RETHINKING THE LEGAL REASONING OF THE EMPLOYMENT AND LABOUR RELATIONS COURT: THE ROLE OF REBUTTABLE PRESUMPTIONS IN ESTABLISHING INFORMAL EMPLOYMENT RELATIONSHIPS IN KENYA

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Declaration

I, GEORGIA DORSILA NYAWARA, 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.

Signed: .....

Date: 16 April 2025.

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

Signed: .....

Kelvin Mbatia Wachira

Date: 29th April 2025

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To my mother, your resilience, your quiet perseverance, and your belief in me have carried me through more than you know.

To my father, your absence is felt, but so is your pride, all which I continue to honour every waking moment.

Finally,

To The Nobodies: nobody's children, owners of nothing.

The nobodies: the no ones,

the nobodied, running like rabbits,

dying through life, screwed every which way.

Who are not human beings, but human resources.

Who do not have names, but numbers….

~Poem by Eduardo Galeano~

To the Claimants that inspired this study.

Preliminaries

List of cases

List of Legal Instruments

Constitution of Kenya, 2010

Employment Act (No.11 of 2007).

Employment Act (No.11 of 2007).

Employment and Labour Relations Act (No. 18 of 2014).

Labour Relations Act of South Africa (No.66 of 1997)

Basic Conditions of Employment Act of South Africa (No. 75 of 1997).

ILO Recommendation No. 198 on the Employment Relationship (2006)

Directive on the European Parliament and of the Council on improving working conditions in platform work Directive (EU) 2024/2831.

List of abbreviations

ELRC	Employment and Labour Relations Court
EU	European Union
ILO	International Labour Organisation
ICLS	International Conference for Labour Statisticians
KIPPRA	Kenya Institute for Public Policy Research and Analysis
KUDHEIHA	Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers
OECD	Organisation for Economic Co-operation and Development

Abstract

Informal employees in Kenya often struggle to prove the existence of an employment relationship before the Employment and Labour Relations Court (ELRC), owing to evidentiary barriers rooted in structural and systemic inequalities. Through a case analysis, this study evaluates the legal reasoning adopted by the ELRC in such cases where the relationship is in dispute, and there is evidentiary deficiency. It reveals that both the prevailing strict and lenient approaches are flawed. While the strict approach disproportionately burdens claimants unable to produce formal proof of employment, the lenient approach allows claims to succeed without sufficient scrutiny of evidence, risking judicial inconsistency and abuse. In addressing this gap, the dissertation examines the potential of a rebuttable presumption of employment as an evidentiary tool to correct this imbalance. Drawing on comparative insights from the European Union and South Africa the study assesses the strengths and weaknesses of its current operation in labour law. While these presumptions ease the claimant's burden of production, they rely on pre-existing employment indicators that may not fully reflect the informality of certain work arrangements. The dissertation ultimately proposes a discretionary presumption guided by an understanding of the context and the claimant's circumstances, allowing courts to determine its applicability based on the circumstances of each case. This approach seeks to balance the requirement of proving a case with the need to account for structural evidentiary deficiencies, thereby advancing substantive fairness and improving access to justice for informal employees in Kenya.

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1. CHAPTER ONE: INTRODUCTION

PART I: INTRODUCTION

1.1 Background

Informal employment is a significant component of the Kenyan labour market. As of 2023, nearly 20 million people were employed. Approximately 85% of the new jobs created within this year fell within the informal sector.[1]

The International Labour Organisation (ILO) defines informal employees as those whose employment falls outside national regulation, either by law or practice.[2] This is attributed to several reasons including the failure to declare the existence of the employment relationship in law or poor implementation of existing regulations in practice altogether. Informal employees are mostly engaged using verbal or implied contracts and in some cases without any sort of tangible agreement.[3] With that said, about 76% of the informal labour force is engaged without a written contract.[4]

The absence of a written contract has several detrimental consequences for informal workers. First, it creates job insecurity, as employers can freely terminate these workers without due process.[5] Second, it makes it challenging for employees to register for employment benefits such as health insurance and social security which often require proof of employment as a pre-requisite.[6] Third, in any dispute where the employee claims to have been unfairly dismissed, the fate of the case is dependent on the existence of an employment relationship. This is difficult to prove due to the lack

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[1] Kenya National Bureau of Statistics, *2024 Economic Survey*, 2024, 11 https://www.knbs.or.ke/wp-content/uploads/2024/05/2024-Economic-Survey.pdf - on 22 October 2024.

[2] International Labour Office, Revision of the 15th ICLS resolution concerning statistics of employment in the informal sector and the 17th ICLS guidelines regarding the statistical definition of informal employment, 20th International Conference of Labour Statisticians, Geneva, 1-19 October 2018, 11.

[3] The Federation Kenya Employers, *Informal Economy in Kenya*, March 2021, 10 https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_820312.pdf - on 3 September 2024.

[4] KIPPRA, the labour market integration of migrants in Kenya, Discussion Paper No. 300, 2022, 22 https://repository.kippra.or.ke/bitstream/handle/123456789/4819/DP300.pdf?sequence=1&isAllowed=y on 22 October 2024.

[5] Development Centre of the Organisation for Economic Co-operation and Development (OECD), International Labour Organisation (ILO), *Tackling vulnerability in the informal economy*, 21 May 2019, 21.

[6] International Labour Organisation, '*Extending social security to workers in the informal economy: Lessons from international experience*' 2019, 14.

of a tangible contract.[7] While this dissertation appreciates the prevalence of the first two issues, its scope remains within evaluating the third.

It must be important then, to define who an employee is. An employee is largely accepted to be a person engaged under a contract of service to provide a service in exchange for wages or a salary.[8] In Kenya, the Employment Act stands as the cornerstone in governing labour matters.[9] It defines an employee as "a person employed for wages or a salary," and that only a person who is engaged under a contract of service, whether oral, written or implied can be considered an employee.[10] A contract must therefore exist, for an employment relationship to be established. Additionally, in any case dealing with unfair termination, it is mandatory that an employment relationship is established before a decision of an employee's right to a remedy can be made.[11]

On matters of evidence, the Act places a duty on employers to formalise employment relationships through written contracts, particularly for engagements exceeding three months.[12] Furthermore, it imposes a duty on an employer to maintain and provide relevant records when called upon to appear in legal proceedings.[13]

Legislators failed to foresee any unique instances where such a contract or relevant documents do not exist, which is the case for most informal employees. As result, the court is forced to revert to ordinary rules of evidence, dictated by common law and the Evidence Act.[14] The employee (claimant) is required to prove that the employment relationship exists on a balance of probabilities.[15] The essence of justice for all employees who claim unfair termination therefore hinges on their ability to prove an employment relationship in order to be considered eligible for the award of a remedy.

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[7] *Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers v Inderjeet Singh* (2013) eKLR.
[8] Joellen R, 'The Definition of the contract of employment and its differentiation from other contracts and other work relations in Freedland M (ed) et al, *The Contract of Employmen*t, Oxford University Press, Oxford, 2016, 321 – 340.
[9] Employment Act (No. 11 of 2007).
[10] Section 2, *Employment Act* (No. 11 of 2007).
[11] Section 7, *Employment Act* (No. 11 of 2007).
[12] Section 10(6), *Employment Ac*t (No. 11 of 2007).
[13] Section 10(7), *Employment Act* (No. 11 of 2007).
[14] Section 109, *Evidence Act* (No.80 of 1963).
[15] Kenya Human Rights Commission, *Labour Rights Legal Framework*, 2019, 22 https://khrc.or.ke/storage/2024/02/LABOUR-RIGHTS-LEGAL-FRAMEWORK331.pdf - on 3 September, 2024.

For informal employees, this task is cumbered with several obstacles given the prevalence of oral contracts, cash payments, and the absence of conventional documentation such as a contract of service, an appointment letter, payslips, or records of social security contributions.[16] The nature of informal employment creates a phenomenon called evidentiary deficiency which refers to instances where the evidence is unavailable, not due to choice, negligence or fault but due to systemic or structural barriers that hinder their production in court.[17]

The task further increases in difficulty where the alleged employer (defendant) utilises denial as a defence; by denying the existence of the employment relationship or denying having any knowledge of the claimants. The court, therefore, is confronted with a situation where there is no shared factual premise from which to proceed. The burden of proof remains squarely on the claimant, yet the means to discharge that burden are structurally inaccessible due to the informal nature of the relationship.

The Employment and Labour Relation Court (ELRC) is the court of first instance tasked with handling labour disputes.[18] In response, the Court has adopted varying approaches in evaluating the evidence provided by parties, which the study classifies as either strict or lenient. The strict approach applies conventional evidentiary rules without adjusting for the unique vulnerabilities of informal employees. This places an onerous burden on claimants and leads to unsuccessful claims. The lenient approach accepts uncontroverted evidence but lacks principled reasoning, risking inconsistency and abuse.

In light of the foregoing, it is evident that the reasoning adopted by the ELRC fails to effectively resolve the core problem: the systemic evidentiary disadvantage inherent in informal work and while at it, causes judicial inconsistency. This study therefore seeks to address the evidentiary challenges faced by informal employees by proposing a rebuttable presumption of employment,

[16] International Labour Organisation, Indian Institute for Human Settlements, *Employer practices and perceptions on paid domestic work recruitment, employment relationships, and social protection*' 2022, 49.
[17] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law' 9 *International Journal of Procedural Law* 1, 2019, 58.
[18]Section 12, *Employment and Labour Relations Court Act* (No. 18 of 2014). However, Gazette Notice No. 6024 of 22nd June 2018 vests limited jurisdiction in magistrates of the rank of Senior Resident Magistrate and above to handle employment and labour relations matters within their local jurisdiction. While such matters would ordinarily fall under the exclusive purview of the ELRC, this notice serves as a statutory exception, extending adjudicative powers to the subordinate courts in specific instances. The designated magistrates are thus empowered to hear employment disputes and certain offences arising under labour laws, provided the employee's gross monthly pay does not exceed Kshs. 80,000.

grounded in legal reasoning, as a tool to guide judicial discretion, correct power asymmetries, and promote fair access to justice within Kenya's employment dispute resolution framework.

1.2 Statement of the Problem

The legal system is founded on the principle of equality before the law, ensuring that all parties in civil litigation have equal opportunity to be heard and present their case. This procedural equality underpins the right to a fair trial and access to justice. However, in practice, this ideal does not translate into substantive fairness for all. Due to evidentiary deficiency, caused by systemic inequality, informal employees are left to bear a disproportionate burden of proof vis a vis their employer. When courts apply standard evidentiary rules without accounting for these disparities, they assume false equality in capacity and perpetuate an uneven playing field.

This study proposes the use of a rebuttable presumption as a targeted evidentiary device to adjust judicial reasoning in recognition of the evidentiary disadvantage faced by informal employees. When applied through a structured and principled exercise of judicial discretion, such a presumption would help shift the burden of proof in appropriate cases, thereby correcting the procedural imbalance and enhancing fairness in adjudication. Ultimately, this approach aligns with constitutional commitments to equality, and enhances access to justice for vulnerable claimants, while also streamlining the legal reasoning of the court.

1.3 Research Questions

1. What is the current approach adopted by the Employment and Labour Relations Court in reasoning and determining the weight and probative value of evidence adduced by informal employees?
2. To what extent does the failure of the Court in accounting for evidentiary deficiency hinder access to justice for informal employees?
3. How can a rebuttable presumption of employment be utilised as a tool of legal reasoning to correct the imbalance caused by evidentiary deficiency and promote fairness, and what lessons can Kenya draw from its use in other jurisdictions?
4. What legal, institutional, and procedural reforms are necessary to reduce evidentiary disadvantage and power asymmetry in employment disputes involving informal workers?

1.4 Research Objectives

1. To analyse the current judicial approach in reasoning and assessing the weight and probative value of evidence in cases involving informal employees.
2. To examine the extent to which the reasoning approaches adopted by Kenyan courts fail to account for evidentiary deficiency in claims involving informal employees, and to assess the implications for access to justice.
3. To evaluate the potential of a rebuttable presumption of employment as a doctrinal tool for correcting evidentiary asymmetry.
4. To propose legal, institutional, and procedural reforms aimed at mitigating evidentiary deficiency in employment disputes involving informal workers.

1.5 Hypothesis

The evidentiary approach adopted by the Employment and Labour Relations Court is flawed and disproportionately burdensome on informal employees, and a more just approach would involve adjusting legal reasoning to account for evidentiary deficiency through the use of a discretionary rebuttable presumption of employment.

1.6 Justification of Study

The informal employment sector comprises the majority of Kenya's workforce**.** Despite this, informal employees face significant challenges in accessing justice, particularly in cases of unfair termination. The absence of written contracts and conventional employment records makes it difficult for them to prove an employment relationship, especially when the ELRC imposes stringent evidentiary requirements. This study is therefore justified as it seeks to address the disproportionate impact of the court's approach on informal employees, who are often low-income earners and among the most vulnerable in the labour market.

This research is important for guiding legal and policy reforms that can promote an \inclusive legal framework. The findings can inform the development of a nuanced approach to legal reasoning, ensuring that informal employees are not unfairly disadvantaged by the lack of formal documentation. By offering practical recommendations for a more equitable approach, this study

aims to enhance judicial consistency, promote employer accountability, and ultimately protect the rights of a workforce segment that has long been marginalized within Kenya's labour laws.

1.7 Theoretical Framework

1.7.1 Judicial Pragmatism

Unlike formalism, which emphasizes strict adherence to established rules and formal logic,[19] Legal pragmatism encourages judges to adopt a policy-based, outcome-oriented approach, especially in complex cases. The theory has been extensively discussed by Justice Richard Allen Posner to have three main characteristics: a future-looking mode of analysis, the reliance on empirical evidence and openness to judicial activism.[20]

a) Future-Looking Mode of Analysis

Judicial pragmatism encourages judges to consider how their decisions will serve present and future societal needs, rather than solely relying on historical precedent. Posner along with Roscoe Pound criticize mechanical jurisprudence.[21] This is the tendency of judges to be fixated on rules and adhere to precedent when interpreting constitutional and common law cases.[22] It suggests that judges should view legal consistency as valuable only to the extent that it serves present and future societal needs.[23]

He suggests that judges should focus on the most "sensible" resolutions that maximise wealth and efficiency.[24] While this aim has been largely rejected, the maximization of wealth and efficiency has been expanded to include the distribution of resources and the social implications of legal decisions, asserting that courts should strive to achieve fairness and equity in the allocation of resources to achieve a more just society, particularly in cases involving marginalized groups.[25]

[19] Posner R, 'Legal formalism, legal realism, and the interpretation of statutes and the constitution' 37 *Case Western Law Review* 2, 1986, 183.
[20] Doori S, 'Judicial pragmatism: Strengths and weaknesses in common law adjudication, legislative interpretation, and constitutional interpretation' 52, *UIC Law Review* 4, 2019, 333.
[21] Barzun C, 'Three forms of legal pragmatism' 95 *Washington University Law Review* 5, 2018, 1009.
[22] Posner R, *The Federal Judiciary: Strengths and weaknesses*, Harvard University Press, Boston, 2017, 50.
[23] Posner R, 'Legal pragmatism defended' 71, *University of Chicago Law Review*, 2004, 684.
[24] Lake P, 'Posner's pragmatist jurisprudence' 73 *Nebraska Law Review* 3, 1994, 625-627.
[25] Lake P, 'Posner's pragmatist jurisprudence,' 627.

b) Empirically Based Decision Making

Judicial pragmatism places a high value on decisions informed by empirical data, claiming that well-informed judges produce better outcomes.[26] By incorporating empirical evidence and social science data, pragmatic adjudication ensures that legal decisions are grounded in reality. This enhances the law's capability to produce fair and workable outcomes.[27] A more holistic approach to pragmatism relies heavily on the interdependence of factual and evaluative considerations.

He asserts that, for adjudication to be rational, there must be a standard that adjudicators apply to the facts of a case when determining a party's responsibility or the validity of a claim.[28] Even where these standards are unclear, it is likely for a decision to be accepted by both parties if an adjudicator makes a decision based on the values and principles of the community.[29] Fuller infers that courts can rationally decide cases and derive judicial standards based on underlying principles and goals of the community. Naturally, the outcome will reflect the evolving needs and values of society emphasizing practical solutions.[30]

c) Judicial activism

Judicial pragmatism envisions judges not just as rule-appliers but also as "rule-makers," especially in instances where legislation is ambiguous, absent, or counterproductive.[31] The theory recognises that there will be instances where the standard application of a rule would lead to unfavourable outcomes thus calling for a judge to resolve legal ambiguities or fill in the gaps.[32] While this leaves room for judicial tyranny, pragmatic adjudication still relies on guiding principles that are embedded in practice or the law.[33]

Judicial pragmatism, as proposed by Judge Richard Posner, presents an adaptable framework that seeks to balance present and future societal needs through empirical analysis and a willingness to deviate from precedent when necessary.

[26] Posner R, Legal pragmatism defended' 684.
[27] Posner R, 'What has pragmatism to offer law?' 63 University of Chicago Law School, 1990, 64.
[28] Palms L, 'The natural law philosophy of Lon. Fuller' 11 The Catholic Lawyer, 2, 1965.
[29] Palms A, 'The natural law philosophy of Lon. Fuller' 100.
[30] Doori S, 'Judicial pragmatism' 373.
[31] Palms A, 'The natural law philosophy of Lon. Fuller' 100.
[32] Doori S, 'Judicial pragmatism' 376.
[33] Doori S, 'Judicial pragmatism' 376.

Relevance of Judicial Pragmatism to the Study

Judicial pragmatism supports the adoption of legal mechanisms that are responsive to social realities and designed to produce just outcomes. The theory's emphasis on forward-looking analysis, empirical grounding, and judicial activism aligns with the use of rebuttable presumptions in employment law—particularly as a means to mitigate evidentiary asymmetry and improve access to justice for informal workers. By focusing on practical legal tools rather than rigid formalism, pragmatism provides a normative basis for advocating the use of rebuttable presumptions not only as an evidentiary device but also as a policy intervention that reflects the evolving needs of society.

1.7.2 Marxist Labour Theory

The Marxist Labor Theory of Value (LTV) finds its origins in classical economic theory, particularly the works of Adam Smith and David Ricardo.[34] However, Karl Marx developed and expanded the theory in the 19th century to offer a critique of capitalism. Through his seminal work, *Das Kapital*, his critique built on existing ideas but diverged by focusing on how labour under capitalism creates value and how this process results in exploitation.

The first three aspects of the theory emphasize the relationship between labour and value in capitalist production. Firstly, he asserts that the value of a commodity is determined by the socially necessary labour-time required for its production, meaning value is based on average labour input rather than individual effort.[35] Secondly, he differentiates between *use-value* (a commodity's practical utility) and *exchange-value* (the value derived from the labour embedded in the commodity, reflecting its worth in the market).[36] Thirdly, he posits that workers produce more value than the wages they receive, with the surplus being appropriated by capitalists, leading to exploitation.[37] This is said to be the foundation of capitalist profits.[38]

According to Marx, workers, also known as the *proletariat*, are individuals who do not own the means of production and must, therefore, sell their labour power to survive.[39] In Marx's view,

[34] Smith A, The Wealth of Nations, W. Strahan and T. Cadell, London,1776, 15.
[35] Marx K, *Das Kapital, 'Critique of political economy*, Engels F (ed) Charles H. Kerr & Co., Chicago, 1909, 209.
[36] Marx K, *Das Kapital*, 1909, 215.
[37] Marx K, *Das Kapital*, 1909, 206.
[38] Marx K, *Das Kapital*, 1909, 206.
[39] Marx K, *Das Kapital*, 1909, 209.

workers under capitalism are treated as mere instruments of production, stripped of their autonomy and creativity.[40] This commodification of labour means that workers are no longer seen as human beings with inherent value but are instead valued only for the labour they can provide.

They are alienated from the product of their labour, from their fellow workers, and from their own essence as creative beings. This alienation is a central feature of the capitalist system and contributes significantly to the exploitation and oppression of workers.[41]

Additionally, an employment relationship is characterized by an imbalance of power where the employer (master) controls the means of production, while the worker (servant) is dependent on the employer for wages.[42] Authors such as Hegel and later Marx adopted this relationship to explain the dynamics between the capitalist class (bourgeoisie) and the working class (proletariat).[43] It sustains the unequal distribution of power and wealth within society. Employers, therefore, take advantage of this vulnerability by maximizing profits through low wages and unfavourable working conditions.[44]

Furthermore, workers face constant insecurity and uncertainty, as they are subject to the fluctuations of the labour market. This uncertainty creates a reserve army of labour – a pool of unemployed workers ready to replace those currently employed.[45] The existence of this reserve army allows capitalists to maintain control over wages and working conditions, as workers are aware that they can easily be replaced.[46]

As long as the means of production remain in the hands of a few, workers will continue to face exploitation and subjugation, which underscores the relevance of Marxist theory in contemporary debates about labour rights and economic justice.

Relevance of Marxist Labour Theory to the Study

The Marxist Labour Theory provides a critical lens through which to understand the structural power imbalance inherent in the employment relationship, particularly as it affects vulnerable and

[40] Marx K, *Das Kapital*, 1909, 282.
[41] Marx K, *Das Kapital*, 1909, 260.
[42] Marx K, *Das Kapital*, 1909, 216.
[43] Marx K, *Das Kapital*, 1909, 216.
[44] Engels F, *Condition of the working class in England*, Panther Publishing, London, 1976, 212.
[45] Marx K, Das Kapital, 1909, 702.
[46] Marx K, Das Kapital, 1909, 702.

informal workers. By framing the employer-employee dynamic as one rooted in economic dependency and systemic exploitation, the theory highlights how informal employees often find themselves at a disadvantage; they lack bargaining power, legal documentation, and social protections. This vulnerability inevitably extends to the courtroom, where such employees struggle to assert their rights due to evidentiary deficiencies and the commodification of their labour.

PART II: LITERATURE REVIEW

1.8 Literature Review

1.8.1 Fact finding in civil cases

It is widely accepted that ascertaining the existence of an employment relationship is a fact-finding process. It is therefore up to the court to determine whether there was an employment relationship on account of the evidence given by both parties. Any fact-finding process is usually shaped by rules of evidence such as the standard and burden of proof. These rules in conjunction with legal reasoning have one goal, which is to arrive at the truth both formally and substantively.[47]

Stein states that fact-finding is a matter of probability.[48] Therefore, in cases where there is scarcity of evidence, which is a common issue faced by adjudicators, standard rules of probability should be adjusted to accommodate the slim base of evidence.[49] Several authors have critiqued relying solely on the probability theory in determining the existence of a fact in trial. The presence of doubt in such cases has led to courts developing several legal tests and rules across all areas of law to guide finding the most probable fact. Given the evidentiary challenges involved in establishing the existence of an employment relationship, courts have had to rely on more than just abstract rules of evidence. They have developed legal tests grounded in case law to assist in drawing inferences from available facts. These tests have evolved over time to address the changing nature of work and employment structures.

[47] Summers R, 'Formal legal truth and substantive truth in judicial fact-finding: their justified divergence in some particular cases' 18 *Law and Philosophy*, 5, 1999, 497.
[48] Stein, A 'An essay on uncertainty and fact-finding in civil litigation with special reference to contract cases' 48 *The University of Toronto Law Journal*, 3, 1998, 299.
[49] Stein, A 'An essay on uncertainty and fact-finding in civil litigation' 1998, 306.

1.8.2 Common Law Tests on Determining the Existence of an Employment Relationship

In employment law, courts have developed common law tests to determine whether the relationship exists.[50] The first test was the control test, which examined the degree to which an employer controls an individual's work, assessing whether the employer dictates how, when, and where tasks are performed.[51] Its effectiveness was soon deemed limited and there was a need to consider other factors.

The organization/ integration test was then formed which considered whether the individual's work is integral to the business.[52] It was applied jointly with the control test until new work-related contracts started to emerge, calling for a more nuanced test.[53] This gave rise to the economic reality test which evaluates the individual's financial dependence, risk of profit or loss, and whether they are genuinely operating as an independent business.[54] Lastly, courts seem to have settled on a 'multi-factor test' which takes all of the aspects discussed above into account.

However, the tests are only used where there is an understanding between parties that some form of relationship exists. In instances where the contract does not exist, or where such a relationship cannot be ascertained, normal evidentiary rules apply. It then becomes difficult to ascertain these facts as it is the word of the employee against that of the employer's. (Kaiga, 2007).[55] While these judicially crafted tests provide useful guidance in instances where some form of employment relationship is presumed, they are less effective in cases where no written contract exists or where the existence of any relationship is disputed. Therefore, different legal tools have been deployed to grant labour rights where it is difficult to do so. Such attempts include worker classification and using the presumption of employment.

[50] Joellen R, 'The definition of the contract of employment, 2016, 325.
[51] Joellen R, 'The definition of the contract of employment' 2016, 326.
[52] Joellen R, 'The definition of the contract of employment' 2016, 326.
[53] Joellen R, 'The definition of the contract of employment' 2016, 327.
[54] Joellen R, 'The definition of the contract of employment' 2016, 328.
[55] Kaiga A, Kanyoka V, 'Decent work for domestic workers: Opportunities and challenges for East Africa' International Labour Office, Occupational Paper Series No 1/1011, 12 www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-dar_es_salaam/documents/publication/wcms_316 67 - on 3 February, 2024.

1.8.3 Proposed Remedies: Labour classification and the rebuttable presumption of employment

There have been debates on whether labourer classification would solve the gaps presented by non-standard forms of employment. Classification would enable courts to award specific legal protections to the claimant depending on what category they belong to.[56] Such classification is clear in the United Kingdom where there are tiers of employment, each having its own labour rights. A person categorised as a 'worker' would therefore accrue different rights from a standard employee. For these reasons, Kullman challenges this solution arguing that by restricting further possible advances in employment rights to the category of the proposed class, workers may not be awarded their maximum but necessary rights and benefits.[57] Classification risks obscuring the employment status of these workers and denying them essential labour rights (De Stefano, 2015.)[58]

Several scholars have proposed to introduce a rebuttable presumption of employment in favour of the workers whose employment status is unclear.[59] However, this proposal is made in light of the rising gig economy where the aim is still to help mediate the evidentiary burden in differentiating an independent contractor working on a digital platform, from an employee.

Therefore, the solutions proposed to address the issue of access to labour protections awarded by national laws have majorly included: sensitization of workers and employers on their rights and duties in order to better enforce the latter's duty to provide employment contracts (D'Souza, 2010).[60]

1.8.4 Existing Gap

Current research is mainly focused on providing solutions to curb the confusion caused by the gig economy, which has made it much harder to distinguish an independent contractor from an employee. With regards to informal employment, most of the research seeks to provide solutions

[56] European Union Trade Institute, *The concept of 'worker' in EU law: Status quo and potential for change*, 5 June 2018, 46.
[57] Kullmann M, 'Platformisation' of work: An EU perspective on introducing a legal presumption' 13 *European Labour Journal*, 1 2021, 69.
[58] De Stefano V, 'The rise of the 'just-in-time workforce': On-demand work, crowd work and labour protection in the 'Gig-Economy' *Comparative Labor Law & Policy Journal*, 2016, 16.
[59] Kullmann M, 'Platformisation' of work' 2021, 69.
[60] D'Souza A, 'Moving towards decent work for domestic workers: An overview of the ILO's work' ILO Bureau for Gender Equality, Working paper number 2, 2010, 42.
https://journals.sagepub.com/doi/epub/10.1177/20319525211063112 - on 3 February, 2024.

that affect other important employment benefits as mentioned above. While it is a general consensus that many informal employees have no written contracts, very little has been done in exploring how this would affect their right to a fair hearing and access to justice. This dissertation aims to contribute to this gap by exploring the most suitable way in which the law and the courts can evaluate claims made by informal employees by considering their prevailing circumstances.

PART III: RESEARCH DESIGN

1.9 Research Methodology

This research uses a doctrinal research methodology. It will analyse the primary sources of law including International Conventions, the Employment Act and other statutes, as well as case law within the ELRC and in other complementary jurisdictions. It will also examine secondary sources such as journal articles, books, published theses and reports from reputable labour- related institutions.

1.10 Assumptions

Informal Employment Realities: Informal employees often lack written contracts, payslips, or other conventional documentation, making it inherently challenging for them to meet the standard evidentiary requirements imposed by the courts.

Current Legal Interpretation: The ELRC applies traditional rules of evidence without adequately adapting them to the unique circumstances of informal employment, leading to difficulties in establishing employment relationships.

Socio-Economic Disparities: Informal employees generally belong to lower socio-economic classes and have limited access to legal resources, which exacerbates their vulnerability within the justice system.

Similarity of jurisprudence: This study assumes that the magistrates' courts designated under *Gazette Notice No. 6024* apply jurisprudence and evidentiary standards similar to those of the ELRC. This is due to the unavailability of reported decisions from these courts, making direct analysis impossible.

1.11 Limitations

Judicial Discretion and Inconsistency: The study might face difficulties in generalizing findings due to variations in judicial discretion and inconsistencies in the application of evidentiary rules across different cases by the ELRC. This could make it harder to draw definitive conclusions about the court's approach.

Scope of Informal Employment: Informal employment is diverse, with different sectors and job types having varying levels of vulnerability and evidence challenges. This diversity may limit the ability to create a one-size-fits-all solution or recommendation for all informal employees.

Changing Jurisprudence: The dynamic nature of legal interpretations and evolving jurisprudence in employment law could limit the relevance and applicability of the findings over time, as new court decisions may alter the current evidentiary approach.

Bias in Testimonies and Evidence: The reliance on anecdotal evidence, court cases, or testimonies from informal employees might introduce bias, as these accounts may not always fully represent the broader experiences of all informal workers in Kenya.

Limited evidence: This study is unable to incorporate and analyse jurisprudence emerging from the designated Magistrate Courts, despite their centrality in adjudicating a substantial number of employment disputes. This limitation affects the comprehensiveness of the legal analysis and may result in the underrepresentation of trends and patterns prevalent in these lower-tier forums.

1.12 Chapter Breakdown

1.12.1 Chapter 1: Introduction

This chapter introduces the research topic, providing an overview of the challenges faced by informal employees in navigating evidentiary requirements in the ELRC. The chapter sets the stage by highlighting the need for a critical examination of the Court’s legal reasoning and the broader implications for labour justice for informal employees in Kenya.

1.12.2 The Legal Framework and Analysis of Evidentiary Approaches

This descriptive chapter explores the legal framework governing the evidentiary burdens of proof in Kenya. Through the framework it discusses the current jurisprudence within the ELRC, examining the legal reasoning in determining the weight and probative value of evidence, presented by informal employees during unfair termination cases. It proceeds to classify the approach of the Court into two: Lenient and strict, each having their own implications for informal employees.

1.12.3 Chapter 3: A Critical Appraisal of The ELRC's Evidentiary Approaches

This chapter critically examines legal reasoning, adopted by the ELRC in determining the existence of informal employment by demonstrating the flaws in each approach and how this leads to the disproportionate burden borne by informal employees.

1.12.4 Chapter 4: A Case for A Rebuttable Presumption of Employment

This chapter examines the potential of a mandatory rebuttable presumption of employment in harmonising the approach of the Court in a way that considers evidentiary deficiency in legal reasoning. It highlights the operation of the presumption of employment in the EU and South Africa, assessing limits of their role in resolving the conflict in question. It then proposes a more nuanced presumption based on judicial discretion.

1.12.5 Chapter 5: Recommendations and Conclusion

This chapter outlines recommendations aimed at eliminating evidentiary deficiency and balancing the burden of proof in informal employment claims. It advocates for statutory and jurisprudential reforms, public awareness, and institutional support to enhance access to justice for informal workers.

2. CHAPTER TWO: LEGAL FRAMEWORK ON DETERMINING THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP FOR INFORMAL EMPLOYEES

2.1 Introduction

This chapter explores the statutory framework governing employment and evidentiary issues in Kenya. Simultaneously, it examines the ambiguity of who bears the burden of proof in the context of establishing an employment relationship, revealing a legal tension and an unaddressed evidentiary gap. It then turns to judicial interpretation in cases where no agreement exists between the parties as to the existence of an employment relationship.

2.2 International Legal Instruments

Kenya, as a member of the International Labour Organization (ILO),[61] is influenced by various international labour standards. ILO Recommendation No. 198 (Employment Relationship Recommendation, 2006), provides guidance on determining the existence of an employment relationship. The recommendation underscores the importance of clear criteria in establishing employment status by encouraging national legal systems to develop mechanisms in assessinto assess the existence of an employment relationship outside the conventional use of a written contract[62] ensuring that workers in ambiguous employment situations are not unfairly disadvantaged. This is particularly relevant for informal employees who work without formal contracts and face difficulties proving their employment relationships.

However, the Recommendation is not legally binding and has not yet gained recognition by the State, nor have its provisions been integrated into the current national labour laws.

2.3 Constitutional Provisions

The Constitution of Kenya, 2010, establishes key protections relevant to the rights of employees It guarantees fair labour practices, ensuring that workers, including those in informal employment,

[61] International Labour Organisation, Employment Relationship Recommendation, (No. 198, 2006).
[62] *Preamble*, International Labour Organisation, Employment Relationship Recommendation, (No. 198, 2006).

are protected from unfair treatment.[63] It guarantees access to justice,[64] and enshrines the right to a fair hearing, emphasizing procedural fairness in litigation.[65]

These provisions collectively reinforce the need for a legal system that is aware and alive to the existing circumstances of vulnerable groups with the aim of ensuring that affirmative action is taken to guarantee the labour rights of every citizen.

2.4 Statutory Framework

2.4.1 Employment Act, 2007

The Employment Act sets out the rights of employees and specific obligations of both parties to an employment relationship, meaning that the provisions of the Act only apply where an employment contract, whether oral or written, exists.[66]

Employers have the primary responsibility of drafting the written contract, ensuring that they state the employment particulars.[67] It also requires that all relationships exceeding 3 months be formalised in writing, where the contract was oral or implied and considers persons working for remuneration under such a contract be considered an employee.[68]

Employers are also mandated to maintain all additional employment records.[69] Additionally, in unfair termination disputes, the Act places an initial burden on the employee to establish that a dismissal occurred unfairly and the employer is required to prove that the dismissal was reasonable and justifiable.[70] It remains silent on where the evidentiary burden of proof lies when proving the existence of an employment relationship.

However, Section 10(7) states that if an employer fails to produce a written contract or employment particulars in legal proceedings, the burden of proving or disproving an alleged term of employment lies with the employer.[71]

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[63] Article 41, *The Constitution of Kenya* 2010.
[64] Article 48, *The Constitution of Kenya* 2010.
[65] Article 50, *The Constitution of Kenya* 2010.
[66] Section 2, Section 8, *Employment Act* (No.11 of 2007).
[67] Section 10, *Employment Act* (No.11 of 2007).
[68] Section 9 (1), *Employment Act* (No.11 of 2007).
[69] Section 74 (1), *Employment Act* (No.11 of 2007).
[70] Section 47(5), *Employment Act* (No.11 of 2007).
[71] Section 10(7), *Employment Act* (No.11 of 2007).

2.4.2 The Evidence Act

The Evidence Act sets out general principles regarding the burden of proof in both civil and criminal matters. A party asserting a fact must prove its existence further establishing the principle of [72] "*he who alleges must prove*."

It further states that the burden of proof rests on the party who would fail if no evidence was adduced[73] and that the burden of proving a particular fact lies on the party who wishes the court to believe in its existence, unless otherwise provided for by law.[74]

These provisions collectively place the initial evidentiary burden on the claimant in a dispute to establish the existence of the facts they rely on. In the context of employment disputes, this includes the burden of proving the existence of an employment relationship, unless another law provides otherwise.

In summary, there is a clear legal gap regarding who bears the burden of proof when the existence of an employment relationship is disputed. While the Evidence Act generally places the burden on the claimant, the Employment Act does not explicitly address this issue except in the context of unfair termination. As such, determining where this burden lies depends largely on judicial interpretation. It is through jurisprudence that one can assess how courts navigate this gap.

2.5 Jurisprudence within the Employment and Labour Relations Court

This section shall give an account of the two approaches taken by the ELRC in determining claims involving informal employees where their claims remain undefended as a result of the defendant's absence or where the latter merely denied the existence of the employment relationship. The analysis below reveals two broad judicial approaches to determining the existence of an employment relationship where it is in dispute.

The first is a **strict approach**, which can manifest in two ways: either where the court requires proof even in an undefended claim, or where the respondent has denied the claim and the court

[72] Section 107(1), *Evidence Ac*t (No.46 of 1963).
[73] Section 108, *Evidence Act* (No.46 of 1963).
[74] Section 109, *Evidence Act* (No.46 of 1963).

proceeds to assess the claimant's case against that denial without in-depth interrogation of the nature of the denial.

In cases where the respondent does not appear or defend the claim, the courts have consistently held that the claimant must nonetheless discharge the burden of proof in full. The courts insist that oral evidence alone is inadequate, even where the claimant alleges that the contract was oral and wages were paid in cash. In *Monica Kanini Mutua v Al-Arafat Shopping Centre*, the Court dismissed the claim despite a trade union demand letter and testimony from the claimant, citing the absence of documentary proof.[75] Similarly, in *Kyalo v Kantaria Commercial Stores*, the Court dismissed a claim simply because there was no documentary evidence linking him to the employer despite his oral testimony.[76]

This evidentiary expectation continues to apply where the employer appears and merely denies the existence of a relationship. Courts have shown a similar unwillingness to scrutinise such denials or draw adverse inferences from the absence of employer documentation, even when it is statutorily required. In *Ekhuya & 2 others v Golden Sport Bar*, the claim was denied because there was no material evidence showing a link between the parties, despite the respondent's bare denial.[77] Likewise, in *Casmir Nyankuru Nyaberi v Mwakikar Agencies*, the Court acknowledged the employer's obligation to maintain employment records but still found that the claimant had failed to prove their case.[78] This strict stance was further echoed in *Mwangi v All Time Security Ltd*, the employer's denial was accepted without demand for corroboration, and the burden remained entirely with the claimant to substantiate the relationship. The claimant was unable to do so as his testimony and evidence of occasional payments were deemed insufficient to discharge the burden of proof.[79]

Across both sets of cases, the courts' reasoning reveals rigidity in the application of evidentiary rules. The expectation for claimants to provide documentary or corroborative evidence such as employment contracts, payment records, or third-party witness testimony remains constant,[80]

[75] *Monica Kanini Mutua v Al-Arafat Shopping Centre & M/D Mire Guhad* (2018) eKLR.
[76] *Kyalo v Kantaria Commercial Stores* (2017) eKLR.
[77] *Ekhuya & 2 others v Golden Sport Bar* (2023) eKLR.
[78] *Casmir Nyankuru Nyaberi v Mwakikar Agencies* (2014) eKLR.
[79] *Mwangi v All Time Security* (2025) eKLR.
[80] *See Owiti v C & A Security Services* (2022) eKLR. The Court implied that the use of an additional witness would have made the claim stronger.

regardless of the employer's participation in the proceedings or their ability to produce the relevant records. Consequently, informal employees whose engagements remain undocumented and whose employers may be elusive or uncooperative find themselves unable to satisfy the standard of proof.

The second is a **lenient approach**, where the claim is accepted based on uncontroverted evidence without close scrutiny of its internal merit. In some cases, the Court has awarded judgement in favour of claimants who have backed their submissions and memoranda of claim by oral testimonies, and such is evident in *Dorcus Aono v Amina Durad*,[81] *Azibetah Mudagale v Mary Nyaluok Nyuon* [82] and *Mrs. Pamela Katenja Machoni v Mr/Mrs Gaurav Bhalla*[83] among others. In none of these cases does the issue of whether an employment relationship exists arise for determination. The rationale of the Court is that all the claimants' cases were undefended and thus their evidence was uncontroverted. This is so, even when the oral evidence and written statement is a mere reiteration of the averments earlier made in their submissions.[84]

[81] *Dorcus Aono v Amina Durad & another* (2017) eKLR.
[82] *Azibetah Ngonyele Mudagale v Mary Nyaluok Nyuon* (2017) eKLR.
[83] *Mrs. Pamela Katenja Machoni v Mr/Mrs Gaurav Bhalla t/a c/o Crown Paints (K) Limited* (2019) eKLR.
[84] *Aseyo v Narendra* (2023) eKLR.

3. CHAPTER 3: A CRITICAL EVALUATION OF THE LEGAL REASONING OF THE ELRC

Chapter 2 outlined the lenient and strict approaches adopted by the ELRC in determining the existence of an employment relationship for cases where the claimant is an informal employee and where the respondent fails to appear in court or denies the existence of the relationship. This chapter will now evaluate each approach in order to highlight their flaws and the resulting implications for both potential claimants and defendants.

3.1 The Strict Approach

This approach is evident where the Court rejects a claim on grounds of evidentiary insufficiency. A party is required to prove their case on a balance of probabilities, whether or not the suit is defended.[85] As a result, the Court overlooks the presence of evidentiary deficiency and the role it has to play in informing the availability of evidence, especially to a claimant. This immediately enforces the application of the standard rules of evidence that would likely cause some form of disproportionate impact on the claimant.

3.2 Understanding evidentiary deficiency

Evidentiary deficiency is a conceptual term used to describe circumstances where a party who bears the burden of proof is unable to produce sufficient or necessary evidence to support their case.[86] It considers the structural or contextual factors that affect availability, accessibility, or existence of evidence, rather than a party's negligence or fault in non-production.[87] There are three types of evidentiary deficiency namely: evidentiary asymmetry, evidentiary impossibility and evidentiary uncertainty.

Evidentiary asymmetry is where one party (typically the weaker or less powerful party) lacks access to critical information or documents, which are either exclusively in the possession of the opposing party or is out of the party's reach as far as their resources can allow it.[88] This is observed

[85] *Monica Kanini Mutua v Al-Arafat Shopping Centre & M/D Mire Guhad* (2018) eKLR.
[86] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law,' 58.
[87] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law,' 59.
[88] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law,' 2019, 61.

in labour disputes where the employer retains all employment records leaving the employee with limited means of proof. Evidentiary impossibility occurs when neither party can present the necessary evidence to support or refute a claim, even though such evidence might typically be available in similar circumstances.[89] This is either because the evidence never existed, or where the actions or omissions of one party hinder the other party's ability to prove their case through obstruction or loss of evidence.

Lastly, evidentiary uncertainty refers to factual ambiguity or the absence of reliable indicators to verify a claim, even when some evidence exists. This form of deficiency underscores situations where the available evidence is too vague or incomplete to be discerned using the normal standards of proof.[90] This category falls outside the scope of the present study. Accordingly, the analysis in this dissertation will focus solely on the first two as the principal forms of evidentiary deficiency that affect informal employees.

3.3 Factors that contribute to evidentiary deficiency

3.3.1 Weak Bargaining Power

Informal employees face a systemic power disparity in the employment relationship, primarily due to socio-economic and structural disadvantages. Unlike employers, who have financial resources and own capital, informal workers rely almost exclusively on their wages to meet immediate survival needs.[91] This creates a dependency relationship between the employer and employee that is characterised by vulnerability and subordination even in the wake of poor working conditions for fear of loss of continuous provision of work.[92] Furthermore, the informal sector is characterised by the payment of wages that fall significantly below the statutory minimums.[93] The possession of general skills that are easily replaceable further diminishes their leverage in wage negotiation only

[89] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law,' 2019, 62.
[90] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law' 2019, 62.
A practical example is found in environmental litigation, particularly in cases of diffuse pollution. In such instances, pollutants may originate from multiple industrial sources over time, making it extremely difficult to isolate a single culpable actor.
[91] Riisgaard L, Okiya O, 'Changing labour power on smallholder tea farms in Kenya' 22:1 *Journal of Competition, and Change*, 2018, 42.
[92] Vincent V, *The role of bargaining power: How unions affect income distribution*, Potsdam University Press, Potsdam, Germany, 14.
[93] Schmidt V, Webster E, Mhlana S, Forrest K, 'Negotiations by workers in the informal economy 'ILO Working Paper no 86 January 2023, 34 https://www.ilo.org/publications/negotiations-workers-informal-economy - on 23 February, 2024.

increasing their dependency on the employer.[94] Eventually, a fear of retaliation is cultivated and employees avoid enforcing their rights out of the need to keep their jobs.[95] This fear also affects the ability of a claimant to obtain witnesses to testify against the respondent in order to prove a set of facts in labour disputes.[96]

Lastly, most informal employees also lack the benefit of collective bargaining. Many remain un-unionised due to restrictions imposed by their employer[97] and the isolated and fragmented nature of their jobs all of which frustrate the process.[98] As a result, they are unlikely to reject poor working conditions or negotiate better terms.

3.3.1 Informal nature of employment and regulatory arbitrage

The informal economy is structured to deliberately evade formal obligations and avoid statutory compliance.[99] Employers frequently rely on verbal agreements, cash payments and non-written arrangements which are difficult to verify or enforce.[100] This practice leaves informal employees without legal protection, making their jobs precarious and highly dependent on the employer's discretion.[101] As a result, informal employees are left with heightened job uncertainty, and without any tangible proof of the terms of their employment. [102]

Similarly, a considerable number of informal enterprises fail to make statutory contributions to public social security schemes such as health and pension funds.[103] This failure is usually intentional, aimed at reducing labour costs and avoiding regulatory scrutiny.

[94] Vincent V, '*The role of bargaining power*,14.
[95] Foster J, Barnetso B, and Matsunaga T J, 'Fear factory: retaliation and rights claiming in Alberta, Canada' 8 SAGE Open, I2, 2018, 3
[96] Alteri A, Rubin E V, and JooPark Y, 'Two Wrongs Do Not Make a Right: Understanding Retaliation for Filing Discrimination Complaints in the U.S. Federal Government' 52 Journal of Public Personnel Management 1, 2022, 12.
[97] Bonner C, Spooner D, 'Organizing in the informal economy: A challenge for trade unions' Friedrich-Ebert-Stiftung, 201I, 90.
[98] Carré F, Bonner C, Horn P, Collective bargaining by informal workers in the global south: where and how it takes place' Women in Informal Employment: Globalizing and Organizing, Working Paper No 8 October, 2018, 8 https://www.wiego.org/wp-content/uploads/2019/09/Carre_Collective_Bargaining_Informal_Workers_WIEGO_WP38.pdf - on 13 October 2024.
[99] Federation of Kenyan Employers, *The informal economy in Kenya*, 35.
[100] Federation of Kenyan Employers, *The informal economy in Kenya*, 35.
[101] OECD, *et al*, *Tackling vulnerability in the informal economy*, 79.
[102] OECD, *et al*, *Tackling vulnerability in the informal economy*, 79.
[103] Federation of Kenyan Employers, *The informal economy in Kenya*, 37.

3.3.2 The adversarial court system

One of the most profound structural disadvantages faced by informal employees in employment litigation is the passive nature of the judicial process. Kenya's legal system is fundamentally adversarial, rooted in the English common law tradition, wherein the judiciary functions as an impartial arbiter between disputing parties rather than an active investigator.[104] The Court does not operate autonomously; it must be "mobilised by the claimant."[105]

This creates a structural disadvantage for informal workers employees who are often economically vulnerable and unfamiliar with legal processes, as they face significant difficulty in navigating the restrictive procedural requirements.[106] The passivity of the court, while intended to promote neutrality, inadvertently reinforces inequality by failing to accommodate the already existing imbalance in power between an employer and employee.[107]

3.4 <u>The effect of overlooking evidentiary deficiency in legal reasoning</u>

Overlooking the evidentiary deficiency faced by informal employees in employment disputes undermines the integrity of the court's evaluation process in two key ways.

First, it influences how the Court determines whether the claimant has met the required standard of proof. As seen in the previous chapter, there is a clear preference for formal documentary evidence, such as written contracts or payslips, as proof of an employment relationship. This is so even when the engagement was purely oral and there were no accessible pieces of evidence. As a result, oral testimonies are considered insufficient resulting in the failure of the claimant to discharge their proof, who might as well have been bound to fail from the beginning.

It results in the standard application of evidentiary norms without sufficient contextual consideration. The rules of evidence are applied uniformly, as though both parties operate from an equal footing causing the burden of proof to disproportionately fall on the claimant, who is barely equipped to discharge it.

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[104] Toy-Cronin B, 'Power in civil litigation' 17 V*ested Interests Policy Quarterly* 2, 2021, 30.
[105] Galanter M, 'Why the "haves" come out ahead: speculations on the limits of legal change' 9 *Law and Society Review*, 1, 1974 ,97.
[106] Toy-Cronin B, 'Power in civil litigation' 30.
[107] *See* in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* where the Court acknowledged that despite the documents being in the defendant's custody, the claimant was obligated to serve a production notice to obtain them.

3.4.1 Where there is a defence to the claims made by the claimant

In civil litigation, denial constitutes a foundational method of defence and represents a respondent's initial attempt at avoiding civil liability.[108] Where a defendant merely denies the claimant's factual assertions, the effect ought to be procedural, compelling the claimant to make out a *prima facie* case.[109] In such cases, if the claimant adduces no evidence, the action is summarily dismissed.[110] However, if the claimant presents any evidence in support of the claim, the case proceeds to evaluation on its merits.

The classical view holds that the burden of proof lies with the claimant primarily because they bear the burden of the issues raised in the initial pleadings.[111] Where the defendant makes countervailing claims, the burden of proof shifts accordingly. While a denial should only operate procedurally, to invite proof from the claimant, it does not extinguish the defendant's obligation to adduce evidence in support of their position.[112]

As previously shown, the Court has overlooked the substantive obligations that arise once a claimant has discharged their *prima facie* burden. Rather than requiring the defendant to substantiate their denial or provide an affirmative defence, the Court focuses solely on the Claimant's evidence.[113] This is despite the judicial practice within the High Court, to require proof when denying a claim. This position has been resounded by the Kenyan Court of Appeal *Magunga General Stores vs. Pepco Distributors Ltd* mere denial was not considered a defence.[114]

3.4.2 Implications

Employers with competent legal representation often use denial to avoid civil liability and frustrate the claimant's access to justice by escalating costs or inducing procedural fatigue.[115] Thus, procedural tools even when designed to ensure fairness and efficiency can be transformed into instruments of procedural exclusion when wielded by repeat players against under-resourced

[108] Bolhen F H, 'The effect of rebuttable presumption of law upon the burden of proof' 68 *University of Pennsylvania Law Review*,1920, 308.
[109] Abbott A, 'Two burdens of proof' 6 *Harvard Law Review* 3, 1892, 126.
[110] Abbott A, Two burdens of proof' 127.
[111] James B. Thayer, A Preliminary Treatise on Evidence at the Common Law, Little Brown, Boston, 1898, 355.
[112] Keane A, McKeown P, *The modern law of evidence,* 13th ed Oxford University Press, London, 2020, 9.
[113] *Mwangi v All Time Security* (2025) eKLR.
[114] *Magunga General Stores vs. Pepco Distributors Ltd* (1987) KLR.
[115] Cohen J R, 'The culture of legal denial' 84, *Nebraska Law Review*, 1,2005, 256.

informal employees.[116] This undermines the status quo that civil litigation seeks to maintain, which worsens the imbalance between the claimant and defendant, tipping the scales in favour of the defendant.

3.5 The Lenient Approach

This approach is characterized by presuming the existence of an employment relationship where the claimant's evidence remains uncontroverted or undefended. The Court, in such circumstances, tends to presume the existence of an employment relationship and other essential facts merely on the basis that the claimant's evidence remains unchallenged.[117] The rationale appears to be that the failure to controvert or challenge the claim supports a finding that the standard of proof (of a balance of probabilities) has been satisfied without alluding to the veracity of the evidence produced and its weight in determining the case.[118]

As a foundational principle in civil litigation, the burden of proof remains with the claimant, irrespective of the defendant's participation in proceedings.[119] Courts are under a duty to evaluate all evidence before them and to assess its probative value in context. This duty persists even where the evidence is unchallenged.[120] The fact that evidence is uncontroverted does not automatically render it credible, persuasive, or legally sufficient.[121] The Court is therefore required to interrogate unchallenged evidence and determine its merit based on its internal coherence, plausibility, and consistency with the broader facts of the case.[122]

3.5.1 Implications

The implications of adopting a lenient approach to evidentiary evaluation are arguably less harmful than those posed by the strict approach, which risks systemic injustice by disregarding structural disadvantages. Nevertheless, the legal reasoning is flawed for failure to evaluate the merits of

[116] Cohen J R, 'The culture of legal denial' 257.
[117] *General Stores vs. Pepco Distributors Ltd* (1987) KLR.
[118] See. *Mrs. Pamela Katenja Machoni v Mr/Mrs Gaurav Bhalla t/a c/o Crown Paints (K) Limited* (2019) eKLR.
[119] This was discussed at the Supreme Court in the Petition No. 2 of 2017 *Suleiman Kasuti Murunga v IEBC & 2 Others* (2018) eKLR.
[120] Soh P K, Tan R, 'Rejecting an uncontroverted expert report' SSRN, 3 September 2022,7 https://ssrn.com/abstract=4209141 - on 20th February 2025, 5.
[121] Soh P K, Tan R, 'Rejecting an uncontroverted expert report' 6.
[122] This position has been echoed in *Gichinga Kibutha v Caroline Nduku* where the court emphasised that the absence of a defence does not absolve the court from its obligation to scrutinize the claimant's assertions.

uncontroverted undermines procedural fairness and opens the judicial process to potential abuse against potential defendants.

A balance must therefore be struck. Evidentiary standards must be applied with sensitivity to socio-economic context, while courts assess the credibility and probative value of unchallenged evidence to maintain judicial integrity.

4. CHAPTER FOUR: MAKING A CASE FOR THE USE OF A REBUTTABLE PRESUMPTION

As previously demonstrated, the structural inequality between informal employees and employers can create disproportionate disadvantages for vulnerable claimants. This chapter will make a case for the use of a mandatory rebuttable presumption of employment as a corrective tool. It shall proceed to examine how rebuttable presumptions are used in the European Union and South Africa to assist vulnerable workers in proving employment relationships while highlighting the shortcomings in order to propose a flexible, judicially driven approach tailored to Kenya's context.

4.1 Defining mandatory legal presumptions

A legal presumption is a rule of law that allows a court to assume a fact is true until it is rebutted by contrary evidence.[123] Presumptions can be either rebuttable or conclusive. A *rebuttable presumption* permits the opposing party to present evidence challenging the presumed fact, which, if sufficient, can displace the presumption.[124] A *mandatory presumption* is a type of rebuttable legal presumption that compels the court or trier of fact to draw a specific inference from the existence of one established fact (Fact A) to another (Fact B) unless the opposing party successfully rebuts it with sufficient contrary evidence.[125] The court would be compelled to accept the inference in the absence of rebuttal.[126]

Presumptions arise from statutory provisions, case law, or regulations and often reflect either probabilistic reasoning (based on common experience or logic) or broader social policy goals.[127] By serving both evidentiary and policy functions, they are practical tools for addressing structural disadvantages in informal employment claims.

[123] Black's Law Dictionary, 2nd Ed.
[124] This distinguishes it from a conclusive presumption, which does not allow any such rebuttal and effectively alters substantive law by fixing a legal outcome irrespective of contrary evidence. See Black's Law Dictionary, 2nd Ed.
[125] Rothstein, P F, 'Demystifying burdens of proof and the effect of rebuttable evidentiary presumptions in civil and criminal trials' SSRN Papers, 4 October 2017. https://ssrn.com/abstract=3050687 - on 1 March 2025, 3.
[126] Bolhen F H, 'The effect of rebuttable presumption of law upon the burden of proof' 309.
[127] Rothstein, P F, 'Demystifying burdens of proof,' 18.

4.1.1 The Evidentiary Function

The primary function of a rebuttable presumption is to redistribute the burdens of proof between the parties in a manner that facilitates substantive justice. Three types of burdens of proof exist:

a) Legal Burden (Burden of Persuasion)[128]

This is the obligation placed on a party to prove the essential elements of their case to the standard required by law, usually on a balance of probabilities in civil proceedings. Normally, it remains fixed throughout the trial and determines who ultimately bears the risk of losing if the evidence is inconclusive.[129]

b) The Evidentiary Burden (Allocative Burden of Production)[130]

This refers to the duty to produce evidence on a particular issue at a specific stage of the proceedings. Unlike the legal burden, this burden can shift between the parties as the case unfolds, depending on how the evidence develops. It is concerned with ensuring that enough material is brought before the court to allow proper adjudication of contested facts.

c) The Tactical Burden[131]

This burden arises as a matter of practical litigation strategy. A party faces a tactical burden when, in light of the evidence, they must decide whether to produce more evidence to avoid an adverse ruling. It is not a legal obligation, but a pragmatic one based on the perceived risks of proceeding without rebutting or qualifying the evidence already on record.

4.1.2 Effect the Rebuttable Presumption on the Claimant

For claimants, rebuttable presumptions serve as evidentiary tools that significantly ease the allocative burden of establishing core facts, especially when those facts are difficult or impossible to prove directly.[132] Invoking a presumption would relieve the claimant of the obligation to provide evidence for every element of the claim we presumption they wish to rely on. This enables them

[128] Sartor G, Prakken H, 'Presumptions and burdens of proof' European University Institute, Law Working Paper Number 36, 2006, 4 https://ssrn.com/abstract=963761 - on 1 March 2025.
[129] Sartor G, *et al*, 'Presumptions and burdens of proof' 4.
[130] Sartor G, *et al*, 'Presumptions and burdens of proof' 4.
[131] Sartor G, *et al*, 'Presumptions and burdens of proof' 4.
[132] Dale A N, *The burdens of proof: Discriminatory power, weight of evidence and tenacity of belief*, 3 ed Cambridge University Press, Cambridge, 2016, 61.

to more effectively discharge their legal burden, especially where evidentiary deficiency remains prominent like in the case of informal employment.

4.1.3 Effect of the Rebuttable Presumption on the Defendant

Once triggered, a rebuttable presumption shifts both the evidentiary and tactical burdens to the defendant. The risk of an adverse ruling rises, placing the defendant in a position that necessitates strategic assessment unless new or countervailing evidence is introduced.[133] In relation to the evidentiary burden, the defendant must produce evidence to rebut the presumption. Failure to do so may result in the court treating the presumed fact (the existence of the employment relationship) as established.[134]

A presumption merely aids in the production of evidence but does not absolve the claimant from ultimately proving their case on a balance of probabilities.[135] However, the presence of a rebuttable presumption, especially where there is evidentiary asymmetry or structural disadvantage, invites a more nuanced approach.

If the mere presentation of contrary evidence (regardless of its weight) automatically neutralises the presumption, it arguably renders the presumption functionally inert as if there was no presumption in the first place.[136] That just enough evidence in needed to 'burst the bubble.[137] This approach treats the presumption as a mere procedural tool, offering no continuing influence on the fact-finder's reasoning after a rebuttal is raised. As a result, the effect of the presumption is diminished and in the case of informal employees, the result would not be any different from the current practice.

Scholars therefore argue that the policy function of a rebuttable presumption requires a shift in the burden of persuasion depending on the underlying goal and the intended outcome of establishing it.

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[133] Keane A *et al*, The modern law of evidence, 33.
[134] Keane A *et al*, The modern law of evidence, 33.
[135] Dale A N, The burdens of proof, 154.
[136] Rothstein, P F, 'Demystifying burdens of proof and the effect of rebuttable evidentiary presumptions in civil and criminal trials' 28.
[137] The 'bursting bubble' theory where opposing evidence ought to be just enough to make the presumption disappear See Rothstein, P F, 'Demystifying burdens of proof,' 28.

4.2 The Policy Function

In theories of dialogical reasoning, a presumption functions as a practical and dialogical advantage: it sets the starting point that is more aligned with justice or social utility.[138] In evidentiary terms, this means that where the presumption advances a policy goal it is reasonable enough for the burden of persuasion to shift to the defendant.[139] The defendant should have to present substantial, credible proof to displace the presumption.[140]

In this light, the presumption works not to relieve the claimant of their initial burden, but to place the defendant in a position where displacing the presumption requires more than simply creating doubt.[141] It raises the evidentiary and tactical obligations of the defendant to a level that reflects the policy rationale behind the presumption.[142]

Rebuttable presumptions, by their very nature, often operate on insufficient or incomplete data in order to ease the discharge of the legal burden of the claimant. They permit the assumption of a fact as true even where the available evidence would not ordinarily meet the standard of proof required to support that fact.[143] However, they do not preclude inquiry into the actual existence of the fact. They still operate within the legal framework and sound legal reasoning.

Therefore, it is established that for a rebuttable presumption of employment to achieve its intended effect, it must go beyond merely shifting the allocative and tactical burdens of proof. It must also shift the persuasive burden to the defendant, thereby compelling the employer to substantively disprove the existence of an employment relationship once the presumption is triggered.

Notably, presumptions in law are rarely absolute; they are often triggered by specific factual conditions that justify their application. There is always a need for guidelines that govern the establishment of a presumption by a factfinder.[144] This is to ensure that presumptions are not only rooted in legal utility but also in rationality, allowing for consistency and fairness. Legislators and

[138] Sartor G, *et al*, 'Presumptions and burdens of proof' 7.
[139] McCormick C, 'Charges on the presumptions of proof' 5 *North Carolina Law Review*, 4, 1927, 306.
[140] McCormick C, 'Charges on the presumptions of proof,'308.
[141] Sartor G, *et al*, 'Presumptions and burdens of proof' 4.
[142] For instance, in election petitions, courts have emphasized the rebuttable presumption of validity of declared results. The principle of evidential burden is thus grounded in the notion that an election, being a matter of public significance, should not be set aside lightly. See *Jeet Mohinder Singh v Harminder Singh Jassi*, (2000) The Supreme Court of India.
[143] Bolhen F H, 'The effect of rebuttable presumption of law upon the burden of proof' 315.
[144] Vandenbussche W, 'Dealing with evidentiary deficiency in Tort Law' 2019, 64.

courts have responded to this by establishing legal rules that prescribe conditions, upon which if proven allow the establishment of the presumption in various areas of the law.[145]

Such conditions have been adopted in labour law frameworks in jurisdictions such as the European Union and South Africa. In both contexts, legislation or judicial doctrine has laid out clear factual criteria which, when met, activate the presumption of employment. The next section explores how these conditional presumptions have been structured and operationalised to secure labour rights for vulnerable workers and assesses their potential suitability within the Kenyan legal context.

4.3 The Rebuttable Presumption of Employment in Labour Law

Rebuttable presumptions have increasingly been utilised in labour law as tools to assist in distinguishing between employees and independent contractors where it is in dispute or remains unclear.[146]

This approach has gained traction in jurisdictions facing rising informalisation or platform-based work. The European Union, for example, introduced a rebuttable presumption in response to the rapid expansion of the gig economy, where digital platforms tend to classify workers as independent contractors.[147] Similarly, South Africa has adopted a statutory rebuttable presumption aimed at protecting low-income earners from misclassification and supporting enforcement of employment rights.[148]

This section outlines the operation of rebuttable presumptions in these two jurisdictions, highlighting their legal foundations, the conditions under which they arise, the problem they aim to resolve, and their effect on the burden of proof.

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[145] See *Hortensiah Wanjiku Yawe v The Public Trustee* (1976) KLR, where the Court of Appeal established that long cohabitation creates a presumption of marriage, shifting the burden of proof to the party disputing its existence. The presumption serves both justice and social utility, ensuring that individuals in informal unions are not unjustly denied marital rights upon the fulfilment of certain conditions.

[146] Kullmann M, 'Platformisation' of work' 70.

[147] Zeid R, Dana J, Mohamed I, Mehment A and Nayib R, The Gig Economy and the Future of Work: Global Trends and Policy Directions for Non-Standard Forms of Employment, Social Protection Discussion Papers, 2014, 10 https://documents1.worldbank.org/curated/en/099060524074041161/pdf/P1796471e104d70c8193971d1ead6456d2e.pdf - on 12 March 2025.

[148] Theron J, 'The erosion of workers' rights and the presumption as to who is an employee' 6 *SAJ Law Democracy & Development*, 1, 2002, 29.

4.3.1 The European Union: Platform Work

In 2024, the EU Parliament and Council officially adopted a Directive on improving the working conditions in platform working an initiative to regulate platform work and clarify the employment status of individuals providing labour through digital platforms.[149] While informal employment is not identical to platform work, both share similar features: lack of formal contracts, power imbalances, and challenges in accessing documentation.[150] The accompanying explanatory memorandum[151] defines the control of 'work by a digital platform' which forms the basis for the underlying conditions of the presumption where at least two of the following five indicators of control or direction are met:[152]

- *The platform sets or limits remuneration.*
- *The platform imposes specific rules on appearance, conduct, or work performance.*
- *The platform supervises or evaluates work performance, including via algorithmic management.*
- *The platform restricts autonomy in scheduling, task selection, or delegation.*
- *The platform limits the worker's ability to work for other clients or platforms*.

Once the presumption is triggered, the evidentiary burden shifts to the platform to demonstrate that the relationship does not constitute employment under national or EU labour law.[153] The legal effect is procedural: it simplifies the claimant's task in establishing prima facie employment, reversing the typical evidentiary burden in civil litigation.

[149] Directive on the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work 2024) 2024 /2831.

[150] The Directive therefore offers a modern, adaptable model for reconceptualising employment status in a way that centres the worker's lived reality, which is critical to this dissertation's normative goal of encouraging a judicial approach that prioritises equity and inclusion.

[151] *See Article 4(2)*, Directive (EU) 2024/2831. The Directive obliges Member States to establish mechanisms for verifying the correct employment status of platform workers, prioritising the factual performance of work, including platform-imposed controls such as automated monitoring and decision-making systems. The legal presumption of employment, elaborated in *Article 5* of the Directive, is activated where such control is evident. However, the specific control indicators are detailed in the Explanatory Memorandum. These indicators clarify what constitutes "control" under the Directive, and the Memorandum further explains that meeting at least two such indicators suffice to trigger the presumption. Though not binding, the Explanatory Memorandum is authoritative in interpreting the Directive's intent and is used to guide national implementation.

[152] Article 4(2), *Explanatory Memorandum on the Directive European on improving working conditions in platform wor*k (2024).

[153] Article 4(1), *Directive European on improving working conditions in platform work* (2024).

4.3.2 South Africa: Protection for Low-Income Workers

In South Africa, the rebuttable presumption of employment is established under Section 200A of the Labour Relations Act 66 of 1995 (as amended).[154] It was introduced in response to the growing prevalence of disguised employment relationships among low-income and informal workers.[155]

The presumption applies to workers earning below the statutory earnings threshold,[156] as determined by the Minister of Employment and Labour.[157] If this threshold condition is met, the presumption arises when one or more of the seven conditions are met:[158]

a) The manner in which the person works is subject to control or direction.
b) The person's hours of work are subject to control or direction.
c) The person forms part of the organisation.
d) The person has limited economic independence in that they cannot work for others.
e) Tools or equipment are provided by the employer.
f) The work is performed solely or mainly for one person.
g) The person is subject to the employer's instruction or supervision.

Once the presumption is established, the burden of persuasion shifts to the employer who must now prove that the relationship falls outside what would be considered an employment relationship.[159] By requiring the employer to justify their classification of the working relationship, the presumption acts as a procedural safeguard to help clarify the employment status of informal workers.

4.4 Normative Reflections on the Limitations of the operation of the presumption as applied in the EU and South Africa

Rebuttable presumptions in both jurisdictions represent a commendable effort in changing legal reasoning to acknowledge the evidentiary imbalance that exists between vulnerable workers and

[154] Section 200A, Labour Relations Act (No. 66 of 1995).
[155] Godfrey S, Clarke M, 'The Basic Conditions of Employment Act amendments: More questions than answers' 6 *SAJ Law Democracy & Development*, 2, 22.
[156] As of 1 April 2025, the threshold for earning by informal workings was set at R 21812,37 per month. See Truter J, 'New earnings threshold as from 1 April 2025' Labourwise- Labour News, 10 May 2025 - https://labourwise.co.za/labour-news-teazer/new-earnings-threshold-as-from-1-april-2025 - on 20 March 2025.
[157] Section 83, *Basic Conditions of Employment Act* (No. 75 of 1997).
[158] Section 200A, *Labour Relations Act* (No. 66 of 1995).
[159] Theron J, 'The erosion of workers' rights and the presumption as to who is an employee' 28.

employers.[160] However, their application to the cases in this study remains limited for the following reasons:

4.4.1 The need for an agreement on the existence of some sort of relationship

The presumptions operate under the premise that some form of working relationship between the parties exists. They are primarily tools for distinguishing an employment relationship from an independent contract.[161]

In contrast, the types of disputes contemplated in this study involve complete denial by the defendant of the existence of any relationship capable of giving rise to labour obligations. In some instances, the employer may even deny knowing the claimant. It is therefore impossible to trigger this presumption.

4.4.2 The requirement of formal proof in order to establish the presumption

The indicators listed under South Africa's presumption of employment are more relevant for this study as they target disguised employment relationships common in the informal economy. These indicators are a reflection of those provided for by ILO Recommendation 198 of 2006, which as previously established mimic the common law tests used to determine and differentiate an employment relationship from an independent contractual one for example: degree of control, economic dependence, and integration into the employer's business.[162]

In practice, these factors are demonstrated through documentary evidence or observable structures of control, an option that remains out of reach for most informal employees who lack tangible evidence.[163] Requiring tangible proof to trigger the presumption ultimately reintroduces the same evidentiary disadvantage that the presumption was meant to address.

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[160] The Directive acknowledges the existing power imbalances between platform workers and platforms and the effect in the ability to enforce rights and prove the existence of an employment relationship. See Note 31, Directive (EU) 2024/2831.

[161] The European Union's Directive on platform work, clearly focuses on distinguishing between self-employed platform workers and employees, in order to ensure the proper allocation of rights and obligations. See Article 4(1) Directive (EU) 2024/2831.

[162] International Labour Organisation, Employment Relationship Recommendation, (No. 198, 2006).

[163] Author suggests that even where the Explanatory Memorandum for the Basic Conditions of Employment Act Amendment Bill (2000) acknowledged the lack of legal protection for informal employees, it fails to clarify exactly how the presumption would be of benefit to them. See Theron J, 'The erosion of workers' rights and the presumption as to who is an employee' 28.

4.5 Towards a Discretionary, Context-Sensitive Presumption

To effectively address the challenges caused by evidentiary deficiency this study proposes a judicial presumption that may be triggered at the court's discretion, rather than through rigid conditions. The flexibility inherent in discretion is essential in responding to the realities of informal labour.[164] Moreover, discretion allows for a more faithful realisation of the presumption's normative goal:[165] to correct the power imbalance between vulnerable informal workers and their employers and further substantive justice.

Discretion in this context must be understood, not as arbitrary power or unprincipled freedom, but as a structured and logical mode of decision-making.[166] It is a controlled freedom, guided by legal standards, institutional purpose, and normative coherence. While a judge may have interpretive latitude, it is constrained by an obligation to act reasonably and within the structural framework of the legal system.[167] With time, it can give rise to a set of nuanced, principle-based conditions that reflect jurisprudential coherence while maintaining space for context-driven justice.[168] Present jurisprudence from the cases discussed in this study already point towards recurring issues that could form more nuanced conditions in order to trigger the presumption. These include:

a) *The claimant's ability to articulate a coherent employment narrative;*
b) *References to specific duties performed, locations, and routines;*
c) *Attempts made by the claimant to obtain documentation or serve production notices;*
d) *The conduct of the defendant, particularly where they issue mere denials without affirmative rebuttals;*
e) *The vulnerability and socio-economic status of the claimant, which often correlates with limited access to written proof.*

[164] Dworkin R, Judicial Discretion' 60 The Journal of Philosophy, 21, 1963, 636.
[165] See David P, Stuesser L, *The law of evidence*, 5 ed, Irwin Law, Toronto, 2008, 316. (Where the use of flexible guidelines on the practice of judicial discretion may threaten a re-introduction of rigidity that was supposed to be cured).
[166] Segal Z, Ariel L, 'The judicial discretion of justice AHARON BARAK' 47 University of Tulsa, 2 Symposium: Justice Aharon Barak Working Paper Number 2, 2011, 466 https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2823&context=tlr – on 20 December 2024.
[167] Barak A, *Judicial discretion*, Yale University Press, New Haven, 1989, 261.
[168] Dufraimont L, 'Realizing the potential of the principled approach to evidence' 39 *Queen's Law Journal*, 1, 2013, 26.

Judicial discretion, when properly exercised, offers a means through which courts can bridge this gap without undermining the legitimacy or coherence of the legal system. Even where there is a threat to the lack of certainty or the predictability of decisions, it is an acceptable cost when it aims to achieve substantive justice.[169]

[169] Dufraimont L, 'Realizing the potential of the principled approach to evidence' 22.

5. CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

The recommendations set out below are intended to either reform the prevailing legal reasoning adopted by the ELRC and the designated Magistrates' Courts or to address and eliminate evidentiary deficiencies that disadvantage vulnerable employees, particularly those in informal or low-income employment. Accordingly, the first set of recommendations is designed to apply uniformly across both levels of adjudication, in recognition of their shared role in resolving employment disputes and the need for coherence in the development of labour jurisprudence.

5.1 Adopt ILO Recommendation No. 198 on the Employment Relationship

Kenya should adopt and domesticate the ILO Recommendation No. 198 (2006), which provides guidance to states in identifying and addressing disguised or ambiguous employment relationships. The Recommendation encourages member states to develop legal presumptions and clear criteria that help in identifying employment relationships where formal contracts are absent.[170]

5.2 Amend the Employment Act to Enact a Judicial Presumption

The *Employment Act, 2007* can be amended to enact a legal presumption based on judicial discretion where the existence of an employment relationship is in dispute. This recommendation is inspired by similar practices in South Africa under Section 200A of the *Labour Relations Act*,[171] where a rebuttable presumption is established once certain factual indicators are met, and the burden shifts to the employer to prove otherwise. The Ministry of Labour and Social Protection in partnership with the Kenya Law Review Commission ought to formulate the appropriate indicators in the application of this presumption in Kenyan courts.

5.2.1 Proposed Amendment

This study proposes to amend the Act by including an additional provision under Section 8 in Part III on the Employment Relationship.

[170] Preamble, Article 11, *International Labour Organisation, Employment Relationship Recommendation*, (No. 198, 2006).
[171] Section 83, *Basic Conditions of Employment Ac*t (No. 75 of 1997).

Section 8A – Presumption of Employment Relationship

(1) Where a person renders services to another for remuneration or reward, and the existence of an employment relationship is disputed, the court may presume the existence of such a relationship unless the contrary is proved.

(2) In determining whether to apply the presumption under subsection (1), the court shall exercise judicial discretion based on the evidence produced by the claimant and with the understanding that the employer bears the burden of production under Section 10(7) of this Act.

a) the claimant's ability to articulate a coherent employment narrative;

b) references to specific duties performed, work locations, patterns of engagement, and regularity of work;

c) any efforts made by the claimant to obtain employment documentation or to serve production notices on the alleged employer;

d) the conduct and weight of evidence of the alleged employer;

e) the ability of the claimant to obtain evidence within the employer's possession.

(3) Where the court applies the presumption under this section, the burden of proving the non-existence of an employment relationship shall rest with the person denying it, and the employer shall have the responsibility of producing relevant evidence of such a denial, including but not limited to employment contracts, payment records, and other documentation that might prove the non-existence of an employment relationship.

(4) Nothing in this section shall prevent the court from making a determination of the existence of an employment relationship based on other applicable legal principles or statutory definitions.

5.3 <u>Enhance Judicial Training on Evidentiary Evaluation in Labour Cases</u>

The Judiciary Training Institute (JTI) should collaborate with labour law experts to develop judicial education programmes for judicial officers. Judicial officers require capacity building on how to assess non-documentary evidence, especially in cases where informal employees rely on oral testimony to prove the existence of an employment relationship.[172] Enhancing the

[172] See Butool F, Humayun K, 'Impact of judicial training on judicial work culture in district courts: a case study of Uttar Padesh 58 *Journal of the Indian Law Institute*, 2, 2017, 198. Where judicial training was shown to have a direct impact on shaping legal culture and practice by changing and sharpening legal reasoning in the district courts in India.

understanding of the context of informality, labour vulnerability, and socio-economic disparities can help the courts apply evidentiary rules in a way that ensures substantive justice.

5.4 Promote Formalisation through the Unionisation of Informal Workers

Unionisation of informal workers increases the bargaining power of employees through collective bargaining.[173] This enables them to negotiate better contractual terms, including benefits such as social security and health insurance contributions. Negotiation would encourage the documentation of employment terms.[174] It can also provide access to social security and health benefits and help workers demand contracts and better working conditions.

In Kenya, the unionisation of informal workers has been driven by trade unions like Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA), which has actively organised domestic workers, offering legal aid, advocating for the formalisation of employment, and promoting rights awareness.[175] Despite challenges such as employer resistance and informal work structures, unionisation has enhanced protections for vulnerable workers by enabling collective representation, improving working conditions, but most of all, it has increased the access to legal representation and redress mechanisms for informal workers.[176]

5.5 Increase Public Awareness of Labour Rights and the Legal System

Public awareness is critical in protecting informal employees, many of whom are unaware of their rights due to low levels of literacy and limited access to information.[177] The lack of awareness impairs their ability to recognise labour violations or pursue claims.[178] In Kenya, efforts by civil society organisations, trade unions, and the State have aimed to bridge this gap through community

[173] Economic Policy Institute, *Unions are not only good for workers, they're good for communities and for democracy*, 15 December 2021, 3.
[174] Economic Policy Institute, *Unions are not only good for workers, they're good for communities and for democracy*, 4.
[175] https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2823&context=tlr - on 13 October 2024.
[176] Economic Policy Institute, Unions are not only good for workers, they're good for communities and for democracy, 4.
[177] OECD Development Centre, Breaking the vicious circles of informal employment and low-paying work, January 2024, 146.
[178] OECD, Economic Policy Institute, *Unions are not only good for workers, they're good for communities and for democracy*, 7.

outreach, radio programmes, and simplified educational materials.[179] Expanding these initiatives, particularly in local languages and through grassroots networks, remains essential to empower informal workers, enabling them to assert their rights and seek legal redress when violated.

5.6 Conclusion

This study has demonstrated that the current judicial approach to determining the existence of an employment relationship for informal employees is significantly flawed. The strict approach fails to account for evidentiary deficiency caused by systemic and structural inequalities and as a result, applies standard evidentiary rules that unfairly disadvantage claimants. Conversely, the lenient approach grants favourable judgments based on uncontroverted evidence, without substantively assessing the merit of such evidence. This undermines the reliability of judicial decisions and risks encouraging frivolous claims.

It then examined the potential of a rebuttable presumption of employment to correct this imbalance. It assessed models from the EU and South Africa, noting their strength in easing the claimant's burden of production but also their weakness in relying on a pre-existing relationship and proof-intensive indicators.

Due to these shortcomings, the dissertation therefore proposes a discretionary presumption, informed by context and grounded in legal reasoning that acknowledges the impact of evidentiary deficiency. Such a presumption would better harmonise the rights of both parties by shifting the burden of persuasion where necessary, promoting substantive fairness in line with constitutional and labour rights.

[179] See for example Kituo Cha Sheria's Handbook on Labour Law and the rights of workers which is freely accessible. Kituo Cha Sheria, *The Kenyan worker and the law: An information booklet on labour law*, September 2009.

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