between the employer and the outsourced worker due to employers using their power to distort contracts in their favor.<sup>145</sup> It then leaves the workers vulnerable to unfair treatment in the labor market.<sup>146</sup> Due to the presence of the two authority figures, it will be challenging for the moderators to determine who to hold liable for the infringement of their rights, which results to the intervention of the principle of proportionality to determine the interests of the parties and map out the various ways in which parties can be liable.

Part V of the *Employment Act 2007* outlines the fundamental requirements for employment, subject to the rights and obligations given to both employers and employees. Section 27 enables employers to regulate the employees' working hours but mandates that employees should have at least one day off every seven days. However, to complete the tasks allocated to them, content moderators have to deal with rigorous schedules, overnight shifts, and extensive micromanagement.<sup>147</sup> A content moderators' typical workday consists of eight hours with a one hour break. If they exceed this time period, a penalty will be imposed which involves deduction of pay.<sup>148</sup> Consequently, the moderators are vulnerable to maltreatment by their employers who benefit from their work at their expense. The principle of proportionality is important as it analyses the demerits of these schedules and ensures that there are measures to mitigate this while not majorly inconveniencing their employers.

In Kenya, workers are entitled to a minimum leave of 21 working days with pay after twelve consecutive months of service.<sup>149</sup> Considering content moderators' employment is contract-based which can span less than a year, content moderators don't have access to the same benefits as regular employees.<sup>150</sup> Also, the opportunity to have leave days is not offered to them

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<sup>144</sup> Mbogori F, 'Towards legal reform for protection of all workers in Kenya' Researchgate, 2021, 13, [https://www.researchgate.net/publication/351266641\\_TOWARDS\\_LEGAL\\_REFORMS\\_FOR\\_PROTECTION\\_OF\\_ALL\\_WORKERS\\_IN\\_KENYA](https://www.researchgate.net/publication/351266641_TOWARDS_LEGAL_REFORMS_FOR_PROTECTION_OF_ALL_WORKERS_IN_KENYA) on 30 October 2023.

<sup>145</sup> Mbogori F, 'Towards legal reform for protection of all workers in Kenya' 14.

<sup>146</sup> Mbogori F, 'Towards legal reform for protection of all workers in Kenya' 14.

<sup>147</sup> Nurik C, 'Facing contracting issues: The psychological and financial impacts of Facebook outsourcing content moderation' 1551.

<sup>148</sup> Nurik C, 'Facing contracting issues: The psychological and financial impacts of Facebook outsourcing content moderation' 1551.

<sup>149</sup> Section 28, *Employment Act* (Act No.11 of 2007).

<sup>150</sup> Mbogori F, 'Towards legal reform for protection of all workers in Kenya' 14.

as per this regulation which leaves them vulnerable to being overworked which is harmful to their health.

Pursuant to Article 29 of the *Employment Act 2007*, a female employee is entitled to a paid three-month maternity leave. Afterwards, she has to return to her original position or one that is equivalent, with terms and conditions that are equal to or better than those that applied to her prior to her maternity leave.<sup>151</sup> This promotes the principles of equality and non-discrimination as provided by article 27 of the Constitution.<sup>152</sup> Male employees are also granted a two-week paid paternity leave. It is beneficial to the employee as it enables them to attend to other non-work priorities without compromising on their position in the workplace. Therefore, the employee feels valued, hence increasing their productivity which is favourable to the employer.

Employees are also mandated to a minimum of seven days of paid sick leave, followed by an additional seven days of paid leave after two consecutive months of employment, provided they can produce a valid medical certificate to substantiate their claim.<sup>153</sup>

Section 45(2) of the *Employment Act, 2007* stipulates the conditions for termination of employment. It terms the termination unfair if it cannot be proven to be legitimate, fair, and related to the employee's conduct, compatibility, or capacity.<sup>154</sup> If the employment relationship lasts less than thirteen months, an employee is not eligible to file a complaint under section 45(3) of the *Employment Act*.<sup>155</sup> Outsourced content moderators would be affected by this as some of their contracts tend to last 12 months which fails to meet this threshold. Also, there is uncertainty on the termination of the outsourced worker when the client enterprise terminates their contract with the outsourcing company<sup>156</sup> To address the uncertainty, the outsourcing companies opt to include this aspect in the termination clause of the employment contracts.<sup>157</sup> Through the principle of proportionality, it highlights the precarious position of content moderators as for them to seek for justice, they have to wait for a period of time which is not guaranteed due to the short term contracts offered to them.

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<sup>151</sup> Section 29, *Employment Act* (Act No.11 of 2007).

<sup>152</sup> Article 27, *Constitution of Kenya* (2010).

<sup>153</sup> Section 30, *Employment Act* (Act No.11 of 2007).

<sup>154</sup> Section 45(2), *Employment Act* (Act No. 11 of 2007).

<sup>155</sup> Section 45(3), *Employment Act* (Act No. 11 of 2007).

<sup>156</sup> Part VI, *Employment Act* (Act No. 11 of 2007).

<sup>157</sup> Muindi M, 'The international labour standards on outsourcing triangular employment relationships: implications for Kenya' 4.

The *Occupational Safety and Health Act, 2007* aims to protect the welfare, health and safety of employees, as well as any visitors to businesses. An employee is defined as a person whose employment is stipulated by a contract.<sup>158</sup> It also applies to casual workers and affects all workplaces, whether they are temporary or permanent.<sup>159</sup> Employers are given the mandate to maintain worker safety.<sup>160</sup> The Act has expanded its scope of protection beyond employees hence it offers protection to atypical workers as it makes the employers consider the well-being and safety of workers and employees while in the workplace. However, it has been proposed that the Occupational, Health, and Safety provision could be expanded to include the mental health "diseases" content moderators experience as a result of the trauma-inducing nature of their work.<sup>161</sup> It would be beneficial to content moderators as it gives a legal incentive for the outsourcing company to provide adequate mental health services.

## Findings

1. The contracts that the moderators sign with the outsourcing companies are in contradiction with the *Employment Act, 2007*, as they subject their workers to unfair working conditions and put them in a situation of being vulnerable to be laid off without following the law required procedure, which is worsened for immigrants who work in Kenya.
2. Since content moderators and the work they do are under the direct control of the social media platform, and not the outsourcing company, there is a need to clarify which legislation is applicable to such a relationship, taking into account that it goes beyond the contract. The social media platform is in charge of the policies and the performance metric in which the moderators are expected to carry out their role, which exposes them to graphic content.

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<sup>158</sup> Section 2, *Occupational Safety and Health Act, 2007*.

<sup>159</sup> Section 3, *Occupational Safety and Health Act, 2007*.

<sup>160</sup> Muindi M, 'The international labour standards on outsourcing triangular employment relationships: implications for Kenya' 4.

<sup>161</sup> Wohn D, 'Volunteer Moderators in Twitch Micro Communities: How They Get Involved, the Roles They Play, and the Emotional Labour They Experience,' 2019, 5.

3. The protection of the law is limited as outsourcing companies have significant control over the moderators. The outsourcing companies use their power to violate the rights of the outsourced workers, which is against the law.

## **CHAPTER FOUR**

### **KENYAN AND INDIAN CASE LAW ON THE OUTSOURCING OF CONTENT MODERATION**

This chapter analyses the jurisprudence of Kenya and India concerning the outsourcing of content moderators to ascertain the role of the courts in the protection of the outsourced workers. It also examines the employment status of the outsourced workers in light of the court decisions in both countries.

#### **4.1 Relevant Cases In Kenya**

This section examines two cases : *Meta Platforms, Inc & 2 others v Motaung & 186 others*; *Kenya National Human Rights and Equality Commission & 14 others (Interested Parties)* and the *Arendse & 42 others v Meta Platforms, Inc & 3 others*; *Kenya Human Rights Commission & 8 others (Interested Parties)* .

##### **4.1.1 Meta Platforms, Inc & 2 others v Motaung & 186 others; Kenya National Human Rights and Equality Commission & 14 others (Interested Parties)**

This case delivers a judgement for two appeal cases that were heard together, namely Civil Appeal Numbers E232 of 2023 and E445 of 2023.<sup>162</sup> They arise from two separate interlocutory rulings in the Nairobi ELRC Petition *E071 of 2022* and Nairobi ELRC Petition *E052 of 2023*, respectively.<sup>163</sup>

### **Facts of the case**

Both appeals seek for the respective petitions to be struck out. The courts in the trial cases above bestowed themselves with adequate jurisdiction to hear the matters put before them and made the social media platform, Meta, a party to the suits, which they were not satisfied with. They claimed that they are a foreign corporation, hence Kenyan courts do not have the jurisdiction to try them and they are not the employers of the outsourced moderators.<sup>164</sup>

In *Civil Appeal No. E232 of 2023*, the counsel for the appellants maintained that the court had not yet assumed jurisdiction over the appellants.<sup>165</sup> They contended that since the Kenyan Constitution does not extend outside its borders and the appellant is not bound by it, the ELRC could not take jurisdiction over a foreign firm. Consequently, Meta is not in violation of rights protected by a constitution that doesn't bind the company. The fact that Daniel Motaung was employed by the outsourcing firm Sama, making Meta a party to the contract, while they did not participate in , violates their sovereignty and is against natural justice.<sup>166</sup>

The counsel for the respondents argue that in today's digital world a foreign company can operate fully in Kenya without a physical office.<sup>167</sup> On the question of whether the trial court was justified in failing to strike out the petition, they cited the case of *Meta Platforms, Inc & Another vs Samasource Kenya EPZ Limited t/a Sama & 185 Others; Central Organization of Trade Unions Kenya & 8 Others (Interested Parties)* to argue that the issue is not a jurisdictional question but is a factual one that needed to be subjected to a full trial.<sup>168</sup> They argued that for a matter to be considered as an extra-territorial application of the Kenyan

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<sup>162</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>163</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>164</sup> *Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others* (2023) eKLR, *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>165</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>166</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>167</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>168</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

Constitution, the violations complained of must have taken place outside the jurisdiction of the trial.<sup>169</sup>

In *Civil Appeal No. 445 of 2023*, the grounds for dismissal were that the appellants were foreigners, there was no employer- employee relationship between them and the 3rd to 186th respondents, and that there was no basis upon which the court could assume jurisdiction.<sup>170</sup> The counsel for the appellants argued that even with the leave granted, the appellants had the right to challenge the court's jurisdiction over them because foreign corporate entities cannot be subjected to Kenyan laws and the Constitution.<sup>171</sup> This would violate their constitutional sovereignty and illegally interfere with their respective states' exclusive territorial jurisdiction. Moreover, they argued that the court lacked jurisdiction to deal with a matter which did not arise from an employer-employees relationship.<sup>172</sup>

The counsel for the respondents argued that the 3rd to 186th respondents' request to serve the appellants at their principal offices in California and Ireland was granted as they proved that the violations they had complained about had taken place in Kenya. Furthermore, the appellants had brought them there from other nations to work for them.<sup>173</sup> Concerning the claim that the 3rd to 186th respondents were not the appellants' employees, they stood with the trial court's holding that privity of contract is not an essential element in establishing violation of fundamental rights by a person in control and authority over another. Further, where employees are engaged through an outsourcing arrangement, the party assigning and supervising their work cannot escape liability when an employee suffers harm from doing the work.<sup>174</sup>

## **Ruling**

The Court held that, as the issues raised by the appellants are a matter of fact, they could not be determined by way of an interlocutory application but were best resolved in a full hearing. They argued that an appellate court should not get involved where a court of first instance uses discretion and it can be demonstrated that it was reasonable in making its conclusion by taking into account all pertinent facts and principles.<sup>175</sup> Consequently, there was no improper exercise

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<sup>169</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>170</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>171</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>172</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>173</sup> *Civil Procedure Rules* (2010).

<sup>174</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>175</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

of jurisdiction or misdirection by the judge in the impugned rulings. In conclusion, the court found that both appeals lack merit and they should be dismissed with costs to the respondents.<sup>176</sup> The case upholds an important precedence which enables outsourced workers to seek recourse in the country they are working in when an employer is a foreign institution.

#### **4.1.2 Arendse & 42 others v Meta Platforms, Inc & 3 others; Kenya Human Rights Commission & 8 others (Interested Parties) (Constitutional Petition E052 of 2023) [2023] KEELRC 1398 (KLR) (2 June 2023) (Ruling)**

##### **Facts of the case**

The petitioners are content moderators who work for the 1st respondent, Meta and 2nd respondent, Meta Platforms Ireland Limited, through the 3rd respondent, Sama. In January 2023, the petitioners and all other content moderators were issued termination letters which would be effective on 31st March 2023 on redundancy claim. The decision will put out of work 260 content moderators<sup>177</sup>. The applicants include Kenyans, foreigners and refugees whose stay in the country is dependent on their work. The petitioners have been denied access to employment opportunities by the 4th respondent, Majorel Kenya Limited, due to them previously working for the 3rd respondent.<sup>178</sup> The action was challenged while the petitioners sought a range of interim protection orders. The petitioners described their work environment in their affidavits, including the lack of adequate provision of mental health services, insecurity faced as they exercise their duties, among others.

The petitioners argued that the redundancy was unlawful because they were not provided any justifiable reason for the dismissal and for failure to comply with the provisions of the *Employment Act, 2007*. They contend that their role cannot be redundant due to its importance in the protection of the consumers and preservation of the platform's image. In contrast, the 1st and 2nd respondents argued that they were not the "employer" of the content moderators, presenting the 3rd respondent as the party that is responsible for the welfare of the moderators. The 3rd respondent is depicted as the responsible party for the redundancy notices being served to the petitioners.

##### **Ruling**

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<sup>176</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

<sup>177</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>178</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

The court held that pending the hearing and determination of the suit, the various interim protections the petitioners sought be granted based on several grounds. Firstly, the court considered Meta as the “primary or principal employer(s) of the applicants” ,while Sama’s role was that of an agent in Kenya<sup>179</sup>. This is because Meta had control over the operational requirements and standards of performance and Sama was only in charge of recruitment, training, the physical workspace, human resources and personnel management.<sup>180</sup>

The court found that Meta was bound by the statutory obligations under the *Employment Act 2007* and the *Occupational Safety and Health Act, 2007*.<sup>181</sup> Consequently, the termination of the contracts to redundancy was halted and the court mandated the provision of adequate “medical, psychiatric, and psychological care” for the content moderators.<sup>182</sup> The Court also acknowledged the irreversible harm to the mental health of the content moderators, if the contract was terminated, especially for the immigrant moderators whose termination would result in a return to their home countries.<sup>183</sup>

### **Analysis**

The appeal case, *Meta Platforms, Inc & 2 others v Motaung & 186 others; Kenya National Human Rights and Equality Commission & 14 others (Interested Parties)*, upholds the rulings set forth in the trial cases, which hold Meta as a proper party to the suit. The court also has proper authority to hear the matter in dispute subject to *Order 5 rule 21 of the Civil Procedure Rules (2010)*.<sup>184</sup> The decision meets the necessity and sustainability requirements in the principle of proportionality, as it warrants the social media firm to consider the content moderators’ interests when they seek to engage their services through the outsourcing company. The decision is relevant in that it states Meta’s duty to shoulder their responsibilities by ensuring that they do not transfer them solely onto the outsourcing company, Sama.

The Arendse case goes a step further in addressing the relationship between the outsourced content moderators and the social media platform by ruling that the platform is the primary

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<sup>179</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>180</sup> Gautam B, ‘Meta, Labour Law, and the Constitution: The Judgement of the Kenyan Employment and Labour Relations Court, Constitutional Law and Philosophy, 9 June 2023, <https://indconlawphil.wordpress.com/2023/06/09/m...> on 9 June 2023.

<sup>181</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>182</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>183</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>184</sup> *Meta Platforms, Inc & 2 others v Motaung & 186 others* (2024) eKLR.

employer. This is due to Meta's control over the workplace and integration of content moderators into the business of the platform.<sup>185</sup> The ruling goes beyond the established employment relationship between the outsourcing company and the content moderators. By using this approach, the burden of protecting the rights of the outsourced workers are placed on the platform and not solely on the outsourcing companies. The court's decision is reasonable as the moderators perform their function to the platforms' benefit. Through the constitutional guarantee provided for in *Article 41 of the Constitution*, this measure protects the workers as it looks to prevent the dodging of the platform's responsibilities through clever drafting of contractual agreements.<sup>186</sup>

## 4.2 Relevant Cases In India

This section examines the cases of *Shreya Singhal v Union of India* (2015) and *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019). Although the second case does not address content moderation, it is important as it reiterates a crucial precedence of employer liability in an outsourcing relationship, which is applicable in the context of content moderation. The section is structured as follows: the facts and rulings of both cases, the analysis, and the findings.

### 4.2.1 Shreya Singhal v Union of India (2015)

#### Facts of the case

This is a landmark case delivered by the Supreme Court of India. The petitioner, Shreya Singhal, a law student, challenged the validity of Section 66A of the *Information Technology Act* 2000. The grounds were that the provision was vague, overbroad and violated the right to freedom of speech and expression as enshrined in the Indian Constitution.<sup>187</sup> The petition was sparked by the public's anger due to the arrest of two girls in Mumbai, for posting comments

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<sup>185</sup> *Arendse & 42 others v Meta Platforms, Inc & 3 others* (2023) eKLR.

<sup>186</sup> Gautam B, 'Meta, Labour Law, and the Constitution: The Judgement of the Kenyan Employment and Labour Relations Court, Constitutional Law and Philosophy, 9 June 2023, <https://indconlawphil.wordpress.com/2023/06/09/m...> on 9 June 2023.

<sup>187</sup> *Shreya Singhal v Union of India* (2015), The Supreme Court of India.

on Facebook criticizing the shutdown of the city, for the funeral of Shiv Sena leader Bal Thackeray.<sup>188</sup>

Although the protection of the freedom of speech is important, this section is going to focus on the court's view on sections 69A and 79 of the *Information Technology Act 2000*.

Section 69A empowered the central government to issue blocking orders to intermediaries for certain categories of illegal content. It also provided for the procedure in handling this exercise. The petitioner argued that this provision is unconstitutional as the user whose content is to be taken down is not given adequate notice and the opportunity to defend themselves through a pre-decisional hearing.<sup>189</sup>

Section 79 authorised the central government, state government, courts and private individuals to send "Take Down Requests" (TDRs) to intermediaries concerning the presence of illegal content on their platforms. Also, it compels intermediaries to proactively remove illegal content when they come across it. The petitioner challenged this provision by claiming that intermediaries lack the capacity to judge the legality of content based on private takedown notices. Furthermore, the use of the term "unlawful acts" suggests that these intermediaries might take down content beyond the purview of Article 19(2) of the Constitution of India.<sup>190</sup>

### **Ruling**

The court ruled that a pre-decisional hearing can be extended to users as well as intermediaries. Also, the reasoning in issuing a blocking order should be in writing for the user's ease to challenge such an order in court.<sup>191</sup> This is important to the outsourced moderators as it promotes transparency of the moderation practices and enables the evolution of moderation standards. Consequently, their working conditions are likely to improve as the public is involved in the moderation policy-making process and redress can be sought in case of the infringement of their rights.

The court ruled that private TDRs will excessively burden intermediaries, as they lack the incentive to be the judges of third-party content. In this ruling, the court added that the content removal obligation of intermediaries under Section 79(3) are restricted to Article 19(2)

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<sup>188</sup> *Shreya Singhal v Union of India* (2015), The Supreme Court of India.

<sup>189</sup> *Shreya Singhal v Union of India* (2015), The Supreme Court of India.

<sup>190</sup> *Shreya Singhal v Union of India* (2015), The Supreme Court of India.

<sup>191</sup> *Shreya Singhal v Union of India* (2015), The Supreme Court of India.

subjects.<sup>192</sup> This is important because the moderators are not subjected to unreasonable working conditions to meet the demand of the users. In addition, it provides for a general framework which sets its limit and provides enough flexibility to the moderators.

#### 4.2.2 Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others (2019)

##### Facts of the case

Bharat Heavy Electricals Ltd. (BHEL) terminated engaged with contract labour in its factory at Haridwar. Upon termination of their service, the contract labourers approached the Labour Court demanding their reinstatement.<sup>193</sup> The Labour Court ruled in their favour after due consideration as to the supervision,superintendence and administrative control exercised by the company. An appeal was made to the Uttarakhand High Court which upheld the decision of the Labour Court.<sup>194</sup> As the BHEL were still not satisfied with the decision made, they appealed this case before the Supreme Court.

Prior to the judgement, the court relied on the case of *International Airport Authority of India vs. International Air Cargo Workers' Union* (2009) to explain the concept of supervision and control. It stated that "...if the contract is for supply of labour by the contractor, they will work under the directions, supervision and control of the principal employer. However, the worker is not a direct employee of the principal employer, if: the salary is paid by a contractor; the right to regulate the employment is with the contractor; and the ultimate supervision and control lies with the contractor."<sup>195</sup>

The court utilised a well-recognised two pronged test, to establish whether the contract labourers are the direct employees of the principal employer.<sup>196</sup> It was established in the case

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<sup>192</sup> Sachin Dhawan, Harsho Sarkar, 'Shreya Singhal Judgement:Safeguard the Future of Internet Freedom', Live Law Academy, 22 April 2022, <https://www.livelaw.in> on 22 April 2022.

<sup>193</sup> *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

<sup>194</sup> *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

<sup>195</sup> *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

<sup>196</sup> Ashima Obhan, Akanksha Dua, 'Determination Of Contract Workers As Direct Employees: Two Prong Test Laid Down By The Supreme Court' Obhan & Associates, 15 July 2019 <https://www.mondaq.com/india/employment-litigation-tribunals/825494/determination-of-contract-workers-as-direct-employees-two-prong-test-laid-down-by-the-supreme-court> on 15 July 2019.

of *Bengal Nagpur Cotton Mills, Rajnandgaon vs. Bharat Lala & Another* [(2011)]. They are: whether the principal employer pays the salary instead of the contractors and whether the principal employer controls and supervises the work of the employee.<sup>197</sup>

### **Ruling**

The Supreme Court held that despite the contract labourers working under the directions, supervision and control of the principal employer, they would still not be considered direct workers if the concerned contractor was paying their salary, regulating their employment and exercising their ultimate control and supervision.<sup>198</sup> In this case, the primary control was with the contractor who paid the salaries to the contract labour while the control and supervision exercised by the principal employer were secondary in nature.<sup>199</sup> Hence, both the tests failed, the appeal was allowed and the award granted by the Labour Court and High Court was set aside. Consequently, the case is important as it demonstrates that there needs to be a direct involvement by the principal employer for a contract worker to be considered an employee.

### **4.2.2 Analysis**

This section presents the analysis of the two cases by demonstrating the employment liability of the outsourced workers as well as the role of the government in shaping content moderation policies.

In both cases, the courts have established that a contract laborer is a person who is employed by an employer through a contractor to help with an establishment's operations. While a contractor provides the organization with contract labor, the principal employer is in charge of maintaining control over the business.<sup>200</sup> Content moderators can be considered contract labourers as they are employed by outsourcing companies to work on behalf of the social media platforms.

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<sup>197</sup> *Bengal Nagpur Cotton Mills, Rajnandgaon vs. Bharat Lala & Another* (2011), The Supreme Court of India.

<sup>198</sup> *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

<sup>199</sup> *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

<sup>200</sup> *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019), The Supreme Court of India.

By mandating that a principal employer should directly be paying the wages of the workers to be considered one, it provides a loophole for social media platforms to escape legal culpability, as the outsourcing companies exercise this function. Consequently, the responsibility of the infringement of the workers rights would disproportionately fall on the outsourcing company. It would further contribute to the inequality between them and the social media firm, as the firms set out the standards to be used<sup>201</sup> but are not held accountable for the harms the standards create. This would hinder the enjoyment of the workers' rights which should not be disproportionately compromised by the social media firms and the outsourcing companies, as highlighted by the principle of proportionality.<sup>202</sup> Thus, the strict application of the test impedes on the rights of the workers as the platforms will evade legal responsibility by outsourcing it, which leaves the workers vulnerable to exploitation.

Specifically to outsourcing of content moderation, the government plays an active role in the regulation of content in the social media platforms. Through the *Information Technology Act* 2000, social media intermediaries are granted immunity from liability as long as they remove illegal content on time and its presence is without their knowledge.<sup>203</sup> This enables the outsourced workers to have more security in their work and is proportional to the nature of content creation and the unpredictability of the users. The involvement of the users in content moderation eases the pressure on the workers.

#### **4.4 Comparison between the Kenya and India Case Law**

In Kenyan case law, what is discussed is the employment relationship between the outsourcing company, the outsourced workers and the social media platforms. Generally, the outsourcing company is regarded as the employer of the outsourced workers.<sup>204</sup> However, with the emergence of cases specifically addressing content moderation, the role of the social media platforms came into focus. The court's crucial first step was to include them as a party to the suits filed against them,<sup>205</sup> then went a step further by declaring that they were the principal

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<sup>201</sup> Gitau C W, 'Factors Affecting the Growth of Business Process Outsourcing Firms in Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2014, 22.

<sup>202</sup> Guy D, Pnina AS, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts,' 31.

<sup>203</sup> *Information Technology Act* 2000.

<sup>204</sup> Muindi M, Muli E, and Gichuki N, 'Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya' *Journal of cmsd*, 2021, 42 <https://papers.ssrn.com › sol3 › papers> on 10 June 2021.

<sup>205</sup> Adenkule A, 'Meta faces legal action in Kenya over layoffs of content moderators' *Business Insider Africa*, 21 September 2024, <https://africa.businessinsider.com/local/markets/meta-faces-legal-action-in-kenya-over-layoffs-of-content-moderators/kkc5g8p> on 21 September 2024.

employers of the outsourced workers due to the control they exercise over their work.<sup>206</sup> The establishment of an employment relationship is important as it establishes the application of employment laws to the concerned parties. Apart from the employment relationship dilemma, jurisdiction of the court has also been challenged by the social media firms. The courts, in addressing this, used *Order 5 Rule 21 of the Civil Procedure Rules, 2010*, to affirm that they indeed have the jurisdiction to address the matters brought before them.<sup>207</sup>

Contrary to the Kenyan approach of directly dictating the employment relationship between the parties, a two-pronged test was established in Indian case law to determine whether contract laborers are direct employees: whether the principal employer pays the salary instead of the contractors and whether the principal employer controls and supervises the work of the employee.<sup>208</sup> With this test, it divides the type of control the principal employer and contractor have to primary and secondary control. Therefore, for the principal employer to be considered the direct employer of the contract laborers, they have to exercise primary control, which is determined on a case by case basis.<sup>209</sup>

For content moderation, SLAs play an important role in establishing the roles of the outsourcing companies and the social media platforms.<sup>210</sup> The social media platforms are tasked with the product-oriented aspects such as moderation policies, as well as supervision of recruitment and performance control while outsourcing companies are in charge of human resources related aspects such as wages, employment benefits, among others.<sup>211</sup> Therefore, the above test may disadvantage outsourced workers, due to the lack of direct human interaction between the social media platforms and the moderators, which is not proportional to the power the platforms have over their working conditions.

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<sup>206</sup> Gautam B, 'Meta, Labour Law, and the Constitution: The Judgement of the Kenyan Employment and Labour Relations Court, Constitutional Law and Philosophy, 9 June 2023, <https://indconlawphil.wordpress.com/2023/06/09/m...> on 9 June 2023.

<sup>207</sup> *Civil Procedure Rules* (2010).

<sup>208</sup> Mitra SB, Ghosh P, 'Engaging Contract Labour: Learnings from Landmark Judgements' 47 *Management and Labour Studies* 1, 2021, 111.

<sup>209</sup> Chopra R, Wadhwa R, 'Supreme Court lays down Test to Determine Position of Contractual Employee' S.S.Rana & Co Advocates, 9 December 2019 <https://ssrana.in/Articles> on 9 December 2019.

<sup>210</sup> Ahmad S, 'Who moderates my social media? Locating Indian workers in the global content moderation practices'.118.

<sup>211</sup> Ahmad, 'Moderating in Obscurity:How Indian Content Moderators Work in Global Content Moderation Value Chains', 84.

The government plays a more active role in content moderation in India as opposed to Kenya. Although this model is prone to abuse due to the nature of the government in India, the policies are more available to the public, hence it can be critiqued and, therefore, evolve to cater to the moderators. By granting immunity to the intermediaries, it enables the moderators to conduct their duties diligently without fear of prosecution and aids in promoting job security.

## **Findings**

This section presents the findings resulting from the examination of case law in Kenya and India. This research found that:

1. Kenyan courts have jurisdiction over content moderation claims against Meta, which is an internationally incorporated company.
2. There has been a shift in how the employment relationship between the platforms and the outsourced workers from merely indirect to being regarded as a primary employer. It means that social media platforms can no longer place the responsibility on the outsourcing companies.
3. In India, a primary employer merely controlling and supervising the work of the employees is not enough to establish a direct employer-employee relationship between them.
4. India's two-pronged approach in assessing who the principal employer is in a contract labor relationship, when interpreted strictly, will hinder the enjoyment of the outsourced workers rights.

In conclusion, Kenya's approach in directly naming the social media platform as an employer of the outsourced workers is more impactful compared to the two-pronged test established in India. This ensures that there is clarity on the employment liability in case of the infringement of the rights of the outsourced workers.



## **CHAPTER FIVE**

### **5.0 FINDINGS AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter aims at presenting the findings from the objectives of examining the legal framework and jurisprudence of Kenya and India in order to answer whether the legal frameworks in both countries adequately protect the outsourced workers. It also provides recommendations on how the law can strengthen the protection for content moderators.

#### **5.2 Findings**

The paper examined the legal framework governing the outsourcing of content moderation in Kenya and India, through the lens of protection of the outsourced workers. It did this by analysing the legal regimes and the case law of both countries.

Chapter One is the introduction of the research. It deals with the background of outsourcing and the state of the outsourced content moderators in Kenya and India; the statement of the problem, the research objectives and questions justification of study, conceptual framework, literature review as well as the methodology. The statement of problem of this study is that outsourcing companies who operate on behalf of the social media platforms are violating the outsourced moderators rights. This posed a question on whether the law has any loopholes that enables the third party contractors to exploit the moderators recruited in Kenya and whether India, who are more advanced in the outsourcing, have better laws and regulations.

Chapter two analyses the conceptual framework of the research, the concept of proportionality. The paper established that this concept is relevant to the outsourcing of content moderation. It highlights the power imbalance between the social media platforms, the outsourcing companies and the outsourced workers. This is to the detriment of the workers. Therefore, it seeks to protect and elevate the rights of the workers to bridge this gap. Also, it considers the interests of the platforms and the outsourcing companies and weighs them against the rights to ensure that every party's rights and interests are catered for.

Chapter three analysed the legal framework of outsourcing content moderation in Kenya and India. The comparison of the legal framework in Kenya and India shows that the legal framework in India has been drafted to directly accommodate the content moderators in the country to ensure that their rights are not unduly infringed on. The government is more involved in the content moderation policies and practices which encourages transparency and accountability. Thus, outsourcing of workers is more stringent. In Kenya, the current legislation was drafted with TERs in mind. Also, the protection of the law is limited as the outsourcing companies have a lot of power over their workers. In both countries, there are no current legislation addressing the access to mental health services for the outsourced workers.

Chapter four analysed the jurisprudence of the courts in Kenya as compared to India. The analysis of the jurisprudence in Kenya and India shows the differences in how the courts establish liability and the employment relationship between the outsourced workers, the outsourcing companies and the social media platforms. In Kenya the courts established that Meta was a party to the suit. The court has proper jurisdiction to hear the case. It ensures that the social media platforms cannot hide behind the outsourcing companies when the outsourced workers seek remedies for infringement. Moreover, the court ruled that a social media platform was the primary employer of the outsourced workers. In India, the employment relationship is

subjective. The relationship is determined by a two-pronged test highlighted in the case of *Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Others* (2019). Through this test, the court is able to determine who is liable for offences committed against the outsourced workers.

### **5.3 Recommendations**

The recommendations outlined below are specifically for Kenya. These recommendations are:

Considering the aim of the concept of proportionality is to ensure that human rights are not violated, the rights of the outsourced should be promoted and protected. Thus, these rights can be better protected by establishing an international body where moderators can appeal decisions made in the courts.

Kenya can establish a government panel that is catered to hearing moderation issues as has been established in India. Furthermore, Kenya should draft legislation that addresses the new forms of digital labor, just as India has by drafting legislation addressing contract labour directly. They should also establish a committee that is concerned with the development of the new forms of employment as it is rapidly evolving.

The government can also establish a framework that ensures that big tech companies are mandated to be more transparent with their moderation policies. Lastly, the scope of mental health should be expanded to include prevention of mental health issues due to the niche nature of content moderation.

### **5.4 Conclusion**

The research began from the hypothesis that there are no sufficient protections in the law for the new type of employment. The hypothesis was affirmed and it was found that although there are existing laws protecting outsourced workers, the lack of proper classification can render them helpless while seeking remedies for the infringement of their rights. Moreover, the outsourced companies and the social media platforms have a lot of power over the workers. The power imbalance should be addressed to prevent the exploitation and abuse of the outsourced workers.



## **BIBLIOGRAPHY**

### **List of Books**

Roberts S, *Behind the Screen: Content Moderation in the Shadows of Social Media* , Yale University Press, New Haven, 2023.

### **List of Chapter in Book**

Ahmad S, Krzywdzinski M, ‘Moderating in Obscurity:How Indian Content Moderators Work in Global Content Moderation Value Chains’ in Graham M and Ferrari F, (eds) *Digital Work in the Planetary Market*,1, The MIT Press, Cambridge, Massachusetts, 2022.

Kimuyu P, Ngui D, ‘ Prospects for Information and Communications Technology-Enabled Services in Kenya:The Case of the Mobile Money Transfer Industry.

Chung Wai Man F, ‘Proportionality and Margin of Appreciation’ in Chung Wai Man F(ed), *The Concept of Proportionality in Public Law*, 1, City University of Hong Kong Press, Hong Kong, 2020.

### **List of hard copy journals**

Muindi M, Elizabeth W and Njaramba E, 'The International Labour Standards on Outsourcing Triangular Employment Relationships: Implications for Kenya' 8 *Kenya Law Journal*, 1, 2020.

Nurik C, 'Facing Contracting Issues: The Psychological and Financial Impacts of Facebook Outsourcing Content Moderation' 171 *University of Pennsylvania Law Review* 5, 2023.

Ahmad S, 'Who moderates my social media? Locating Indian workers in the global content moderation practices' in Strippel C, Paasch-Colberg S, Emmer M, & Trebbe J (eds), '*Challenges and perspectives of hate speech research*,' Digital Communication Research, Open Access Repository, Berlin, 2023.

Udupa S, Maronikolakis A, Wisiorek A, 'Ethical scaling for content moderation: Extreme speech and the (in)significance of artificial intelligence', 10, *Big Data and Society*, 1, 2023.

Engle E, 'The History of the General Principle of Proportionality' X:1 *The Dartmouth Law Journal*, 2012.

Guy D, Pnina A.S., 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' 59 *McGill Law Journal* 2, 2013.

Moller K, 'Proportionality: Challenging the critics' 10 *International Journal of Constitutional Law* 3, 2012.

Bacharuddin A, Hijrah L, Asdar A, 'Legal Protection of the Rights of Outsourced Workers in Termination of Employment Relations' 7 *Jurnal Ilmu Sosial dan Pendidikan (JISIP)* 4, 2023.

Gorwa R, 'The Politics of Platform Regulation: How Governments Shape Online Content Moderation' 1ed, Oxford University Press, United States of America, 2024.

Kardava E, 'Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law' *Journal of Law* 1, 2017.

Mitra SB, Ghosh P, 'Engaging Contract Labour: Learnings from Landmark Judgements' 47 *Management and Labour Studies* 1, 2021.

### **List of online journal articles**

Kleibert J.M., Mann L, “Capturing Value amidst Constant Global Restructuring Information-Technology-Enabled Services in India, the Philippines and Kenya European Journal of Development Research,2020, <https://www.researchgate.net/publication/34065995...> on April 2020.

Muindi M, Muli E, Gichuki N, 'Unravelling the Triangle: Clarifying the Employment Status Within Outsourcing Triangular Employment Relationships in Kenya' International Journal of Law and Policy,2021, [10.47604/ijlp.1291](https://www.researchgate.net/publication/34065995...) on June 2021.

Muindi M, Muli E,and Gichuki N, 'Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya' *Journal of cmsd*, 2021,41 <https://papers.ssrn.com/sol3/papers> on 10 June 2021.

Mbogori F, 'Towards legal reform for protection of all workers in Kenya' Researchgate, 2021, 13, [https://www.researchgate.net/publication/351266641\\_TOWARDS\\_LEGAL\\_REFORMS\\_FOR\\_PROTECTION\\_OF\\_ALL\\_WORKERS\\_IN\\_KENYA](https://www.researchgate.net/publication/351266641_TOWARDS_LEGAL_REFORMS_FOR_PROTECTION_OF_ALL_WORKERS_IN_KENYA) on 30 October 2023.

### **List of reports**

Sector Plan for Business Process Outsourcing and IT-Enabled Services (BPO/ITES),2018.

*Report of the Committee on Contract Labour*, ILC 86th Session Geneva, 1998.

### **List of research papers**

Kiyeng P C, 'Developments and Challenges of Business Process Outsourcing Sector in Kenya',7,European Journal of Business and Management,36,2015..

Chebelyon K.K, 'Outsourcing Risks in the Telecommunication Industry in Kenya', Published LLM Thesis, University of Nairobi, Nairobi, 2014.

Maigua A, 'Information Technology Outsourcing and Employee Perceptions at Keswick Books and Gifts Limited in Kenya' Published LLM Thesis,University of Nairobi, Nairobi, 2015.

Gitau C W, 'Factors Affecting the Growth of Business Process Outsourcing Firms in Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2014.

Otieno V.O., 'Strategies Adopted by Sama Kenya Limited in Impact Sourcing', Published LLM Thesis, University of Nairobi, Nairobi,2023.

Ahmad S, "'It's Just the Job": Investigating the Influence of Culture in India's Commercial Content Moderation Industry' Published LLB Thesis, Oxford Internet Institute University of Oxford, Balliol, 2018.

Muindi M, 'An Analysis of the Legal Regulation of Outsourcing Triangular Employment Relationships in Kenya' Published PHD Thesis, University of Nairobi, Nairobi, 2023.

### List of working papers

Noronha E, D'Cruz P, 'The Indian IT Industry: A global production network perspective' Institute for International Political Economy Berlin, Working Paper Number 134/2020, <https://www.ipe-berlin.org> > Working Papers > i..., on March 2020.

### List of internet sources

Odanga Madung, "Dark reality of content moderation: META sued for poor working conditions", Monday March 20, 2023, <https://nation.africa> > Home > Business, on March 20 2023.

Hellerstein E, 'Silicon Savanna: The workers taking on Africa's digital sweatshop' Coda story, 16 October 2023, <https://www.codastory.com> > kenya-content-moderators, on 16th October 2023.

Jain S, "Indian Labour Laws and Its Impact on BPO-IT/ITES Industry", TaxGuru, 25 April 2023, <https://taxguru.in> > corporate-law > indian-labour-laws-i..., on 25 April 2023.

Sabrina Ahmad, 'Don't Blame Your Indian Content Moderators', Council on Foreign Relations, 17 January 2019, <https://www.cfr.org> > blog > dont-blame-your-indian-c..., on 17 January 2019.

Gautam B, 'Meta, Labour Law, and the Constitution: The Judgement of the Kenyan Employment and Labour Relations Court, Constitutional Law and Philosophy, 9 June 2023, <https://indconlawphil.wordpress.com> > 2023/06/09 > m... on 9 June 2023.

Albert Camus, 'The Practical Guide to Humanitarian Law' <https://oxcon.ouplaw.com> > abstract > law-mpeccol-e38.

Porat I, 'Proportionality', Oxford Constitutional Law, <https://oxcon.ouplaw.com> > abstract > , law-mpeccol-e38

Chopra R, Wadhwa R, 'Supreme Court lays down Test to Determine Position of Contractual Employee' S.S.Rana & Co Advocates, 9 December 2019 <https://ssrana.in> > Articles on 9 December 2019.

Ashima Obhan, Akanksha Dua, 'Determination Of Contract Workers As Direct Employees: Two Prong Test Laid Down By The Supreme Court' Obhan & Associates, 15 July 2019

<https://www.mondaq.com/india/employment-litigation-tribunals/825494/determination-of-contract-workers-as-direct-employees-two-prong-test-laid-down-by-the-supreme-court> on 15 July 2019.

