An Examination of Gender-Based Discrimination against Women in the Kenyan Workplace in Light of Section 5 of the Employment Act, 2007.

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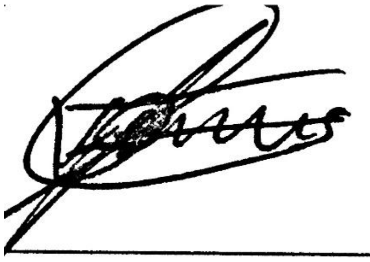
Declaration

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



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

Signed:

Dr. Antoinette Kankindi

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List of Cases

1. *Constitutional Court of South Africa in the case of SA Naptosa & Others v. Minister of Education Western Cape & Others* (2001), The High Court of South Africa.

2. *Esther Nduati v Ofyze Limited t/a Harris Tavern* (2019), eKLR.

3. *G M V v Bank of Africa Kenya Limited* (2013) eKLR.

4. *Jane Achieng & another v University of Nairobi* (2015) eKLR.

5. *Reeves v. Sanderson Plumbing Products Inc.* (2000), The Supreme Court of the United States.

6. *STAWU obo Members Vs South African Airways (Pty) Ltd and Others* (2014), South Africa Labour Court of Appeal.

List of Legal Instruments

1. *Constitution of Kenya* 2010.

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

3. *Judicature Act*, 2010.

Abstract

The fight against Gender Based Discrimination against women in the Kenyan workplace can be traced as far back as the years subsequent to attaining independence. During this period, the Kenyan Government, through the adoption of the principles of equality, by way of the declaration of human rights, sought to promote the equality of both genders. Employment relations in Kenya are governed by the 2007 Employment Act, which dedicates a whole section to outlaw gender-based discrimination. However, employers may be finding loopholes to discriminate against women, while still seeming to comply with the law. The failure to provide a comprehensive and succinct description of what is fair and equal in labour practices has been used as a tool to circumvent the law. Through qualitative analysis of statutes, case law on interpretation of the Employment Act of 2007and other secondary sources, this study investigates the permissive nature of the Employment Act in Kenya and how employers may be exploiting it to discriminate against women. Moreover, the research endeavours to recommend corrective measures which could prevent the possibility of exploitation of legal loopholes in the Employment Act.

Chapter 1: Introduction

1.0 Background

Gender discrimination against women at the workplace in Kenya has been an issue since the beginning of colonization, as then women had worse unequal opportunities in earning and employment opportunity.[1] Women, seen as of less value than men, were barely employed and if so, were employed in the informal sector with little to no remuneration.[2] The independent government of Kenya sought to do away with such views and practices regarding women. In fact, it sought to promote the equality of both genders, as Sessional Paper Number 10 of 1965 highlighted the need for equality in order for the country to develop, through its various institutions.[3]

Unfortunately women in Kenya, currently, still face discrimination in education, employment and earning since Kenya as a whole is a very gendered society.[4] The concept of gender in Kenya is one that has been mostly characterized by unequal power relations between men and women.[5] Kenya's societal views towards the role of women has been heavily influenced by the different local cultures, which reinforce male dominance and assert women inferiority.[6]It is in understanding the persistence of these socio-cultural views, and the influence of nuance, that we can explore the state of gender discrimination in the professional environment.[7]

It appears that, gender inequalities are conditioned in a manner that transcends socialization, and finds itself being reinforced in the economic, political, educational and legal spheres.[8] This transcendence was even more notable when, according to the United Nations in 2007, there was a rejection of a draft constitution that attempted to redress gender inequalities.[9] Moreover, a significant number of women are still uneducated, poor and legally illiterate.[10] The

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[1] Mulinge MM, 'The gendered workplace in Kenya: A comparative analysis of agricultural technicians in public and parastatal sector work settings' 17(1), *East African Social Science Research Review,*2001, 27.
[2] Mulinge MM, 'The gendered workplace in Kenya', 27.
[3] Mulinge MM,' 'The gendered workplace in Kenya', 30.
[4] Lichuma WO, 'Women discrimination in gender division of labour in Nairobi industrial area: an analysis of santowels company limited.' Published Project Proposal in Fulfilment for the Degree of Master of Arts in Gender and Development Studies, University of Nairobi, Nairobi, 2006, 4.
[5] Sessional Paper No. 2 of 2019.
[6] Lichuma WO, 'Women discrimination in gender division of labour in Nairobi industrial area' 10.
[7] Njogu K, Mazrui EO, 'Gender inequality and women's rights in the great lakes: can culture contribute to women's empowerment?', United Nations Educational, Scientific and Cultural Organization < http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Culture-Womens-Empowerment.pdf> on 7 September 2020.
[8] Lichuma WO, 'Women discrimination in gender division of labour in Nairobi industrial area' 5.
[9] United Nations, 'UN anti-discrimination committee urges Kenya to continue pursuing gender equality despite referendum's rejection of women friendly draft constitution' 27 July 2007, < https://www.un.org/press/en/2007/wom1644.doc.htm> on 9 September 2020.
[10]Lichuma WO, 'Women discrimination in gender division of labour in Nairobi industrial area' 10

feminization of poverty and low education levels have led to a huge number of women being employed in the informal sector[11], while in the formal sector, social scientists argue that the feminization of poverty and low education levels have led to the preconditioning of discrimination in the workplace.[12]

Gender-based discrimination in Kenya had its roots in time, as well as socio-cultural practices, prompting the need for the protection if women's rights through the enactment of laws.

The promulgation of the 2010 Constitution bode well for the plight of equality of women, first under national values and principles of good governance which included equity, equality and non-discrimination of genders.[13] Article 27 states that every person is free from discrimination, and is equal before the law, outlawing all forms of discrimination. Article 41 states that every individual has the right to fair and equal labour practices.[14]

In addition to the constitutional gains in terms of gender equality, there was the establishment of a State commission responsible for the promotion of gender equality and empowerment of women in Kenya. [15] Beside the Constitution, parliament provided for freedom from discrimination through the enactment of the Employment Act, which states that there shall be equal opportunity in the workplace.[16]

As progressive as the legal framework is regarding gender equality, women's poverty, education as well as income in the formal and informal employment sector has not seen significant improvement.[17] Women are still shorthanded when it comes to the professional environment, as it seems that loopholes in the law and other existing factors allow for discrimination against them.

1.1 Statement of the Problem

Women form a large percentage of the labour force in Kenya, standing at 49.04%[18]. Consequently, there have been great efforts in the legal sphere, nationally and internationally,

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[11] Mulinge MM,' 'The gendered workplace in Kenya', 30
[12] Christensen MA, 'Feminization of Poverty: causes and Implications' in Walter Leal Filho and others (eds), *Gender Equality*, Springer International Publishing, 2019, 3.
[13] Article 10, *Constitution of Kenya* (2010).
[14] *Constitution of Kenya* (2010).
[15] Sessional Paper No. 2 of 2019.
[16] Section 5, *Employment Act* (No. 11 of 2007).
[17] Lichuma WO, 'Women discrimination in gender division of labour in Nairobi industrial area' 20.
[18]World Bank Group, World Bank Development Indicators on< https://tradingeconomics.com/kenya/labor-force-female-percent-of-total-labor-force-wb-data.html#:~:text=Labor%20force%2C%20female%20(%25%20of,compiled%20from%20officially%20recognized%20sources. > on 9 September 2020.

to ensure the provision of equal opportunity and treatment of women in the workplace. There have been numerous laws enacted to this effect, with the creation of anti-discrimination commissions as well. It is therefore expected that discriminatory practices against women in workplaces, for instance, during recruitment, promotion giving and employment termination, would have reduced to a minimum, with employment opportunities and resources being offered fairly and equally.

However, this is not the case as women are constantly finding themselves left shorthanded in the workplace, be it in the assignment of resources, promotion opportunities and even salary distribution. Despite the extensive coverage of anti-discriminatory policies and laws, several employers, while exercising their freedom of taking reasonable administrative action, are finding ways of circumventing the law to avoid giving women equal opportunity as required by the law, all the while appearing to be abiding by it.

1.2 Significance of the Study

This paper is relevant from a knowledge point of view in the sense that it will seek to bring clarity in understanding the different ways of discriminating against women, in a manner that is seemingly permitted by the law, such as the employers' freedom to take reasonable administrative action, but in actual facts can violate the law.

1.3 Justification of the Study

Fairness and equality in relation to women in the workplace, under the Employment Act, seem to have been applied in a blanket form. The application of the law in a blanket manner has given employers leeway to exercise their freedoms in ways that allow discrimination against women to persist in recruitment, promotion giving, resource distribution and employment termination.

1.4 Aims and Objectives

The main aim of this paper is to examine discrimination against women, as has been made possible by the existence of inadequacies in the Employment Act that enable employers to circumvent the law.

The objectives include:

1. To examine the provisions of the Employment Act in relation to discrimination against women in the workplace in Kenya.
2. To analyse existing case law demonstrating discrimination against women by employers in the workplace.

3. To investigate possible options that would prevent discrimination against women in their professional environment.

1.5 Hypothesis

This study will assume that the presence of discrimination against women in the workplace is made possible by the inherent loopholes in the law, that employers exploit mainly while exercising their freedom of administrative action.

1.6 Research Questions

This study shall be guided by the following questions:

1. What, in the legal framework, is contributing towards the persistence of discrimination against women in the workplace?
2. What have the courts done to overcome the discrimination against women in the workplace?

1.7 Research Methodology

This study will take a doctrinal approach by examining primary data including statutes and case law, as well as secondary data from books, journals, articles and other online internet resources.

1.8 Scope of the Study

This study shall focus on investigating discrimination against women in the professional environment, in light of the anti-discriminatory provisions provided in the Employment Act of 2007 and the Constitution of Kenya.

1.9 Limitations of the Study

While this study is investigating discrimination against women in the workplace, it will not cover employee to employee discrimination. Additionally, the time constraints on this study will not allow for the collection of primary data, which would have provided different insights.

1.10 Literature Review

Discrimination against women in the workplace, in light of anti-discrimination provisions in the law, is an area that has been majorly studied. There are several reasons for the prevalence of gender discrimination in the workplace, despite government efforts, as has been discussed by Zaiton and Nooraini Othman[19]. Verniers C and Vala J, in their study, discuss what they term 'justified discrimination', which is the expression of prejudices without any internal or external

[19] Zaiton O, Nooraini O, 'A literatural review on work discrimination among women employees'11(4), *Asian Social Science,* 2015, 26.

consequences.[20] Yang S and Li O demonstrate how socio-cultural norms have justified discrimination in the workplace, despite anti-discriminatory laws in place. [21] Socio-cultural norms have played a huge role in the persistence of gender discrimination in the workplace, as discussed by Loveday in her study of the same in South Africa.[22] Additionally, the adoption of different equality theories in the interpretation and application of laws in the workplace, has been argued by Stancil P to produce different outcomes.[23]

Furthermore, when it comes to the internal environment in the workplace, Olin E brings forth the fact that the power of those in authority contributes to the persistence of discrimination.[24] He draws focus on the fact that sex-segregation in authority is one of the main causes of gender discrimination in the workplace.[25] He argues that those in powers of position strive to preserve privilege and advantage towards themselves and others like them, leading to male dominance.[26] The male dominance in the workplace has created 'glass-ceilings' to which Myrtle P. Bell attributes the persistence of overt discrimination.[27] Additionally, Wilson J and others study the manner in which the 'homogenization' in the application of provisional requirements and conditions in the workplace, has led to the disadvantaging of women.[28] They suggest that this homogenization has led to employers having a vast number of women in casual and fixed term contracts, with very few women making it into senior positions in the workplace.[29]

Externally, Naidu K argues that, in regard to discrimination in the workplace, the laws have only focused on what she terms as the 'more obvious barriers' that prevent disadvantaged

[20] Verniers C, Vala J, 'Justifying gender discrimination in the workplace: the mediating role of motherhood myths' 9 January 2018, 13 < https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0190657> on 27 August 2020.

[21] Yang S, Li O, 'Legal protection against gender discrimination in the workplace in china' in Taylor and Francis *Gender and Development*, Oxfam GB, 2009, 295.

[22]Loveday G, 'Gender Discrimination in the Workplace' *Journal of South African Law,* 1997, 256, < https://heinonline.org/HOL/LandingPage?handle=hein.journals/jsouafl1997&div=14&id=&page=> on 27 August 2020.

[23] Stancil P, 'Substantive equality and procedural justice', J. Rebuen Clark Law School, Brigham Young University, Research Paper Number 16,7, -- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764240 on 3 October 2020.

[24] Olin EW, Baxter J, Birkelund EG, 'The gender gap in the workplace authority: a cross-national study' 60(3) *American Sociological Review,* 1995, 407.

[25] Olin EW, Baxter J, Birkelund EG, 'The gender gap in the workplace authority', 410.

[26] Olin EW, Baxter J, Birkelund EG, 'The gender gap in the workplace authority', 409.

[27] Bell PM, McLaughlin EM, Sequeira MJ, 'Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents' 37(1) *Journal of business Ethics*, 2002, 66-68.

[28] Wilson J, Marks G, Noone L, Mackenzie J, 'Retaining a Foothold on the Slippery Paths of Academia: University Women, Indirect Discrimination, and the Academic Marketplace' *Gender and Education,* 2009, 539.

[29] Wilson J, Marks G, Noone L, Mackenzie J, 'Retaining a foothold on the slippery paths of academia', 540.

groups from attaining equality. [30] The law has been enacted in a manner in which it purports to be 'sex-blind', allowing itself to be implemented in a blanket form.[31] She explains that the law has allowed for the continuation of male dominance in the workplace, as long as they do not appear to be outwardly discriminating against women.[32] Ford R in his article draws attention to the ambiguity of anti-discriminatory laws.[33] He argues that by poorly defining what 'discrimination' is, the law has allowed itself to be applied in a manner that outlaws only evidences of discrimination, allowing it to persist in the workplace.[34] This is what Myrtle P Bell, calls 'overt discrimination.[35] Fergus and Collier agree with Ford in that they acknowledge that anti-discriminatory laws are poorly worded, hence the prevalence of discrimination in the workplace.[36] Feminist scholars in South Africa as well have recognized that the law is a double-edged sword that could respond positively to women's claims or be resistant, as discussed by Albertyn.[37] Mueller argues that even though the laws provide for 'equal and fair' treatment in the workplace, the interpretations are very much subjective leading to instances of using an employer's powers to discriminate.[38]

The courts too have played a role in the prevalence of gender discrimination in the workplace. According to Schultz V, the courts have established precedent to the disadvantage of women, thereby setting progressive movement of anti-discrimination back.[39] Fergus E and Collier D agree with this standpoint as they attribute the prevalence of gender discrimination in the workplace to both the poor text of the law, as well as poor judicial interpretations of the same.[40] The courts have adopted a narrow stance for the interpretation of the law, thus contributing to the persistence of gender discrimination in the workplace. Toit D demonstrates how the courts

[30] Naidu KM, 'Indirect discrimination against women in the workplace' Published LLM Thesis, University of Natal, 1998, 14.
[31] Naidu KM, 'Indirect discrimination against women in the workplace', 18.
[32] Naidu KM, 'Indirect discrimination against women in the workplace' ,14.
[33] Ford R, 'Bias in the air: rethinking reemployment discrimination law' 66(6), *Stanford Law Review,* 2014, 1385.
[34] Ford RT, 'Bias in the Air: Rethinking Employment Discrimination Law', 1384.
[35]Bell PM, McLaughlin EM, Sequeira MJ, 'Discrimination, Harassment, and the Glass Ceiling', 68.
[36] Fergus E, Collier D, 'Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation' 30, *South African Journal on Human Rights*, 2014, 484.
[37] Albertyn C, 'Law, Gender and Inequality in South Africa',39, *Oxford Development Studies,* 2011, 139.
[38] Mulinge MM,' 'The gendered workplace in Kenya', 53.
[39] Shultz V, 'Telling stories about women and work; Judicial interpretations of sex segregation on the job in the title VII cases raising the lack of interest argument', 103(8), *Harvard Law Review, 1990, 1749.*
[40] Fergus E, Collier D, 'Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation' 484.

limit themselves in the application and interpretation of the law, contributing to the prevalence of gender discrimination in the workplace. [41]

The reviewed literature sheds light on the persisting problem of discrimination against women by employers in the workplace. On one hand, it confirms that such persistence could be attributed to some loopholes in the law. On the other hand, it confirms the need to examine the jurisprudence of the courts, with the aim of addressing why they also seem to fail to deal with the persisting discrimination. This study will contribute towards understanding how possible existing inadequacies in the law may lead to discrimination against women by employers in the workplace, and how the courts would be best suited to remedy the injustices caused.

1.11 Chapter Breakdown

The study shall be done in five chapters.

Chapter one covers the introduction. It provides the background to the study, a statement of the problem as well as the main aim, objectives and research questions to guide this research.

Chapter two advances the theoretical framework used to analyse gender discrimination against women in the workplace. Through ample discussions, it shall introduce the selected theory as well as provide explanations as to why it is the best theory to aide this research.

Chapter three examines the legal framework in relation to gender discrimination in the workplace.

Chapter four seeks to explore jurisprudence of the courts and what they have done with regards to gender discrimination in the professional environment.

Chapter five presents this study's findings and conclusions and will make possible recommendations that would reduce the possible prevalence of discrimination in the workplace.

[41] Toit D, 'Protection Against Unfair Discrimination in the Workplace: Are the Courts Getting it Right?' *Social Law Project*, University of the western Cape, 2.

Chapter 2: Theoretical Framework

2.1 Introduction

The theory that has been selected to analyse the problem in this study so as to answer the research questions and achieve the objectives is the substantive equality theory. This theory identifies the limitations of the formal interpretations of equality and suggest a more substantive approach to the same.[42] It recognizes that it is not necessarily shared characteristics such as race or gender which are at issue, but rather that there are pre-existing disadvantages.[43]The substantive equality theory shall be utilized to examine anti-discriminatory frameworks and their judicial interpretation. However, it will first be contrasted with the theory of formal equality.

2.1.1 Formal Equality and Substantive Equality

Substantive equality is generally contrasted with formal equality today. Formal equality theory assumes that individuals affected by a certain legal framework are the same, failing to address the deeply entrenched patterns of social disadvantage that exist.[44] Substantive equality on the other hand, notes that there are deeper dissimilarities among people, that have the capability of rendering equality provisions unequal.[45]The scarce effect that anti-discriminatory laws have had on equality in the workplace can been attributed to the formal interpretations of equality as provided for in law. The once-justifiable formal equality approach to the interpretation of equality laws is now proving problematic as it is increasing the number of unjust outcomes in discriminatory cases.[46] According to Paul Stancil, formal equality stems from what he calls Aristotelian notion that 'like should be treated as like', resulting in what Naidu Melanie terms as a 'blanket application of the law'.[47] This means that the formal equality approach to the interpretation of anti-discriminatory laws affords identical treatment to all persons, making its application broad. While Naidu Melanie states that this broad application contributes to the persistence of discrimination in the workplace, Fergus Emmie and Collier Debbie are of the view that a blanket application of the law has a potential effect to change all the workplaces in a country.[48] A homogenised application of the law, will have effects that will be felt differently

[42] Fredman S, 'Substantive Equality Revisited', 14(3) *International Journal of Constitutional Law,* 2016, 712.
[43] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 21(2) *South African Journal on Human Rights,* 2005, 163.
[44] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 163.
[45] Stancil P, 'Substantive equality and procedural justice',3.
[46] Stancil P, 'Substantive equality and procedural justice',3.
[47] Stancil P, 'Substantive equality and procedural justice',4.
[48] Fergus E, Collier D, 'Race and gender equality at work,'486.

on the individuals that it is applied to.[49] Creating an environment where women are left shorthanded in the workplace due to the lack of a level playing field.[50]

From the above considerations, it would appear that the formal equality approach in the application of anti-discriminatory laws has enabled the persistence of discrimination in the workplace. In the sense that it treats individuals as the same, ignoring the different factors that may be utilized to discriminate. This is relevant to the study as it may be that the formal approach is being utilized in Kenya, creating a need to change to a substantive approach to equality.

2.1.2 The Theory of Substantive Equality

Substantive equality is founded on the basic principle that equality laws should be responsive to those who are disadvantaged in a much deeper sense, rather than a uniform treatment of its subjects.[51] This can be interpreted to mean that even when applying a law to an individual, consideration of other factors specific to that individual should be observed. Adopting a standpoint that views individuals as abstract and similar is problematic in that it fails to take cognizance of the different causes, nature and circumstances of women's inequality.[52] Ignoring the different causes of discrimination, has been argued to lead only to the outlawing of the more obvious, overt forms of discrimination against women.[53] The outlawing of the more outward forms of discrimination, does not necessarily mean that the act of discrimination itself has been outlawed, but only evidence of discrimination. Substantive equality allows regulators, according to Paul Stancil, to 'peek behind the veil' and asses the various barriers that impede equality.[54] Sandra Fredman suggests a four-category approach to redress disadvantage, allowing a deeper understanding, which includes addressing stigma, stereotyping, prejudice and violence.[55]

Furthermore, a substantive approach to equality has been argued to amend the inherent vagueness of anti-discriminatory laws.[56] The laws that provide for equality are so broadly formulated that they fail to specify the exact obstacles that need to be overcome in order to

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[49] Stancil P, 'Substantive equality and procedural justice',5.
[50] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 163.
[51] Barnard C, Hepple B, 'Substantive Equality,' 59(3), *California Law Journal,* 2000, 563.
[52] Stancil P, 'Substantive equality and procedural justice',2.
[53]Bell P M, McLaughlin E M, Sequeira M J, 'Discrimination, Harassment, and the Glass Ceiling', 68.
[54] Stancil P, 'Substantive equality and procedural justice',4.
[55] Fredman S, 'Substantive Equality Revisited', 712.
[56] Rosenfeld M, 'Substantive equality and equality and equal opportunity: A jurisprudential Appraisal', 74(5) *California Law Review*, 1986, 1688.

achieve their goals of equality.[57] Catherine Mackinnon acknowledges that such laws also have an ambiguity, which has the capacity to be used as a double-edged sword.[58] She explains this aptly when she argues that overgeneralization can lead to inequality, when a law can be applied to both dominant and subordinate groups.[59] For instance, where an employer can claim to be treating both men and women equally by depriving them both of some benefit.[60] The multi-dimensional approach as argued by Sandra Fredman tries to curb instances of discrimination as a result of the inherent ambiguity of anti-discriminatory laws.[61]

The description provided of substantive equality, proves that it could be the correct approach in curbing the prevalence of discrimination in the workplace. By providing an opportunity for one to assess specific circumstances relating to an individual, it may reduce the possible loopholes that exist in law that are being used to discriminate against women in the workplace.

2.2 Conclusion

The above analysis of the substantive equality theory attempts to demonstrate why it has been selected to analyse the persistence of discrimination against women by employers in the workplace, despite numerous anti-discriminatory laws in place. It would avoid the shortcomings of the formal equality that characterises those laws in their current formulation, as will be discussed in Chapter 3.

[57] Rosenfeld M, 'Substantive equality and equality and equal opportunity', 1688.
[58] MacKinnon C, 'Substantive equality revisted: a reply to Sandra Fredman', 14(3*) Oxford University Press*, 2016, 741.
[59] MacKinnon C, 'Substantive equality revisted: a reply to Sandra Fredman',741.
[60] Barnard C, Hepple B, 'Substantive Equality,' 563.
[61] MacKinnon C, 'Substantive equality revisted: a reply to Sandra Fredman',741.

Chapter 3: An examination of Anti-discriminatory Provisions in the 2007 Employment Act

3.1 Introduction

Historically, women in the Kenyan workplace were not well versed with their rights as employees and, consequently, were subjected to deplorable working conditions by their employers and counterparts.[62] As a result, in 2007 there was a review of the national labour laws following numerous complaints by the Kenyan public regarding the terms and conditions of employment.[63] This process led to the repealing of the Employment Act, Cap 226 and the enactment of the Employment Act of 2007. During the review process, it was unearthed that a majority of Kenyans did not know their rights as an employee, nor were employers well versed with their obligations to their workers in the workplace.[64] Kituo Cha Sheria, a human rights non-governmental organization, demonstrated how women were at an even greater disadvantage than their male counterparts.[65] They were subject to discrimination on the basis of gender, sexual harassment and other forms of gender intolerance.[66]The Employment Act of 2007 was enacted in a bid to declare and define the fundamental rights of employees by providing for the basic conditions of employment.[67] It echoes constitutional and international provisions regarding employee rights and, most important to this study, their freedom from discrimination in the workplace.[68]

3.2 Freedom from Discrimination in the Employment Act, 2007

Discrimination against women in the workplace, is a mesh of interlocking factors that anti-discriminatory laws seek to address.[69] The Employment Act of 2007 (hereafter referred to as 'the Act') is celebrated as the most important employment legislation, ever enacted, due to its aim of laying out the fundamental minimum terms and conditions of employment.[70] It dedicates a whole section to outlawing discrimination of all forms.[71] Section 5 of the Act places an

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[62] Karega GM, 'Violence against women in the workplace in Kenya: assessment of the workplace sexual harassment in the commercial agriculture and textile manufacturing sectors in Kenya', *Kenyatta University,* 2002, 5.
[63] Kituo Cha sheria, '*The Kenyan worker and the law*', March 2016, 7.
[64] Kituo Cha sheria,' *The Kenyan worker and the law*', 7.
[65] Kituo Cha sheria,' *The Kenyan worker and the law*', 16.
[66] Kituo Cha sheria,' *The Kenyan worker and the law*', 16.
[67] Preamble, *Employment Act*, (No. 11 of 2007).
[68]BowmansLaw, 'The salient provisions of labour law in Kenya', 31 October 2016, < https://www.bowmanslaw.com/insights/employment/salient-points-labour-law-kenya/ > on 23 October 2020.
[69] Fredman Sandra, 'The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life', *Oxford University*, 3.
[70]Kenya Employment Law, 'The employment act, 2007,' 2015, https://kenyaemploymentlaw.com/2015/11/26/the-employment-act-2007/ on 15 October 2020.
[71] Section 5, *Employment Act*, (No. 11 of 7007).

obligation on employers to promote equal opportunity and to strive to eliminate discrimination of any form in the workplace.[72] This makes it an offence for an employer to discriminate against employees, or prospective employees. More so, it is an offence for employers to discriminate during specific processes such as recruitment, training, promotion and the general terms and conditions of employment.[73]However, gender discrimination against women by employers in the workplace still exists despite these provisions in the Act. It has been shown to manifest itself through unequal gender representation at the different occupational levels, unfavourable working conditions towards one gender and unequal pay structure just to mention a few.[74]

According to Jamleck, laws are implemented in workplaces through their structures, policies and procedures and therefore, inconsistencies may arise as a result of the interpretation and implementation of the law.[75] The Act does not provide a definition for the term discrimination, neither does it define what is fair or equal. Ford argues that when an anti-discrimination law does not define such imperative terms, it creates opportunities for subjective interpretations and implementations of the same.[76]. Mulinge agrees with this and attributes the persistence of discrimination against women in the professional environment to subjective interpretations of legal provisions.[77] Subjective interpretations of the law creates an opportunity for employers to disregard the different circumstances regarding an individual's employment, which allows them to overlook the substantive elements of equality laws.[78] Failing to define these terms seems to imply that the Act provides for formal equality rather than substantive equality.

Furthermore, the provisions on discrimination in the Act have been construed in a manner that can be understood to be 'sex-blind'.[79] Naidu explains that 'sex-blind' laws are laws which explicitly state that individuals are to be treated equally without regard to their sex.[80] These types of laws are increasingly being criticized due to their disregard of the substantive nature of equality laws. A law that treats individuals as similar, without regard of their specific circumstances, fails to take into account the different elements and causes of discrimination

[72] Section 5(2), *Employment Act,* (No. 11 of 2007).
[73] Section 5(3)(b), *Employment Act,* (No. 11 of 2007).
[74] Jamleck MD, Kerre F, Kalel AF, Irungu DN, 'Impact of Kenyan new labour laws on gender disparities in industrial occupations in Kenyan organizations and the respective trade unions', 3(7) *International Journal of Economics, Commerce and Management,* 2015, 384.
[75] Jamleck MD, Kerre F, Kalel AF, Irungu DN, 'Impact of Kenyan new labour laws on gender disparities in industrial occupations in Kenyan organizations and the respective trade unions', 385.
[76] Ford R T, 'Bias in the Air: Rethinking Employment Discrimination Law', 1383.
[77] Mulinge MM,' 'The gendered workplace in Kenya', 53.
[78] Stancil P, 'Substantive equality and procedural justice',
[79] Naidu KM, 'Indirect discrimination against women in the workplace', 11.
[80] Naidu KM, 'Indirect discrimination against women in the workplace', 11.

against women, [81] thus defeating the purpose of anti-discriminatory laws. Anti-discriminatory laws, in the opinion of Sandra Fredman, should not only speak directly to the disadvantage that is at hand, in this case being discriminated on the basis of being a woman, but should also include a positive duty to provide.[82] This can be understood to mean that equality laws should not only target discrimination on the basis of being a woman, but should include a duty for employers to provide equal and fair opportunity to women specifically. Additionally, it has been argued that, by focusing on formal equality as opposed to substantive equality, 'sex-blind' laws ignore dominant normative practices as long as they are not obvious.[83]

The Employment Act places the duty to promote equality in the workplace on the employers.[84] Olin discusses the manner in which placing such an obligation on those in authority can affect the outcomes sought after by equality laws.[85] According to him, if gender inequality exists in authority, then there shall be gender inequality in workplace outcomes.[86] Bell agrees with this view, as she also argues that an unequal authoritative constitution in the workplace, contributes to workplace sex-segregation and discriminated decision making.[87] Placing the duty to promote equality and freedom from discrimination solely on those in power may not have been prudential. There are many obstacles that prevent women from reaching the higher occupational levels in the workplace such as the marketization of high education levels and continued undisrupted employment.[88] These obstacles further male dominance in the workplace. Olin sheds further light that those who are in positions of privilege and authority strive to preserve their dominance.[89] Therefore, by obligating the promotion of equality on a male saturated field, the Act may have enabled those in authority to preserve their status and in doing so, failing to advance equal opportunity for women.

3.2 Conclusion

The Employment Act of 2007 had great motives with regards to curbing discriminatory practices against women in the workplace by employers. The most notable motives are, for instance, the promotion of equal opportunity in specific processes in the workplace and a

[81] Stancil P, 'Substantive equality and procedural justice',2.
[82] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 163
[83] Bell P M, McLaughlin E M, Sequeira M J, 'Discrimination, Harassment, and the Glass Ceiling', 68.
[84] Section 5(3), *Employment Act*, (No. 11 of 2007).
[85] Olin EW, Baxter J, Birkelund EG, 'The gender gap in the workplace authority', 410.
[86] Olin EW, Baxter J, Birkelund EG, 'The gender gap in the workplace authority', 410.
[87] Bell P M, McLaughlin E M, Sequeira M J, 'Discrimination, Harassment, and the Glass Ceiling', 66.
[88] Wilson J, Marks G, Noone L, Mackenzie J, 'Retaining a Foothold on the Slippery Paths of Academia: University Women, Indirect Discrimination, and the Academic Marketplace' 539
[89] Olin EW, Baxter J, Birkelund EG, 'The gender gap in the workplace authority 409.

detailed list of prohibited grounds for discrimination. However, from the above discussions, it can be concluded that it contained salient inefficiencies that contributed to the prevalence of discrimination in the professional environment. It was mum on the specific barriers that need to be overcome in order for its goal of equality to be achieved. These latent loopholes have enabled employers to skirt the law and enable discrimination to still persist in the workplace. This prompts women employees to seek redress from the courts.

Chapter 4: An Analysis of Courts' Jurisprudence on Discrimination Against Women in the Workplace by Employers

4.1 Introduction

In light of the prevalence of discrimination against women in the workplace by employers, despite anti-discrimination provisions in the law, women are being forced to seek redress in the courts. It is commonly known that the role of courts in relation to the law is to interpret it, and not to create it. This duty has been recognized in the Constitution as it imposes on the courts an obligation to interpret the laws.[90] The courts therefore, cannot 'fix' any defects that may exist in a law, neither can they intervene and substitute their own views for those who implement the laws in the workplace.[91] The courts also cannot intercede in any instances of injustice and it is only upon injured parties to approach them and petition for redress.[92]

Mutunga recognizes that the courts in Kenya have a task to establish precedent that is progressive, and he argues that they can only do so by abandoning any formal approaches to the interpretations of the law.[93] This is in order to ensure that their dispensation of justice is constitutional and in accordance with all other laws of the land.[94] The progressive approach as proposed by Mutunga speaks to the substantive approach to equality as well, in the sense that it encourages an assessment of each case, considering its context and circumstances. By disregarding formalisms and dispensing justice in a manner that considers the individual merits and circumstances of a case, Fredman notes that courts can attain the two main aims of substantive equality: equality of opportunity and most importantly, equality of results.[95] The courts and the jurisprudence they set, therefore, have an important role to play in curbing discrimination against women in the professional environment by employers.

4.2 Kenyan Jurisprudence on Discrimination Against Women in the Workplace by Employers

There are three cases that have been selected to discuss the Kenyan jurisprudence on discrimination against women in the workplace. The first two are the cases of *GMV v Bank of Africa Kenya Ltd* and *Esther Nduati v Ofyze Limited t/a Harris Tavern* where the courts

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[90]Article 259, *Constitution of Kenya*, 2010
[91] Bazelon DL, 'The impact of the courts on public administration,' 52(1) *Indiana Law Journal,* 1976, 103.
[92] Bazelon DL, 'The impact of the courts on public administration,' 103.
[93] Mutunga W, ' he 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions', 1(6) *South African Legal Information Institute',* <http://www.saflii.org/za/journals/SPECJU/2015/6.html > on 29 October 2020.
[94] Mutunga W, ' he 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions', 1(6) *South African Legal Information Institute',* <http://www.saflii.org/za/journals/SPECJU/2015/6.html > on 29 October 2020.
[95] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 167.

determined that discrimination on the basis of gender occurred. The analysis of the two cases will demonstrate the different factors the courts considered to be able to arrive at their findings and will assist this study to answer its research question. The other is the case of *Jane Ochieng & Esther Obachi v University of Nairobi,* which demonstrates an instance whereby the courts determined that there was no discrimination on the basis of gender in the workplace. The discussion of this third case provides a contrast to the first two cases and will show a different stance the court took in determining matters on discrimination against women in the workplace. It is relevant to the analysis of Section 5 of the Employment Act, as it might show the possible limitations of instances of formal equality in the courts' jurisprudence.

4.2.1 GMV v Bank of Africa Kenya Ltd

This is a landmark case, that has set precedence which has been used to solve many other cases. This case involves the resolution of a dispute on termination of employment on the basis of gender-related discrimination. The claimant was an employee of the respondent who had worked with them for five years. However, on the last two years of her employment, she was blessed with children. Her second pregnancy was not a smooth one and she fell ill with a pregnancy related issue, proceeded to take sick off and was subsequently terminated as the respondent's employee. Just before her termination, it was discovered that her employer mentioned to her that she had become 'an expensive employee'. This accusation was because in two years the employee took maternity leave twice and sought sick leave once. It was when she sought her sick leave, that her employment was then terminated under claims of under-performance as an employee. She then proceeded to sue the respondents on the basis of unfair discrimination, contrary to Section 5 of the Employment Act of 2007. The main issue before the court was whether the dismissal of the claimant amounts to discrimination under Section 5 of the Employment Act.[96]

The respondents counterclaimed that the employment was terminated because the employee had not achieved any of the targets set for the last two years of her employment. As a result, she was put on probation but still carried on her duties. They averred that her employment was terminated on the basis of poor performance, and not on the basis of pregnancy. They also denied any claims of calling her an 'expensive' employee.

The court recognized that the Act places an obligation on employers not to discriminate against employees on the basis of gender, and furthermore on the basis of pregnancy.[97] However, in

[96] *G M V v Bank of Africa Kenya Limited* (2013) eKLR.
[97] *G M V v Bank of Africa Kenya Limited* (2013) eKLR.

order for this provision to apply to an employee, the court established that an employee must first prove that they belong to the category of protected people.[98] This helps the employee establish a prima facie case, which would then force the employers to prove that they did not discriminate.[99]

The shifting of the burden of proof to the employers, is due to the belief that the employers have information they may not avail to the employee. The court can request this information to be made available to the employee, especially in cases where there is need to prove that an employer's decision was not discriminatory.[100] The court cited ***Reeves v. Sanderson Plumbing Products Inc*** as its reason for this move as it believed that not just a prima facie case is enough to establish a claim of discrimination, but prima facie case and sufficient evidence to falsify an employer's justification as well.[101] The respondents, in *G M V v Bank of Africa Kenya Limited*, tried challenging the jurisdiction of the court, as the main issue was one of a contractual nature. The court recognized that it is not their duty to intervene when there is a violation of a contractual right in the workplace. However, when the violation of the contractual right effectively constitutes a violation of a constitutional right, then the courts have jurisdiction to intervene and grant remedies.[102] This is what happened in *G M V v Bank of Africa Kenya Limited.*

4.2.2 Esther Nduati v Ofyze Limited t/a Harris Tavern

This case involves the determination of unfair termination of employment on the basis of gender. The claimant was an employee of the respondent's and had been employed on a permanent basis and had sufficient qualifications for her job. Her performance was exceptional and never warranted any complaint from the respondent. Her case is that she had requested for maternity leave for September to December of 2014, after dispensing all her audits for the financial year 2013/2014 and had completed all her tasks. Additionally, all parties had agreed she spend her annual leave for the year 2014 in January 2015 and would therefore resume work in February of 2015. She noticed that while on leave, she was not paid her salaries and when she pursued follow up on the same, the respondent was unresponsive and unwilling to discuss this as well as her resumption to work. She then deduced that she had been terminated from her employment and sought a claim that the act of terminating her employment was

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[98] *G M V v Bank of Africa Kenya Limited* (2013) eKLR.
[99] Section 5(6), *Employment Act,* (No. 11 of 2007).
[100] *Jane Achieng & another v University of Nairobi* (2015) eKLR
[101] *Reeves v. Sanderson Plumbing Products Inc.* (2000), The Supreme Court of the United States.
[102] *Constitutional Court of South Africa in the case of SA Naptosa & Others v. Minister of Education Western Cape & Others* (2001), The High Court of South Africa.

discriminatory against her on the account of her gender and her pregnancy, contrary to Section 5 of the Employment Act. The respondents then proceeded to deny these allegations and counterclaimed that the claimant had acted negligently and had absconded from work by not returning immediately her maternity leave was due. They argued that they did not terminate her employment and they did not have any records demonstrating the same, but that the claimant made herself absent from her work. As a result of this absenteeism, the respondents launched internal investigations against the claimant's poor conduct at work, thus suspending her salary which was held in lien for the past 3 months. The court then had to determine, whether the claimant was terminated from employment as a result of taking up her maternity leave, and whether this termination was a gender discrimination on grounds of pregnancy.

The court noted that this case was a matter of your case against mine, as the claimants posts a case of discrimination which is denied by the respondent.[103] The court cited **GMV v Bank of Africa Kenya Ltd**, requiring an employee to establish that they fall under the legal category of protected people, which the claimant does. **GMV v Bank of Africa Kenya Ltd,** further requires employers to provide evidence that falsifies the claims that their acts were discriminatory. The court cited the Employment Act, Sections 9, 10 and 74 which mandates the employers to have records pertaining to employment, which in the event of disputes relating to the employment status of an employee, employers are meant to avail to the courts.[104] When the respondents argued that the claimant absconded her workplace obligations, they were duty bound to document and to adduce this evidence before the court, which they did not. Instead, the respondents chose to deny the allegation and, ultimately, the courts found that there was constructive termination on the basis of the claimant's gender.

This case was selected because the courts relied heavily on the provisions of the law in order to solve the issue at hand. While in this case it proved beneficial in combatting gender discrimination in the workplace, it may not always be the case. This is because the conclusion drawn in chapter 3 of this study is that the law itself may contain certain loopholes that can be utilized by employers to discriminate indirectly against women. The study of the cases shows that the formal equality approach is more commonly used in detriment of substantive equality.

[103] *Esther Nduati v Ofyze Limited t/a Harris Tavern* (2019), eKLR.
[104] *Esther Nduati v Ofyze Limited t/a Harris Tavern* (2019), eKLR.

4.2.3 Jane Ochieng & Esther Obachi v University of Nairobi

This case involves a discourse on the fair play of a hiring process between the claimants and the defendants.[105] There was a vacancy, to which the claimants, who were already employees in the company applied. However, they were rejected for the position, and the respondents proceeded to shortlist seven external candidates, on the basis that the claimants were insufficiently qualified for the position. The claimants then proceeded to seek redress for unfair discrimination, since they considered themselves to have attained the qualifications that were required. It seemed that the discrimination, according to the claimants, is based on the qualifications. The respondents then counterclaimed that the recruitment process was in accordance with their recruitment policies, which were not contrary to any law. They argued that the promotions given were based on merit, which the claimants did not possess. The respondents averred that they were an equal opportunities employer, in accordance with the law, natural justice and its own internal policies. In establishing this case, the courts had to determine whether the recruitment process was discriminatory against the claimants.[106] The Employment Act of 2007 provides that an employer has an obligation to provide equal and fair opportunity in the workplace, in accordance with constitutional provisions guaranteeing freedom from discrimination and an employee's right to fair labour practices in the workplace.[107] However, employers still have their freedom to take any administrative action and the courts recognize their role to respect this freedom, and not intervene with decisions made by employers as long as they are in compliance with the law.[108] This means that employers have the freedom to hire, fire and promote anyone they deem fit, and the courts can only intervene when this freedom is exercised contrary to the law.

To solve this matter, the court cited the case of ***STAWU obo Members Vs South African Airways (Pty) Ltd and Others***, a landmark South African case which establishes that, when an allegation of unfair discrimination is made by an employee, the onus is on the employer to prove that the action in question was in fact fair.[109] The reason for doing this is because the employers may possess some information used in making its decision, that the employee may not have known. The court shifted the burden to the respondents, in *Jane Ochieng & Esther Obachi v University of Nairobi,* to demonstrate that discrimination did not occur.

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[105] *Jane Achieng & another v University of Nairobi* (2015) eKLR.
[106] *Jane Achieng & another v University of Nairobi* (2015) eKLR.
[107] *Jane Achieng & another v University of Nairobi* (2015) eKLR.
[108] *Jane Achieng & another v University of Nairobi* (2015) eKLR.
[109] *STAWU obo Members Vs South African Airways (Pty) Ltd and Others* (2014), South Africa Labour Court of Appeal

The respondents chose not to respond to the claims of discrimination. In its ruling the courts also disregarded the discrimination claim. From the point of view of substantive equality, this decision of the court proves what Fredman argues that, judges may sometimes have a limited fact-finding capacity.[110] This poses a challenge to overcoming discrimination, since the court appeared to want to rely only on the respondent's evidence regarding the occurrence of discrimination, which was not provided. Following Mutunga's piece calling on the courts to disregard formalist approaches to the interpretation and applications of the law, it may seem that by failing to seek greater evidence on whether discrimination occurred or not, the judge disregarded one of the two main aims of substantive equality: equality of results.[111] Substantive equality in relation to equality of results on the part of the courts should seek to break the cycle of disadvantage that has been associated with certain groups such as women. [112] The aggrieved claimants sought redress from the court over the denial of an employment opportunity they clearly considered to be discriminatory, since the employment was awarded to individuals less qualified than them. By failing to rule on the discriminatory claim, it may seem that the court failed in this case to contribute towards 'breaking the cycle' of discriminatory hiring practices. This case is relevant to this topic as it demonstrates the reasoning the court may adapt in analysing claims. Toit argues that some courts adopt a narrow stance in discrimination litigation, which may prove detrimental towards combatting discrimination in the workplace by their employers.[113]

4.3 The place of Substantive Equality in the Kenyan Courts of Law

The courts may seem to have a challenge when it comes to overcoming discrimination against women in the workplace. Substantive equality has two main aims which are equality of opportunity and equality of results.[114] Regarding equality of results, Stancil notes this to mean that there must be a balance between the accurate application of the law to facts and socio-economic rights.[115] The Kenyan legal regimes have extensively attempted to guarantee equality of opportunity, with provisions safeguarding the rights to access justice without undue delay or regard to technicalities.[116] It is through the interpretation and application of these laws that the substantive goal of equality of results can be achieved. In the case of *Jane Ochieng & Esther Obachi v University of Nairobi,* the judge shifted the burden of proving that discrimination did

[110] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 164.
[111] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 167.
[112] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 167.
[113] Toit D, 'Protection Against Unfair Discrimination in the Workplace: Are the Courts Getting it Right?*',* 3.
[114] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 167.
[115] Stancil P, 'Substantive equality and procedural justice', 6.
[116] Section 3, *Judicature Act*, 2010.

not occur to the employers. While this is a legally recognized allowance in law, it was the only reliance the court had to prove or disprove whether discrimination happened. This was a narrow stance it took. Substantive equality requires assessing the individual merits of a case.[117] However, in *Jane Ochieng & Esther Obachi v University of Nairobi,* the main issue was not even decided on, disregarding the substantive elements of it, for instance, the fact that the employment being granted to individuals less qualified than the claimants.

Another example of the court adopting a narrow stance can be seen in the case of *Esther Nduati v Ofyze Limited t/a Harris Tavern,* where it relied heavily on the provisions of the law in order to solve the main issue. The courts have vast resources and legal provisions at hand granted to them in order to protect fundamental basic rights.[118] The overreliance on one regime leads to an instance where the courts limit themselves, and consequently may limit the rights, remedies and defense available to the parties in the suit.[119] Toit argues that when the courts adopt a narrow stance in the litigation of claims, they contribute towards the prevalence of discrimination against women in the workplace.[120] Narrow stance here refers to the use of formal equality rather than substantive equality.

Substantive equality theorists recognize the limited fact-finding capabilities that judges have.[121] However, a substantive approach still promotes a form of judicial intervention when the rights infringed are those of a socio-economic nature dealing with a disadvantaged group.[122] This could be seen in *GMV v Bank of Africa Kenya Ltd* where the courts also put the responsibility of proving to the employers, but still delved into discussing whether discrimination still happened. The judge recognized that discrimination violations are more serious as they violate constitutional rights as opposed to violating contractual rights, and thus decided to explore the discussions further in order to reach informed findings.[123] This recognition is what courts should adopt to implement substantive equality. As the equality of opportunity aim of substantive equality is quite limited when it comes to the courts, since it is a function of the law, the courts should strive to attain equality of results through the litigation of claims on their individual merits.[124]

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[117] Bazelon DL, 'The impact of the courts on public administration,' 103.
[118] Toit D, 'Protection Against Unfair Discrimination in the Workplace',3.
[119] Toit D, 'Protection Against Unfair Discrimination in the Workplace',3.
[120] Toit D, 'Protection Against Unfair Discrimination in the Workplace',3.
[121] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 167.
[122] Fredman S, 'Providing equality: substantive equality and the positive duty to provide', 167.
[123] *G M V v Bank of Africa Kenya Limited* (2013) eKLR.
[124] Stancil P, 'Substantive equality and procedural justice', 6.

4.4 Conclusion

The litigation process provides an opportunity for the generation of rules and practices that could curb the prevalence of discrimination against women in the professional environment by employers. These cases are important as they established different principles that may be used in the interpretation of the Act as well as the constitution. They also reinforce the obligations that employers have to their employees. While *Jane Ochieng & Esther Obachi v University of Nairobi,* did not provide clarity on gender discrimination in the workplace, it establishes that when employers set criteria to be utilized in filling out vacancies, they should adhere strictly to the law. *G M V v Bank of Africa Kenya Limited,* establishes as a precedence the criteria for protected people under discriminatory laws, those claiming against discrimination have to prove that they are protected by anti-discriminatory provisions first. Furthermore, it establishes that pregnancy, as a gender discriminatory feature, is not sufficient grounds for termination of employment. These two principles were used in *Tracy Wangechi Mugambi v Windsor Golf Hotel and Country Club* as the courts cited *G M V v Bank of Africa Kenya Limited* in determining a claim for discrimination on the basis of gender. *Esther Nduati v Ofyze Limited t/a Harris Tavern* demonstrates the manner in which constructive termination can amount to discrimination on the basis of gender. From the above analysis, it may seem that in the constructive cases on discrimination in the workplace, the courts used a substantive equality approach. Conversely, when a formal equality approach was used, there was not much contribution towards overcoming gender discrimination in the workplace. This situation makes a greater case for the adoption of substantive equality in determining matters of gender discrimination in the workplace.

Chapter 5: Findings, Conclusion and Recommendations

5.1 Introduction

The concluding chapter of this study provides a summary of the findings, a conclusion and will recommend corrective measures which could prevent the possibility of exploitation of loopholes in the Employment Act.

5.2 Summary of findings

The examination of the legal provisions dealing with discrimination in the workplace showed that the Employment Act of 2007, despite its positive steps to eliminate discrimination, contained latent inefficiencies within it that may have enabled employers to skirt the law. First, the law does not define imperative terms necessary to achieve its goal of equality and freedom from discrimination. The study found that reason appears to be that in its formulation, the Act seems to have adopted a formal approach rather than a substantive approach to equality. Furthermore, the Act does not explicitly set the barriers that need to be overcome in order to quash the prevalence of discrimination against women in the workplace. For instance, the law could be more specific in terms of the circumstances surrounding an individual's employment. These inefficiencies may have enabled discrimination, thus prompting women to seek redress from the courts.

From the analysis of selected court cases on discrimination against women in the workplace the study found that the courts have used both a substantive and formal equality approach in the determination of matters. In instances where the former is used, there is a constructive contribution towards overcoming gender discrimination in the professional environment. Conversely, where formal equality is used, the contribution was of little to no significance. This would indicate that there is a need for the courts to favour substantive equality in determining matters on discrimination against women in the professional environment.

5.3 Conclusion of the Study

The Employment Act of 2007 was enacted in a bid to guarantee the basic fundamental terms and conditions of employment. It placed an obligation on employers to ensure that there was the promotion of equal opportunity in the workplace. However, this study finds that the provisions of the Act that were seeking to ensure freedom from discrimination were poorly construed. First, it seems to have favoured formal equality over substantive equality. Second, it fails to define important terms, which has the capability of creating room for subjective interpretations of the law and leading to the persistence of discrimination in the workplace. And lastly, it places the obligation of promoting fairness and equality of opportunity solely on

those in authority. This may not have been prudential as this study found that women barely make it to positions of authority, and inequality in authority promotes inequality of opportunities in the workplace. Gender discrimination against women in the workplace, therefore, still remains a rampant issue. Women find themselves lacking more so during procedures that require employer's exercising their administrative action. These procedures include hiring, firing and promotion giving just to mention a few. Employers have been able to use these loopholes to discriminate against women, all while appearing to abide by the law.

The assumption of this study is that there exist certain loopholes in the law that employers use to discriminate against women. The above conclusion confirms this hypothesis in the sense that employers use their internal procedures and policies to discriminate against women, taking advantage of the loopholes in the law. The courts then have to remedy any injustices occasioned by employers. This study argues that they can only do so in a just manner if they adopt substantive equality over formal equality. The cases analysed demonstrate how employers misuse their freedom to take administrative action to discriminate against women, and only by integrating the substantive equality approach in the interpretation of the law, can the courts remedy the harm caused.

5.4 Recommendations

Based on the study carried out, three corrective measures regarding the Employment Act are suggested, with the aim of eliminating the persistence of gender discrimination in the workplace:

1. The Act should be amended to include definitions of the terms 'discrimination', 'fair' and 'equal'. Laws are implemented in the workplace through their various policies and procedures.[125] The proposed amendment would most likely reduce the possibility of any vagueness, that would promote the creation of an opportunity for the subjective interpretation of the provisions of the law.
2. The Act should include a positive duty on employers to carry out their administrative functions with the specific circumstances of individuals in mind. While the Act mentions some prohibited grounds for discrimination, it only does so in a general sense. The Act should include a proviso urging employer's to duly regard the particular conditions regarding an employee or potential employee's term of employment. This helps avoid the

[125] Jamleck MD, Kerre F, Kalel AF, Irungu DN, 'Impact of Kenyan new labour laws on gender disparities in industrial occupations in Kenyan organizations and the respective trade unions', 385.

‘blanket’ application of the law and may help change the formal approach that the Act has adopted.

3. The duty to promote freedom from discrimination should not only rest on those in authority. This is because there are few women who make it to positions of authority. When there is inequality in authority, there may be inequality in workplace outcomes. Therefore, the Act should be amended to include a duty on both employees and employers to promote the right to equality in the professional environment. This may also provide a system of checks and balances for those in authority as the employees may, in whatever capacity, ensure there is little to no discrimination in workplace procedures.

The study set out to investigate whether there were latent loopholes in the Employment Act that employers used to discriminate against women. From the distinction between formal equality and substantive equality, the examination of the Act and analysis of selected cases, found that there did exist some loopholes and proceeded to make recommendations that could remedy the inefficiencies of the law, and hence reduce discrimination against women by employers in the workplace.

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