

**AN ANALYSIS OF UBER DRIVERS' EMPLOYMENT
STATUS IN ACCORDANCE WITH THE KENYAN LABOUR LAW**

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Declaration

I, IDA WANGARI WAMBAA, 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: 29/5/18

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

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Dedication

I dedicate this paper to all those innovative minds of the 21st Century who have over turned established legal principles on their heads and inspired us all to reach up even higher.

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Abstract

This dissertation is an analysis of the Employment Status of Uber Drivers according to Kenyan Labour Law. The dissertation seeks to answer the question of whether the Kenyan Labour Law is sufficient in safeguarding the labour rights of Uber Drivers in Kenya as anticipated under Article 41 of the Constitution of Kenya. It further seeks to find out if the classification of the employment status in Kenya should be broadened to accommodate the reality of Uber Drivers Labour relationship with Uber. In conducting the study, case law is used to understand the current relationship between Uber and the drivers. After analyzing the relationship, it becomes apparent that the Kenyan Labour Law is not sufficiently established to properly categorize Uber drivers and needs to be developed further. Having understood the relationship, a comparative analysis is conducted with the United Kingdom who seems to have settled the matter. The study proposes that legislators need to embark on creating protections for Uber drivers and other workers of companies who find themselves in a similar predicament.

List of Acronyms

ERelA	Employment Relations Act (1999)
LRA	Labour Relations Act
S.A.	South Africa
U.K.	United Kingdom
U.S.	United States of America

CHAPTER 1: INTRODUCTION

1.1 Preamble

This dissertation seeks to carry out an in depth analysis of the relationship between Uber and Uber drivers in order to determine their employment status in accordance with Kenyan law. The Uber Company is not incorporated in Kenya but operates within Kenya's jurisdiction;¹ as such it is subject to Kenyan law. The paper examines the Kenyan Constitution, the Employment Act of Kenya, the Labour Relations Act of Kenya, and all other related Kenyan legislation. It seeks to determine whether Uber Drivers in Kenya are properly classified and whether their classification safeguards labour rights of the drivers as established by law.

1.1.1 Background

Uber Technologies Incorporated is an American worldwide transportation network company headquartered in San Francisco, California. It was founded as Uber Cab but dropped the "Cab" and is now solely referred to as "Uber". The application which has been launched in over 70 countries and over 500 cities across the world was founded by Travis Kalanick and Garrett Camp in 2009.² Uber Technologies Incorporated is the parent company with several subsidiaries located in various countries around the world. One of these subsidiaries is Uber B.V. a company incorporated in the Netherlands.³ It is a wholly owned indirect subsidiary of Uber Technologies. Uber B.V. has license to the Uber user application and the Uber Partner application, and makes this software available to users outside the United States and Mainland China.⁴ The company develops, markets and operates the Uber application. The Uber application works to provide taxi services to people at an affordable price. The application works by allowing consumers with smartphones to submit a trip request which the software program then automatically sends to an

¹ <https://www.uber.com/legal/terms/ke/> on 22nd January 2018. This is the version of the terms last updated on 4th December 2017. Uber B.V., Located in Mr. Treublaan 7, 1097 DP, Amsterdam, the Netherlands, registered at the Amsterdam Chamber of Commerce under number 56317441.

² <https://www.uber.com/en-KE/our-story/> on January 23 2017.

³ <https://www.uber.com/legal/terms/ke/> on 22nd January 2018. This is the version of the terms last updated on 4th December 2017. Uber B.V., Located in Mr. Treublaan 7, 1097 DP, Amsterdam, the Netherlands, registered at the Amsterdam Chamber of Commerce under number 56317441.

⁴ Uber B.V. v Federal Commission of Taxation, [2017], FC, 110.

Uber driver nearest to the consumer alerting the driver of the location of the consumer.⁵ The Uber drivers are individuals who have to meet certain requirements so as to qualify as Uber drivers. The first and most important of which is that the drivers must become Uber Partners. This is done by applying to the Uber Partners application and becoming a member. The drivers can do this personally or be hired to drive for a person who is registered as an Uber partner. The Partners must also provide the vehicles to be used and the vehicles must not be branded. Uber does not own any of the vehicles used.⁶ Uber has local subsidiaries located in each of the countries it operates in. These subsidiaries act as the contact point between the drivers and Uber. In January 2015, the online company, Uber was launched in Nairobi and later Mombasa and Thika.⁷

1.1.2 Statement of problem

Uber identifies their drivers as independent contractors however, some drivers believe that they should be regarded as employees. The reason they may want to be regarded as employees is because as an employee one is entitled to certain rights and obligations by an employer such as, being entitled to minimum wage and fair working hours. A Kenyan company recently filed a suit against Uber. This was due to Uber's decision to reduce the fee rate per kilometer. The driver's argue that this was in violation of the contract between Uber and their drivers since they were not consulted.⁸ This is not the first case that has been lodged against the online company. Many suits have been brought against Uber on this question of the employment status of the drivers. It is clear that this is an emerging issue, not only in Kenya but, in other places where Uber has established itself.⁹ This study will seek to find out the appropriate employment status of Uber drivers as per the laws of Kenya. The paper shall delve into the relationship of Uber and their drivers, within the Kenyan context, as it relates to labour law.

⁵ <http://nextjuggernaut.com/blog/how-uber-works-business-model-revenue-uber-insights/> on February 9 2017.

⁶ <https://www.uber.com/en-KE/> on January 23 2017.

⁷ <http://www.techweez.com/2016/06/29/uber-launches-thika-3rd-city-kenya/> on February 9 2017.

⁸ Kanuri Limited & 34 others v Uber Kenya Limited [2017] eKLR.

⁹ <https://www.theguardian.com/technology/2016/jul/19/uber-drivers-court-tribunal-self-employed-uk-employment-law> on November 21 2016.

1.1.3 Purpose of the study

This dissertation seeks to gain a deeper understanding of how internationally run businesses, which traverse various jurisdictions adapt to the laws of the land and how local laws adapt to redefine themselves to include such businesses ruled by technology. This case study of Uber and their drivers serves as such an example.

The working relationship created by Uber is a result of what is called the “shared” economy¹⁰ or “gig” economy¹¹. The labour laws as currently constituted are yet to accommodate the reality of labour relationships people in the twenty first century currently engage in. Thus, the purpose of this study is to highlight the insufficiency of current labour laws and in doing so seeks to provoke law reforms to solve this problem.¹²

1.2 Hypothesis

The Kenyan law should expand so as to protect all dependent workers. This is because the existing classifications as provided by law are limited.

1.3 Research questions

1. Is the Kenyan Labour Law sufficient in safeguarding the labour rights of Uber Drivers in Kenya as anticipated under Article 41 of the Constitution?
2. Should the classification of the employment status in Kenya be expanded to accommodate the reality of Uber Drivers labour relationship with Uber?

¹⁰ <https://www.fastcompany.com/3022028/the-sharing-economy-lacks-a-shared-definition> on 23rd January 2018. The “sharing economy” can be seen as a marketplace that brings together distributed networks of individuals to share and exchange otherwise underutilized assets.

¹¹ <http://www.bbc.com/news/business-38930048> on 23rd January 2018. “Gig” Economy is a labour market characterized by the prevalence of short-term contracts or freelance work, as opposed to permanent jobs.

¹² Moazami Y, UBER in the U.S. and Canada: ‘Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going Beyond the Dichotomous Workers’ Classification?’, Vol 24, *Miami University International & Comparative Law Review* (2017).

1.4 Justification for the study

The Kenyan Labour law recognizes that in determining employment status, one can be either of two types; self-employed (also referred to as an independent contractor or consultant) or employed. The Employment Act of Kenya defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. An employer is defined in the Act as ‘any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company’.¹³ There are several tests that have been created to determine if one is an employee. They include; the control test, the integration test, the mutuality of obligation test and the economic test.¹⁴ Uber and their drivers may seem to satisfy some of the requirements of an employment relationship, of employer- employee, according to some of these tests. However, Uber considers its drivers to be independent contractors, and identifies them as such.¹⁵ The Employment Act does not define an independent contractor; however, Black’s Law Dictionary defines an independent contractor as one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.¹⁶ Therefore, in order for one to determine if a person is employed or an independent contractor they would have to rely on case law.¹⁷

Uber drivers must agree to certain terms and conditions before being allowed to operate under the Uber application.¹⁸ Labour law is based on the freedom to contract since in order for one to provide labour for another there must be some form of agreement on to how it is to be done. But to understand whether the relationship of Uber and their drivers constitutes a *contract of service* or a *contract for services*, a deeper study must be carried out. The reason behind creating this distinction is because as an employer certain rights and obligations are owed and thus must be provided for by law. Also there is the wider question of liability when it comes to torts. Without a proper establishment of what relationship exists, the question of who should or can be held liable

¹³ Section 2, *Employment Act* (CAP 226 of 2007).

¹⁴ Pitt G, ‘Employment Status’, *Employment Law*, Sweet & Maxwell, London, 2004, 65.

¹⁵ https://www.uber.com/af/join/?var=v3r&exp=70117_11 on February 9 2017.

¹⁶ Garner B, Black H, *Black’s Law Dictionary*, 8th Edition, 2004, 2252.

¹⁷ Section 3 (1) (c), *Judicature Act* (no 46 of 2016).

¹⁸ <https://www.uber.com/en-KE/drive/partner-app/> on November 21 2016.

arises. The legal question on taxation also comes to play. The question of who should be taxed and how this is to be done also arises without a clear determination of employment status. Recently there have been strikes by taxi drivers working for Uber as well as other similar ride share applications. This has led to questions of the regulation by the competitions authority as well as those of consumer protection.¹⁹ Therefore, it is apparent that many other questions of law come to play on this matter and demand answers.

1.5 Scope of the study

This study will be limited to analyzing the Kenyan Labour Relations Act as well as the Employment Act of Kenya, in as far as they relate to this topic. It shall also examine lending instruments such as the Constitution of Kenya 2010 and the Judicature Act. Since labour law was developed mainly through case law, there shall be heavy emphasis with respect to tests to distinguish between employees and independent contractors. Furthermore, there shall be a brief examination of how other jurisdictions have handled this problem as it is a fairly novel issue which Kenya is yet to address. Therefore, a comparative analysis between Kenya and the United Kingdom is carried out.

1.6 Research methodology

This research was focused on literary works relating to the subject matter; inclusive of library research and internet searches. This method of research was chosen because the study is an analysis of the Employment status in Kenya, and will therefore look at the law and information provided by the various sources. The comparative analysis was on the Employment Status of Uber Drivers in the U.K. in accordance with their Labour Laws. The choice in using this jurisdiction as an area of study is that the U.K. already has established precedent on this matter.²⁰ Furthermore, Kenya is a commonwealth country. Therefore, the ruling in the U. K. would be of persuasive value in Kenya. It will also act to widen the scope of research on this question since the labour law in the U.K. jurisdiction is slightly different from that of Kenya.

¹⁹ <https://www.nation.co.ke/oped/Opinion/Protect-jobs-trade-greed-at-core-of-taxi-drivers-strike/440808-4099822-jow49u/index.html> on 30 January 2018.

²⁰ Uber v Farrah & Aslam [2016] Employment Tribunal, p.1.

1.7 Literature review

This section shall examine the published literary works and case law which are related to this topic in order to provide a basis for this discussion.

The Constitution of Kenya under Article 41 provides for labour relations,²¹ which in summary gives every person the right to fair labour practices. Furthermore, this article gives every worker the right to fair remuneration, reasonable working conditions, and the right to participate in a strike and be part of a trade union. The former Constitution did not refer to labour relations at all with the only provision for it being a protection against forced labour and slavery.²² Thus before the Constitution of Kenya 2010, the concept of giving fair labour practices to every person was not established. The Employment Act and the Labour Relations Act, which were enacted in 2007, give protection and rights to workers but do not protect all dependent workers as it seems was anticipated by the 2010 Constitution.²³ It is therefore clear that the Employment Act and Labour Relations Act should be amended so as to reflect the newly established protections in the 2010 Constitution.²⁴

Sargeant and *Lewis*²⁵ state that, 'an employment relationship results from the employment contract.' In the book by *Collins*, the author talks of the freedom of contract. This principle was established in order to remove the possibility of workers being treated like commodities thus ensuring their dignity as people. It also allows the parties to regulate their own relationship.²⁶ This text along with a journal article written by *Spector*²⁷ form the basis of the theoretical framework that was used throughout this paper. *Sargeant* and *Lewis* say that an employer can either be an individual, a partnership or a business with limited liability and an employee can either be a natural person or a legal person. These individuals form the parties to the contract. The text then establishes the tests that are used in order to determine if one is an employee. They are the control

²¹ Article 41, *Constitution of Kenya* (2010).

²² Section 73, *Kenya Independence Constitution*, 1963 (as amended in 2008), Repealed.

²³ Lumumba P, Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, 2014, 194-195.

²⁴ Article 41, *Constitution of Kenya* (2010).

²⁵ Sargeant M and Lewis D, 'Employment Relationship', *Employment Law*, Pearson Education Limited, 2010.

²⁶ Collins H, 'Freedom of Contract', *Employment Law*, Clarendon Law Series, 2010, 14-16.

²⁷ Spector H, 'Philosophical Foundations of Labor Law', *Florida State University Law Review* (2006), 1122.

test, integration test, mutuality of obligation test, and economic reality test.²⁸ *Hardy* and *Upex* discuss the same tests, but including the exception that in the event of health and safety, for example if someone is injured, then they shall be treated as an employee even if the contract does not regard them as one.²⁹

In the book by *Pitt*³⁰ there is a very comprehensive chapter on the employment status. This chapter identifies the distinction created between an independent contractor and an employee through the establishment of tests. The chapter also details a category or class of persons identified as 'workers'. These persons although not quite employees, receive legal protection in the United Kingdom as a result of statute.³¹ The category of worker did not have much practical importance until the government indicated in its White Paper, *Fairness at Work*. In it there is a detailed description of the desire to encourage a flexible labour market, but not at the expense of fair minimum standards of protection for those employed on non-standard work contracts. This led to the Secretary of state being given state power to extend all employment protection rights to individuals other than employees.³²

The employment status of individuals is found through the use of tests established come from case law. Case Law is recognized as law in Kenya by virtue of the **Judicature Act** that states that, "*subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.*" This means that all laws before and during the period stated above form part of Kenyan law.³³

Several cases have been argued on the Employment Status of drivers in various jurisdictions around the world. In the *Douglas O'Connor v Uber Technology Incorporated* case, argued in the

²⁸ Sargeant M and Lewis D, 'Employment Relationship', *Employment Law*, Pearson Education Limited, 2010, 20-24.

²⁹ Hardy S and Upex R, 'Employment Status', *Employment Law for Business Students*, Sage Publications, 2006, 17.

³⁰ Pitt G, 'Employment Status', *Employment Law*, Sweet & Maxwell, 2004, 65-88.

³¹ Pitt, 'Employment Status', 71.

³² Section 23, *Employment Relations Act* (1999), England.

³³ Section 3 (1) (c), *Judicature Act* (Act no. 46 of 2016).

California District Court in the U.S.,³⁴ the court establishes that the employment status of drivers is to be determined according to common law tests. The court further goes on to say that the test to be used would be that affirmed by the Supreme Court in the *Borello analysis*³⁵. This analysis is done in two stages: “the putative employer’s right to control work details” and the various “secondary indicia” enumerated by the Supreme Court. As for S.A, in the case of *Uber South Africa Technological Services v NUPSAW and SATAWU*,³⁶ the court applies the; control test, organizational test, economic dependence test and the dominant impression test. Thus when looking at these two cases it will be important to remember the distinction between the tests as applied in Kenya and in these other jurisdictions. The S.A case has since been overturned³⁷ on the basis that the correct party to the suit was Uber B.V. and not Uber S.A, thus the drivers are not employees but independent contractors. However, this change in the decision of the court should not affect the arguments made as they regard the employment relationship of Uber and their drivers, be it Uber B.V or the local subsidiary.

1.8 Definition of term

Uber Driver/ Uber Partner³⁸

According to Uber, the term Uber Driver and Uber Partner are classified into 3 types as follows:

1. Partner only is one who owns one or more vehicles but does not drive them.
2. Partner-driver is both an owner of the vehicle and drives for the application.
3. Driver only is one who does not own the car but drives a vehicle provided by a partner.

For the purposes of this study the terms Uber Partner and Uber Driver shall be used interchangeably to mean a Partner-Driver or a Driver only, as and when appropriate.

³⁴ Douglas O’Connor v Uber Technologies Inc., [2016] C.A. No. 13-03826-EMC (N.D. Cal.).

³⁵ S. G. Borello & Sons, Inc. v. Department of Industrial Relations, [1989], (48 Cal. 3d 342).

³⁶ Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others, [2017] ZACCMA 1.

³⁷ Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others, [2018] Labour Relations Court, Cape Town.

³⁸ Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others, [2017] ZACCMA 1.

CHAPTER 2: FREEDOM OF CONTRACT

2.1 Introduction

Labor law is an offspring of social and political activities of the working class movement. While this movement started its first revolts in seventeenth-century Europe, it was only capable of organizing itself in the nineteenth century when the old laws against combinations were repealed. During this period there was a big debate on the benefit of free labour as opposed to slave labour.³⁹ This chapter shall examine the principle or doctrine of freedom of contract. This is because at the foundation of any labour relationship is the freedom of contract, since this is what creates the relationship.

2.2 Freedom of contract

Freedom is defined as liberty without restriction or interference.⁴⁰ The contract of employment is a consensual relation between two parties involving an exchange, in this case work for pay. The freedom of contract is defined as the ability to enter into whatever type of legally binding agreement one wishes with no legal limitations other than being of legal age to do so.⁴¹ This principle has been discussed with two different views below. This is the view of positive freedom and that of real freedom.⁴²

2.2.1 Positive freedom

Thomas Hobbes defined freedom as liberty without interference. In his theory of freedom, he talks of freedom from interference by the state. He was therefore opposed to the idea of labour laws since they went against one's freedom to contract. Utilitarian's favored Hobbes' view thus **Jeremy Bentham** in his own conceptions of freedom was of the view that all coercive laws especially those in relation to freedom were abrogative of liberty. **Thomas Hill Green** was the main proponent of the theory of moralized conceptions of positive freedom as self-realization and

³⁹ Collins H, 'The contract of Employment', *Employment Law*, Clarendon Law Series, Second Edition, Oxford University Press, New York, 2010, 6.

⁴⁰ Garner B, Black H, *Black's Law Dictionary*, 1958.

⁴¹ Garner B, Black H, *Black's Law Dictionary*, 1959.

⁴² Spector H, 'Philosophical Foundations of Labor Law', Vol 33, *Florida State University Law Review* (2006), 1122.

self-fulfillment. Green defined positive freedom as an individual moral capacity. He was of the view that giving up one's freedom to the state resulted in elevation of the few and degradation of the many. Thus freedom of contract was necessary as it resulted in equal development of the faculties of all. He was of the view that since labour was a commodity so closely related to the person of a man then legal restrictions were needed to ensure that labour contracts would not hinder workers to become free contributors to social good. In terms of the economic argument Green accepts the position that labour is an exchangeable commodity. However, since it is so closely attached to the person of man legal restrictions were needed to secure that labour contracts would not hinder workers to become free contributors to social good. **Isaiah Berlin** criticizes Green's moralized conceptions of positive freedom in that they have the potential for totalitarianism. Berlin was not opposed to welfare liberalism but rather the ideal of positive freedom since it could lead to the abolition of liberty. Thus, noting the danger of positive liberty in authoritarian regimes. He however defends a pluralistic value theory, which warrants labour and social legislation. Berlin therefore is warning against granting discretionary powers to government in the name of positive freedom.⁴³

Marxists and **liberals** defend non-moralized conceptions of positive freedom that would aid in creating labour legislation. Their view was that freedom is either the possession of opportunities, options and powers, or the actual exercise of these powers. **Amartya Sen** argues that well-being should be understood as a set of substantive freedoms or capabilities. Sen avails himself to the concept of functionings, these are the various things a person may have a reason to be or do. This idea is one of a range of options or alternative combinations of functionings that a person can achieve. This argument is however criticized by **Simon Deakin** where he argues that Sen's capability approach provides us with the normative framework or point of reference to compare different proposals. The main criticism however is the capabilities justification of labour law is not a philosophical theory in that it attaches decisive importance to economic consequences. Therefore what is needed is a philosophical approach to labour law capable of showing that, even if a piece of labour legislation is detrimental to welfare or capabilities it still deserves our allegiance.⁴⁴

⁴³ Spector, 'Philosophical Foundations of Labor Law', 1122-1124.

⁴⁴ Spector, 'Philosophical Foundations of Labor Law', 1124-1125.

2.2.2 Real freedom

Real Freedom can be defined as freedom to do ones will. For this to happen one must possess the resources and capacities to carry out this will. The philosophical doctrine about the moral basis of contractual obligation agrees that it is only binding if the parties to the contract are free and engage in the contract voluntarily. Thus the view is that law establishes coercive threats and economic duress as reasons to exclude voluntariness. Contracts begin with an offer and there is a fundamental difference between threats and offers. **Charles Fried** argues that the only way to characterize coercive proposals is by appealing to a moral criterion. Therefore, a proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses. From a legal standpoint labour offers do not violate workers' rights and therefore should be considered non-coercive, but the aspect of economic duress must be considered as well. Political philosopher **Gerald Cohen** was of the view that when an employee has no reasonable or acceptable alternative to taking a hazardous job he would do so. Cohen goes on to say that all job offers under capitalism are coercive because proletarians, considered collectively, are not free to leave the working class and become private owners of capital. Therefore just as slaves proletarians are forced to sell their labour force to capitalists through labour contracts. Therefore, labour law in a capitalist world could have remedial and transitional function to ameliorate the worst effects. That is "proletarian "unfreedom".⁴⁵

Robert Nozick was of the view that choice is an exercise of freedom and workers who take the least attractive jobs do so under coercion. Sometimes labour laws may impose a situation where choice is not possible and one is forced into an employment relationship as a result of the existing laws. For example, in contracts of service the terms are pre-determined and non-compliance could exclude you from getting work thus one is unable to exercise their real freedom. There is a notion of "take it or leave it."⁴⁶ Nozick argues however that although there is a lack of a more attractive alternative due to the narrowing of options from other people legitimately exercising their rights the choice to either work or starve is still voluntary.⁴⁷

⁴⁵ Spector, 'Philosophical Foundations of Labor Law', 1125-1127.

⁴⁶ Spector, 'Philosophical Foundations of Labor Law', 1127.

⁴⁷ Spector, 'Philosophical Foundations of Labor Law', 1127.

Both Fried and Nozick defend a moralized account of coercion, where labour contracts are voluntary even if workers have no other palatable alternatives. Cohen rejects this argument arguing it is counterintuitive. Marxists however need not adopt a neutral, non-moralized definition of coercion to maintain that labour relations are coercive. Private property as a means of production is indefensible, thus if an employer does not have the means the labour offers made to workers without property are coercive. The coerciveness then turns on the underlying theory of moral entitlements one adopts. The Marxian argument that labour contracts are coercive reflects a general indictment of capitalist law. This does not justify labour law but instead abolishes private property and private contracts, thus this general argument of duress is lacking under the general principles of contract. It is not to say that there is no coercion in certain situations.⁴⁸

2.3 Discussion

From the discussion above it is clear that freedom of contract is necessary since it is a basic principle that allows parties to engage so as to assist in their individual benefit. However, from above it is also clear that one party tends to be in a position of power. This party is the employer; as such the state has a duty to intervene so as to provide an employee with certain minimum standards so they do not contract in a way that may be detrimental to their health or human dignity.

The question therefore becomes to what extent should government legislate or regulate on the activities of private individuals in their labour relations. Also, is there a justification to interference in individual's freedom of contract? In addressing the issue in regards to this topic, this dissertation will be focused on a balance. This balance shall be the necessity of the government to protect Kenyan worker's interests weighed against the interests of this company Uber which is a private company allowed to operate and make money within Kenya. To answer this question it will be necessary to see how other jurisdictions have handled this issue and to what extent their actions can be applicable in Kenya.

⁴⁸ Spector, 'Philosophical Foundations of Labor Law', 1127-1128.

2.4 Conclusion

This chapter explains the concept of freedom of contract as the theoretical approach of this dissertation. There are two approaches to freedom. The first is positive freedom which proposes absolute autonomy from the state when contracting. Therefore the proponents of this concept are strongly opposed to the state creating laws that would curtail this freedom. The second approach, real freedom accepts that the state should not impose its will on contracting parties. However, the state is cognizant of the unfair relationship that may exist between some contracting parties and seeks to give them some protection by law.

In discussing this topic it will be necessary to illustrate the need for balance between the duty of government to create and adopt laws that protect and safeguard the rights of individuals, but also allow people the freedom to innovate and create without too much regulation.

CHAPTER 3: EMPLOYMENT RELATIONSHIP AND THE LAW

3.1 Legal Framework

In labour law there are various categories of employment relationships. This chapter shall address the various employment relationships provided for under the Kenyan law. The purpose of this chapter is to provide all the necessary information required for one to correctly classify persons working. This classification comes with certain rights and duties. To fully address the topic of Employment status it will be necessary to look into various legal instruments which include the Constitution of Kenya, the Labour Relations Act, the Employment Act, and the contractual relationship that exists between the parties. This section shall therefore delve into the various legal instruments as well as examine case law to establish the contractual relationship that exist between Uber and their drivers.

3.1.1 Constitution of Kenya

The provision related to labour law is contained in Article 41 of the Constitution of Kenya where it expresses the requirement that every person be given the right to fair Labour practices.⁴⁹ It also grants every worker the right to fair remuneration and reasonable working conditions.⁵⁰ The constitution however, does not provide a definition of who constitutes a “worker” for purposes of protection. Furthermore, legislation on this question is insufficient where it provides every person with the right to fair labour practices but only affords protections to employees. However, it has been said that the ordinary and legal meaning of the word person to include both human persons and corporations should be adopted. As for the term “worker,” some have posit that it should consist of people who are dependent (mostly economically) on the relationship with a particular employer, even when democratic deficits exist.⁵¹

⁴⁹ Article 41 (1), *Constitution of Kenya* (2010).

⁵⁰ Article 41 (2) (a), (b), *Constitution of Kenya* (2010).

⁵¹ Lumumba P, Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, 2014, 194-195.

3.1.2 Labour Relations Act (LRA)

The LRA defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner.⁵² The Act also defines an employer as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and it includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.⁵³ The Act further goes on to define a contract of service as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learner ship.⁵⁴ As for the definition of contract of apprenticeship and learnership, it is a contract where there is an obligation to the employer to take all reasonable steps to ensure that the employee is taught, and acquires the knowledge and skills of that industry, by means of practical training received in the cause of the employee's training and employment. It also includes a provision for formal recognition of the fact that the employee has acquired the knowledge and skills intended to be acquired where the employee has done so.⁵⁵

Within the meaning of the Act the people who are granted rights and protections such as going on strike and the right to enter collective bargaining agreements are employees, apprentices, and indentured learners. That means dependent workers without a contract of service are not protected under this act in terms of the rights established and the protections guaranteed.

3.1.3 Employment Act

The Employment Act defines an employee and an employer in the same way as the LRA above.⁵⁶ The Act (differing slightly with the LRA) defines a contract of service as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learner ship but does not

⁵² Section 2, *Labour Relations Act* (No. 14 of 2007).

⁵³ Section 2, *Labour Relations Act* (No. 14 of 2007).

⁵⁴ Section 2, *Labour Relations Act* (No. 14 of 2007).

⁵⁵ Section 2, *Labour Relations Act* (No. 14 of 2007).

⁵⁶ Section 2, *Employment Act* (CAP 226 of 2007).

include a foreign contract of service. The Act also defines a casual employee as a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.⁵⁷

This means that under this Act the only people with the rights of protection of wages and other protections granted under the Act are those persons defined within the Act. These are therefore the casual employees, employees and apprentices.

3.2 The Employment status

In Kenya, people are either categorized as employees or independent contractors. This section shall go into all the various employment relationships and how they are established.

3.2.1 Employee

The Employment Act defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner.⁵⁸ The Act also defines an employer as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and it includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.⁵⁹ The definition of the terms alone, have in past instances, proved insufficient for the courts to establish whether one was employed or not. This is what led courts to come up with various tests. These tests are used to determine if one is an employee or not. The bulk of this chapter shall be in relation to the tests and the preceding case law that has been used to determine and identify the various employment relationships.

3.2.1.1 Tests

As stated above, these tests were established through the development of case law. And as case law developed so did the tests. It is important to look at the reasoning behind these tests and apply

⁵⁷ Section 2, *Employment Act* (CAP 226 of 2007).

⁵⁸ Section 2, *Employment Act* (CAP 226 of 2007).

⁵⁹ Section 2, *Employment Act* (CAP 226 of 2007).

them with an understanding of their development. The necessity of establishing these tests was due to the misclassification of people. Classification of people is a matter of fact that can be established through evidence. MacKenna J in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*⁶⁰ stated that a contract of service exists if three conditions are fulfilled:

- a) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
- b) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;
- c) The other provisions of the contract are consistent with its being a contract of service.

This case established the mutuality of obligation test and the control test. It also gave rise to the other tests which shall be explained below. An important factor that must be viewed when relating these tests to the contracts in order for one to establish a relationship is that the contract must bear a relationship with reality. Thus a sham could be found where the parties to a contract have a common intention that the document or one of its provisions is not intended to create the legal rights which they set out, whether or not there is a joint intention to deceive third parties or the court as in the case of *Autoclenz Ltd v Belcher*⁶¹. It is important to note that the courts and tribunals will be reviewing these tests on a case by case basis. Thus no one standard can be applied across the board.

3.2.1.1.1 Mutuality of obligation

This test provides that for there to be a contract of services; there must be mutuality of obligation. This means one must demonstrate an obligation on one party to provide work and similarly an obligation on the other party to perform the work. The *locus classicus* case on this test would be *O'Kelly v Trust House case*⁶² where the regular casual staff wanted to claim for unfair termination, the however, needed to show that a

⁶⁰ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2 QB 497.

⁶¹ *Autoclenz Ltd v Belcher* (2011) IRLR 820.

⁶² *O'Kelly v Trust House Forte plc* (1983) IRLR 369 CA.

contract of service existed. The court found that although other tests were seen to be satisfied the lack of mutuality of obligation showed a lack of employment relationship. In the case of *Carmichael and Lesse v National Power*⁶³, the phrase 'irreducible minimum of mutual obligation' was coined. This meant that there was a minimum standard of providing work and performing the work that needed to be established before one would be considered as an employee. The case of *Nethermere Limited v Gardiner*⁶⁴ provides for exceptions where a part-time home worker that had been provided with work for a number of years and had performed it was held to have created this mutual obligation. The obligation upon the employer is to provide work when it is available, not consistently as in the case of *Wilson v Circular Distributors Limited*⁶⁵. Thus a person who entered into a contract and was told that they would only be paid when work was available was still engaged in a contract of service.

3.2.1.1.2 Integration

This test rose due to the inadequacy of the control test. As a result of the level of skill of the individual, the nature of the work makes control by an employer limited. Lord Denning stated that, "*One feature that seems to run through the instance is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.*"⁶⁶ Cooke J in the same case expresses this as; "*the work is done by him in business on his own account.*"

3.2.1.1.3 Control

The *locus classicus* of this case would be the *Walker v Crystal Palace case*⁶⁷. This case involved a professional footballer who played exclusively for a club, in return they

⁶³ *Carmichael and Lesse v National Power Plc* (2002) IRIR 43 HL.

⁶⁴ *Nethermere (St Neots) Ltd v Gardiner* (1984) ICR 612 CA.

⁶⁵ *Wilson v Circular Distributors Ltd* (2006) 1RLR 38.

⁶⁶ *Stevenson, Jordan & Harrison v Mc Donald and Evans*(1952) 1 TLR 101.

⁶⁷ *Walker v The Crystal Palace Football Club Ltd* (1910) 1 KB 87.

would give him a certain fee. The club stated that there was no contract of service due to the skill of the footballer. However, the court rejected this argument due to the fact that the player was under the clubs control during training and certain conduct off the field was expected of him. Like the test of mutuality of obligation above this test too has irreducible minimum legal requirements for the existence of a contract of employment as set out in the case of *Mixed Concrete case*⁶⁸. The key question is whether the employer has the contractual right to control rather than whether in practice the person has day to day control over his own work.

3.2.1.1.4 Economic reality test and

This test was considered in the case of *Market Investigations Limited V Minister of Social Security*⁶⁹ where the court considered not only the amount of control exercised over a part-time worker but also whether she was in business on her own account. In this case they established that other factors were needed to be considered; other tests looked at to establish whether she had a contract of service. The case of *Bernard Wanjoi Muriuki v Kirinyaga Water and Sanitation Company Ltd and another*⁷⁰ was an unfair dismissal that saw the court consider several tests. In applying the economic reality test it stated that, “it looks at economic dependence of the employee thus filling the gap created under the control test. It takes into account the nature of the highly specialized workforce.”

3.2.1.1.5 Multiple test

This test is a culmination of the several tests mentioned above, using the tests that are relevant to the situation. They are used to establish if there is a contract of service. In the *Bernard Wanjoi case*⁷¹ the court stated that the multiple test combines both the control test and the economic reality test.

⁶⁸ Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) 2 QB 497.

⁶⁹ Market Investigations Limited v Minister of Social Security (1968) 3 All ER 732.

⁷⁰ Bernard Wanjoi Muriuki v Kirinyaga Water and Sanitation Company Ltd and another (2012) eKLR.

⁷¹ Bernard Wanjoi Muriuki v Kirinyaga Water and Sanitation Company Ltd and another (2012) eKLR.

3.2.2 Independent contractor

The act does not define an independent contractor; however, it is described in legal dictionaries. An independent contractor is defined as one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.⁷² This term describes the person who is asked to do or perform an action or job who maintains the control over the job. In order for a distinction to be created several tests were established by the courts as discussed above. Thus if one does not fit under the tests set out, their employment status will be that of an independent contractor.

3.2.3 Other Category: Workers

This is a category created in the United Kingdom, where people who would qualify as independent contractors but are dependent on an employer, are given statutory protection similar to that of employees. The following category known as a worker is not provided for or defined within the Kenyan legal system or the labour laws of Kenya. However, it will be important to introduce it at this stage in order for there to be a comprehensive analysis of the labour relationships that exist, especially in respect to this topic. A more detailed analysis shall be done in the upcoming chapter.⁷³

3.3 Relationship between Uber and their drivers

This section shall use case law to assist one in understanding the relationship that exists between Uber and their drivers. It is important to note that Uber Drivers are classified as independent contractors according to Uber.⁷⁴ In the case of *Uber South Africa Technological Services v NUPSAW and SATAWU*,⁷⁵ which related to unfair dismissal, Uber argued reasons to justify why

⁷² Garner B, Black H, *Black's Law Dictionary*, 2252.

⁷³ Pitt, 'Employment Status', 71.

⁷⁴ <https://www.uber.com/legal/terms/ke/> on 24th January 2018. The company provides a big disclaimer in the Uber – User contract that states, “UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER AND THAT ALL SUCH TRANSPORTATION OR LOGISTICS SERVICES ARE PROVIDED BY INDEPENDENT THIRD PARTY CONTRACTORS WHO ARE **NOT EMPLOYED BY UBER** OR ANY OF ITS AFFILIATES.”

⁷⁵ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* (2017) ZACCMA 1.

the Drivers were independent contractors and not employees thus the action brought against them was unfounded. The court heard arguments and related them to the tests. Below the Kenyan tests are applied to the facts in the South African case and the *O'Conner Case*⁷⁶ that was trying to establish whether Uber drivers have been misclassified.

For **Mutuality of Obligation**, Uber argued that the drivers had no legal obligation to drive. However the claimants in this case argued that there existed a requirement to personally perform one's tasks. However, In the *O'Conner case*⁷⁷ Uber argued they did not impose the amount of time the work was to be performed. The court in *Uber South Africa*⁷⁸ found that the drivers render personal services. Where they were to the work personally with the necessary personal details, licenses and applications. Thus they are required to drive in their own name and could not outsource. This implies that although Uber could not require a driver to drive, if the driver chose to drive, Uber had certain expectations of how they were to perform their duties. Upon performance of their duties, the drivers expected to receive payment for services rendered.

When applying the **control test** Uber argued that they had no right to instruct a driver to drive his vehicle, the driver has complete autonomy over the passengers to transport and where to drive. Furthermore, the drivers where free to take on other jobs including those with direct competitors. Uber also controls business conditions such as pricing and the number of drivers in specific locations, like the airport. The claimants countered this by stating that Uber was the one that issued receipts to riders and did not contract independent drivers. The drivers argued that they were controlled their conduct through a rating system by the customer and policies regarding cancellation rates. Uber justified the control has help or tips, but this did not seem like a suggestion when Uber could deactivate their drivers accounts and prevent them from earning an income. The relationship established would terminate upon the drivers death. The relationship was seen to be indefinite as long as the driver complied with the requirements of Uber. The court stated that according to its LRA⁷⁹ and the Code of Good practice⁸⁰ control could be seen by the one with the

⁷⁶ Douglas O'Connor v Uber Technologies Inc., [2016] C.A.

⁷⁷ Douglas O'Connor v Uber Technologies Inc., [2016] C.A.

⁷⁸ Uber South Africa Technological Services v NUPSAW and SATAWU and Others, [2017].

⁷⁹ Section 213, *Labour Relations Act* (Act No.66 of 1995).

⁸⁰ Section 37, 'Code of Good Practice: Who is an employee?', *Labour Relations Act* (Act No.66 of 1995).

power to terminate the working relationship or the extent to which that power existed. In the case of *O'Connor v. Uber Technologies*⁸¹ the court in considering the level of control considered that Uber had no control over driver's schedules or routes. The drivers were also allowed to obtain employment with third parties. It did however have pay set unilaterally by Uber and had a rating system that was used as a "disciplinary measure." Uber also has the right to terminate the relationship without cause. They also looked at the skill required and found no special skills needed and minimal supervision given, if any. Some of these factors showed the degree of control the company had over the drivers.

In applying the **integration test**, Uber averred that the drivers were required to supply their own vehicles and to cover all expenses. The court held that although the application was a tool to request and provide lifts, it is the drivers who provided the users with the actual service they want. Thus they were seen to be an essential part of the organization. In *O'Conner*⁸² the court looked at whether supplies were provided. In the U.S Uber did provide smartphones but all other costs were covered by the partners.

As for the **economic reality**, Uber claimed that all risk of profit or loss borne by the partner as an independent contractor. The court held that relying on the other tests Uber was infinitely more powerful juristic person and the drivers were at Uber's mercy. Where they were not running their own transportation business. Therefore, it seems that some drivers did rely on Uber as their source of income. In the *O'Connor case*⁸³ the courts addressed the question of whether the drivers were involved in a distinct business. They distinguished between drivers subcontracted by partners and those partnering with Uber themselves, where the latter were involved in distinct business. However, this was subject to how economically dependent the drivers were on Uber.

From the above facts, the court recognized the blurred relationship with who is employed and who is not. With formal full-time employment being decreased and part-time employment being more prevalent. In recognizing this, the question of who is labour law meant to protect arose. The court

⁸¹Douglas O'Connor v Uber Technologies Inc., [2016] C.A. This case involves misclassification of drivers. The case is currently on appeal, however it was denied to be heard on the question of arbitrability.

⁸² Douglas O'Connor v Uber Technologies Inc., [2016] C.A

⁸³ Douglas O'Connor v Uber Technologies Inc., [2016] C.A

considered the question of the consequences a decision of declaring Uber Driver's would have to the economic development of the business. But in considering this question found that the protection of rights under the Constitution and the LRA were more important to safeguard. The court found that no single test was decisive however, control and supervision repeatedly emerged as the most helpful determinants. One of the tests found to have emerged in South Africa is the "Reality of the relationship test" as established by the LRA⁸⁴ and the Code of Good Practice⁸⁵. Thus this test required a relationship to be determined on the basis of the real relationship between the parties.

One of the main points brought out in this case was the argument Uber made that each rider contracted with each driver for each trip. The court found this claim to be fiction and not based on the real reality of the relationship. Where riders contracted Uber to supply them with a driver, they had no prior knowledge of who would arrive. As for the drivers they have no control over fares or the destination until the rider is picked up. Furthermore, the driver is given minimal knowledge of the rider's personal details and is prohibited from further contact in terms of the service agreement. This case saw the claimants being declared employees in South Africa.⁸⁶ Their employer was held to be Uber S.A (the subsidiary local company), since they are the ones who appointed them and assist them to obtain necessary licenses, approve the vehicles they drive, and control the drivers. Uber B.V was held to be merely a contract and technology provider as well as the collector of payment. Furthermore the court rejected the argument that it is the Partner that employed the driver's, where they were held to merely provide the vehicles, much like providing a lease.

3.4 Discussion

Having looked at the law in Kenya and the relevant tests and calling to mind the discussion on what the courts have pronounced on the relationship that exists between Uber and their drivers it is necessary to bring these facts closer home. Using and understanding the principle of freedom of

⁸⁴ Section 213, *Labour Relations Act*, (Act No. 66 of 1995).

⁸⁵ 'Code of Good Practice: Who is an employee?', *Labour Relations Act* (Act No.66 of 1995).

⁸⁶<https://www.iafrikan.com/2018/01/23/uber-south-africa-labour-court/> on 25th January 2018. The case has since been overturned. Where the Status of Drivers in South Africa are independent contractors. However, the legal basis for overturning the decision was based on the fact that the claimants should have made Uber B.V. the party to the suit and not Uber South Africa, their local subsidiary. I still however believe the arguments made herein were persuasive, well-reasoned and raise valid points.

contract it would seem that the people driving using the Uber Partner Application should be classified as per the contract, independent contractors. This according to the definition used of independent contractors is one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.⁸⁷ However, the main issue is, ‘has Uber misclassified its drivers as per the law?’ An Employee is defined as one who is employed for salaries and wages. Thus the definition’s given are insufficient to tell us whether the drivers are employed or not. Since Uber drivers could fit into either category. In the *Bernard Wanjohi case*⁸⁸ which was a case that was addressing the issue of unfair dismissal, the court stated that, “It is important in looking at the employment relationship among parties to this dispute to have in mind the statutory definitions of employer and employee, and also to recognize that there do not always satisfy the criteria for establishing the nature of the relationship, particularly given the fact that labour has become flexible, and businesses have had to change their formations, in a fast changing technological world.⁸⁹

The relationship as discussed above uses principles set out in various cases and applies those principles to the tests used in Kenya. Therefore it would seem that Uber does indeed have a level of control over the drivers in that they set up the terms on which drivers will drive, set the prices and can terminate drivers who do not adhere to set standards. But it is equally true that the drivers are accorded a great deal of freedom and flexibility. On the question of mutuality of obligation it would seem that when the drivers do accept a ride then Uber requires them to carry it out and the drivers expect to be compensated for their service. On the test of integration, it does seem apparent that although the drivers provide the tools of trade and provide expenses, without the drivers Uber would not be a ride sharing application. Finally, on the economic reality, it varies from one driver to another. This is therefore dependent on whether or not the driver considers Uber their main source of income. Therefore, one would say that this can only be established on a case by case basis.

⁸⁷ Garner B, Black H, *Black’s Law Dictionary*, 2252.

⁸⁸ *Bernard Wanjoi Muriuki v Kirinyaga Water and Santitaion Company Ltd and another* [2012] eKLR.

⁸⁹ *Bernard Wanjoi Muriuki v Kirinyaga Water and Santitaion Company Ltd and another* [2012] eKLR, 15.

So it seems that some drivers (depending on the circumstance) could be regarded as employees according to the considerations set out in the tests. However, unlike South Africa Kenya's legislation is lacking in determining what type of persons the Constitution and the Acts seek to protect. This ambiguity would make a claim against Uber for protections under either the Employment Act or the LRA difficult. South Africa's LRA,⁹⁰ provides that any person applying the act should do so in tandem with applying the provisions of the Constitution. The purpose of the Act is to advance economic development, social justice, labour, peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are to give effect to and regulate labour rights as provided for in their constitution.⁹¹ This was the weight that the CCMA used to declare Uber Drivers employees in the case.⁹²

3.5 Conclusion

From the above it is clear that there are steps created to identify the status of a working person and these classifications could exist in many instances. Where one is not explicitly employed in the conventional sense as anticipated in this act. There are however situations where when applying the tests they seem to be in favour of one party. In the conventional employment status classifications, employees are protected by statute. Disputes between independent contractors will and can be resolved as civil claims with regard to the contract. However, we can see from the above that the contract between the drivers and Uber is not exactly reflective of the current reality. That is, the party contracting for the work to be done is in a position of power and uses this position against the person performing the work. I believe Article 41⁹³ aimed to protect this individual, as is the case in the relationship between Uber and their drivers. It will therefore be necessary to use the information gathered in this chapter and consider it when conducting the comparative analysis as applied in the U.K.

⁹⁰ Section 3, *Constitution of the Republic of South Africa* (1996).

⁹¹ Section 23, *Constitution of the Republic of South Africa* (1996).

⁹² *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU and Others* [2017] ZACCMA 1.

⁹³ *Constitution of Kenya*, 2010.

CHAPTER 4: COMPARATIVE ANALYSIS

4.1 Introduction

The previous chapter looks into the contractual relationship between Uber and their partners. In doing so several issues emerge. A comparative analysis of the United Kingdom shall be done so as to see how the question was dealt with in that jurisdiction. The choice of the United Kingdom was guided by the fact that the United Kingdom has influenced a significant part of Kenyan Labour law as well as that of many commonwealth countries like S.A. and the United States, whose cases are discussed briefly in the previous chapter. As is discussed in previous chapters especially when discussing the tests to determine if one is an employee, most of the tests as applied in Kenya came from decided cases in the U.K. and have developed over time. Also the United Kingdom has established precedence on this very matter of whether drivers should be regarded as employees or independent contractors. All this would perhaps have an impact on how Kenya would rule on this matter if ever faced with the challenge of doing so.

4.2 United Kingdom

The key case that shall be studied in this comparative analysis not only states the law on employment status in the United Kingdom but gives the current position of the drivers as per the law. This case is *Uber v Farrah & Aslam [2016]*⁹⁴, which can be said to be the locus classicus as set in the United Kingdom. The paragraph below carry out an in depth analysis of the case and the relevant law in the United Kingdom. This includes the issues, existing law, arguments given and findings of the court. It will also be necessary to look at how this law may apply to Kenya, if at all. However, it is worth noting that this decision is currently under appeal and the arguments laid out in this case are non-exhaustive.

4.2.1 Legislation

As mentioned above they are two categories of workers; employed and independent contractors. This is also the case in the United Kingdom. However in the U.K., they have The Employment

⁹⁴ *Uber v Farrah & Aslam [2016]* Employment Tribunal, p.1.

Relations Act⁹⁵, the Working Time Regulations⁹⁶, and the National Minimum Wage Act⁹⁷ which all apply to a special category of persons known as “workers”. These persons are granted statutory protections typically given to employees such as minimum wage and a set working hour cap.⁹⁸ The Employment Relations Act⁹⁹ defines a “worker” as an individual who has entered into or works under a contract of employment or any other contract, whether oral or in writing and implied or express, whereby the individual undertakes to do or perform personally any work or service for another party to the contract whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual. Thus, as the contract is being formed it must be reflective of this provision.¹⁰⁰ A worker has some of the protections afforded to employees. The legislation was created to allow for a flexible labour market.¹⁰¹ In the case of *Cotter vs. Lyft*¹⁰², the trial judge proposes that perhaps the current legislation should be expanded to allow for other models. Such as the approach taken in the United Kingdom and parts of Europe. This statement therefore indicates that the call for reforms to labor law are necessary.

4.2.2 Aslam, Farrar and others vs. Uber Case

This case was brought to court by several drivers in the United Kingdom operating in London against Uber B.V and Uber ULL, which is the Local subsidiary of Uber registered in London. The main contention is that the drivers were of the belief that Uber had not properly classified them, for they could not be held to be independent contractors. One of the first arguments made was that a contractual relationship exists between Uber and their drivers, and another between Uber and the passengers, but none between the drivers and the passengers. According to the terms and conditions agreed to by both customers and partners, there apparently exists a contract between customers and partners, however this is not true. This the court saw this to be far from the reality of the relationship. The argument that Uber works for the drivers is also untrue.

⁹⁵ *Employment Relations Act* (1999), England.

⁹⁶ *Working Time Regulations* (1998), England.

⁹⁷ *National Minimum Wage Act* (1998), England.

⁹⁸ Pitt, ‘Employment Status’, 71-72.

⁹⁹ *Employment Relations Act* (1996) England.

¹⁰⁰ Section 230(3), *Employment Relations Act* (1996).

¹⁰¹ White Paper, *Fairness at Work* (1998) Cm. 3698.

¹⁰² *Cotter v Lyft Inc.* [2014], C.A. 3:13-cv-04065-YGR.

The **integration test** was applied when the court held the view that where the drivers provide their skilled labour, and the organization delivers services and earns profits. The drivers are seen to be an integral part of the organization and they do not market themselves. The allegation that Uber markets a product range but does not offer transportation services is far from the reality. As was decided in the case of *O'Connor vs. Uber*,¹⁰³ the North Carolina District court rejected the assertion that Uber was merely a technology company and affirmed that it did indeed provide transportation services.

The court also considered the **economic reality test**. Where Uber was claiming to offer the partners a business opportunity. The court was of the view that, “the idea that Uber offers multiple small businesses an opportunity to operate also does not seem to conform to the reality. In that majority of the Uber drivers in London, operate in their individual capacity. Furthermore, the drivers are in no position to grow their business in that Uber fixes the prices and the drivers have no opportunity to negotiate with customers.” The court also found the local subsidiary company ULL to be the employer in that they were the point of contact, they were the ones to recruit, instruct, discipline and dismiss the drivers, and finally they were the one’s tasked with determining disputes. This behavior seemed to be indicative of the control Uber had over the drivers. Thus making a case under the **control test**.

The drivers were found to fall squarely within the provisions of the 1996 Act,¹⁰⁴ and thus were said to provide work ‘for’ Uber. Where the contract was a dependent work relationship contract. The court further stated that it can disregard contracting parties depending on whether or not those terms were a “sham”, where parties misrepresent the true nature of their obligations. Thus, where the terms do not correspond with reality the court may intervene, but not go as far as rewriting the contract, but merely disregarding such provisions. The court also stated that “armies of lawyers contriving documents in their clients’ interests which simply misrepresent the true rights and obligations on both sides”. Thus the court found that the current model does not achieve the aim of not employing their drivers. The court also established the scope of when an Uber driver was considered to be working and thus entitled to protection. This is when the application was switched

¹⁰³ Douglas O’Connor v Uber Technologies Inc., [2016] C.A.

¹⁰⁴ Section 230 (3) (b), *Employment Relations Act* (1996).

on, one was within the territory licensed to use the application, and finally one was ready and willing to accept the trips.

4.4 Discussion

Thus in considering what has been discussed in the previous chapters, as well as the current United Kingdom position it is clear to see that in reaching their judgment the court took great reliance of the nature of the relationship not as purported by Uber on paper but rather in reality. This was put well in the *Uber South Africa Technological Services v. NUPSAW and SATAWU*¹⁰⁵ discussed above. In the *Bernard Wanjohi* case which was an unfair dismissal issue, it was said that, “It is recognized however that the nature of work is shifting away from physical production towards the service sector. They are changes taking place in the structure of the industry, and in the workforce, changes that affect how work is performed. Labour law must always respond to the changes in the organizational relationship, otherwise the traditional employment law concepts shall not fit as the legal framework of a technological society”.¹⁰⁶ “As the workplace changed and business formations changed it became important to look at the nature of the work...the mandate they set out to fulfill.”¹⁰⁷ In the case of *Cotter vs. Lyft*,¹⁰⁸ a California judge stated that, “The quondam this question has posed is like being asked to put a square peg into round wholes. The judge states that the current classification does not enable one to deal with the 21st Century issues. Where although the employment model protects the workers the independent contractor model offers them the necessary flexibility.”

Having reviewed the position in the United Kingdom it is apparent that the U.K affords their workers more protections than the simple structure set forth within Kenya’s own legal system. Where a class of workers that do not fall succinctly within the category of employee are left unprotected by the law, as is the case in Kenya.

¹⁰⁵ *Uber South Africa Technological Services v NUPSAW and SATAWU and others*, [2017], 41.

¹⁰⁶ *Bernard Wanjoi Muriuki v Kirinyaga Water and Santitaion Company Ltd and another* [2012] eKLR, 14.

¹⁰⁷ *Bernard Wanjoi Muriuki v Kirinyaga Water and Santitaion Company Ltd and another* [2012] eKLR, 15.

¹⁰⁸ <https://www.reuters.com/article/lyft-drivers/update-3-uber-lyft-rebuffed-in-bids-to-deem-drivers-independent-contractors-idUSL1N0WD2ME20150312> on 25th January 2018. *Cotter v Lyft Inc.* [2014], C.A. This was a class action suit against a ride share app., like Uber, where the drivers for this app were claiming that they have been misclassified. The case was settled out of court and thus did not proceed to trial.

4.5 Conclusion

The key take away is that the main aspect the court should consider is the reality on the ground regarding the nature of the relationship. The basis of this is that the drivers operating under Uber for they are being denied necessary protections as dependent workers. It would therefore be in Kenya's interest to look at other jurisdictions and adjust the law accordingly so as to protect the drivers that may be affected by the legal lacuna.

Therefore, it seems Kenya is at a crossroad, where either classification may not be in the drivers or Uber's best interest. Taking the words from the *Bernard Wanjohi case*¹⁰⁹ "Labour law must always respond to the changes in the organizational relationship..." It would seem that it is time for Kenya's legislation to catch up to today's labour realities and update itself to the constitutionally granted protections.

¹⁰⁹ *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Ltd and another* [2012] eKLR, 14.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter intends to sum up all the arguments made in the previous chapters and propose the way forward for both the legislature and companies who have relationships with working people.

5.2 Restating the initial problem

The initial problem was that Uber identifies their drivers as independent contractors however, it is believed by some that Uber drivers should be regarded as employees. As discussed above the business model of Uber has been called into question, with many finding that according to the law Uber drivers should be regarded as employees.

5.3 Research findings

This study set out to answer two research questions:

1. Is the Kenyan Labour Law sufficient in safeguarding the labour rights of Uber Drivers in Kenya as anticipated under Article 41 of the constitution?
2. Should the classification of the employment status in Kenya be broadened to accommodate the reality of Uber Drivers Labour relationship with Uber?

In analyzing the relationship that exists between Uber drivers we find that the legislation needs to be updated to conform to the 2010 Constitution. Where the law should clearly illustrate what kind of “persons” deserve protection as has been done in South Africa’s LRA

On the second question it is clear that the current labour laws have not caught up with existing labour relationships of today. It seems logical that the law should try and create a new class of workers who are dependent and in doing so, protect the newly flexible labour relationship that exist today.

5.4 Conclusion

The dispute as to whether Uber Drivers are employees or independent contractors is not one merely of law, but one of law and fact. In that although the contract between Uber and their partners explicitly states that it is not a relationship of employment the conduct of the organization must conform to the reality. Calling to mind that the theoretical framework of this paper is the freedom to contract, it will be necessary to address the question of law and fact, with the reasoning as to what degree of intervention of the state is allowable. Allowable in the sense that it does not interfere with the freedom of the parties to engage in a contract on their own terms.

I find myself having to agree with the judge in the *Lyft case*.¹¹⁰ The current law as currently constituted is insufficient to deal with the challenges posed by having to classify the drivers as either employees or independent contractors. The reality is the flexible method of Uber is beneficial to drivers and is a major creator of job opportunities for anyone and everyone with the basic skill of being able to drive. Furthermore, I am cognizant of the economic implications of classifying Uber drivers as employees where this may prove to be to expensive for the company. However, there is a need for certain protections that people working should be granted. My preposition is therefore that Kenya should adopt a model similar to that of the United Kingdom and create a new category of persons known as “workers” who have their own act that grants them certain basic protections, such as minimum wage and the like. Furthermore, this may perhaps address the challenged faced by drivers in Kenya as in the Kanuri case, where a minimum wage would protect their interests thus insuring that the fee cannot be less than a certain amount. Such steps would be instrumental in addressing not only this question but others that may arise as a direct result of it.

For those who believe the preposition that the matter should be legislated on is an attempt by the judiciary to escape giving an answer, it is important to remember that the judiciary does not create law. Therefore, where a lacuna exists the law makers should create law and solve the issue. My belief is that Kenya should not wait for the point that these issues become a reality but rather be progressive and create law and protection not only for Uber drivers and all those using electronic

¹¹⁰ Cotter v Lyft Inc. [2014], C.A.

digital taxi applications, but the class of workers that the law is yet to fully create regulations for as of yet.

5.5 Recommendations

- a) Certain terms need to be defined in the Labour Relations Act. These terms will breathe life into this provision of Article 41 of the constitution. Where workers shall be divided into two separate categories. A dependent worker and an independent worker. The dependent worker will be one who is seen as meriting protection, while an independent contractor is seen as one who engages in business on his own account and who does not necessarily warrant protection.¹¹¹
- b) The next term that will warrant a definition within the act is what fair labour practices are.¹¹² Where the constitution provides for every person's right to fair labour practice, it should qualify this and provide protection to all dependent workers. It would be prudent for legislation to be created that would offer guidance as what constitutes unfair labour practices.¹¹³
- c) Once these definitions are put in place separate legislation can be created to include workers who are in the conventional sense not employees, but are dependent. This legislation will be necessary for the "gig-economy"¹¹⁴ that is constantly emerging. This gig economy is a labour market characterized by the prevalence of short-term contracts or freelance work, as opposed to permanent jobs. This type of work allows one to get paid according to the "gigs" they do; be it courier services, ride hailing driver, food delivery or even video producers. It is somewhat a relationship that pays on commission without the formal employment. As such protections such as those of minimum wage - which are provided for in the constitution as the right to fair remuneration, reasonable working conditions- which include provisions relating to dismissal and the right to fair hearing. Other constitutional provisions such as the freedom to associate and collective bargaining should also to play a role in this act that is to cater to the needs of these dependent workers.

¹¹¹ Hashwani v Jivraj [2011] ICR 1004 UKSC, Lorde Clarke

¹¹² George Onyango Akuti v G4S Security Services Kenya Ltd (2013) eKLR, 26.

¹¹³ Section 186 (2), *South Africa's Labour Relations Act, 2002*.

¹¹⁴ <http://www.bbc.com/news/business-38930048> on January 3, 2018.

- d) As for Uber and other ride sharing applications, as they create their business models they need to understand that their contractual relationships need to reflect of the reality on the ground. This means that if they do not wish for their drivers to be employees the practice of the drivers and the contract should make this relationship clear.

5.6 Recommendations for further research

Due to the wide and varied nature of this topic it was impossible to cover all areas relating to this topic. However, there are some topics that would pose as helpful research areas if addressed. One of which is an understanding of the business model and structure of Uber. Although discussed, I do not believe it was done exhaustively. The purpose of this would be possibly to help regulators and companies identify how to tax digital companies that operate in various jurisdictions and for the companies to structure themselves in a way that allows compliance but is also economical.

Another study could be the economic impact of regarding drivers as employees. This is because although people's rights must be safeguarded, it is also necessary not to create impossible standards of compliance that would stifle innovation. Finally, it would be interesting for a study to be done on both the gig or shared economy and the impact these types of relationships would have on the labour laws.

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