



**TRAINING MODULE ON THE LABOUR RIGHTS
LEGAL FRAMEWORK IN KENYA**

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KENYA HUMAN RIGHTS COMMISSION

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FOREWORD

This Training Module provides a detailed analysis of the legal framework upon which labour laws in Kenya are enshrined. It is a review of the Employment Act (2007), Labour Relations Act (2007), Labour Institutions Act (2007), Occupational Safety & Health Act (2007), Work Injury Benefits Act (2007) and the Industrial Court Act (2011).

It is a useful read for all workers who desire to understand their labour rights and obligations, their employers' rights and obligations and the available avenues for recourse in the event that these rights are trampled upon. Employers and Human Resource practitioners will find it equally valuable and an easy point of reference as it condenses all the five labour Acts of Parliament into one publication. It is produced to consolidate the gains made under the Labour Rights Programme supported over the years by the Hivos Foundation. The overall aim of producing this Training Module is to continuously build a critical mass of empowered workers who understand their entitlements and attendant obligations and are therefore able to defend and claim those rights within the workplace.

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THE EMPLOYMENT ACT, 2007

BASIC MINIMUM TERMS & CONDITIONS OF EMPLOYMENT

This Act provides for, among others, basic rights and duties in employment, employer-employee relationship, protection of wages, termination and dismissal and protection of children from child labour.

EMPLOYER-EMPLOYEE RELATIONSHIP

This relationship is defined primarily by the fact that the employer has work to be done while the employee has labour to offer (for a fee/wage). This relationship implicitly obligates the employee to work as long as the contractual relationship is on and the employer has provided work. Further, the employee is expected to obey any lawful and reasonable orders issued by the employer. It is also the duty of the employee to give proper and faithful service at all times.

The employer on the other hand is legally bound to pay their employees' wages for work done, provide a safe working environment and proper tools and protective equipment whenever necessary.

The employer must not, without reasonable and proper cause, conduct themselves in a manner calculated, or likely, to destroy, or seriously damage the relationship of trust and confidence with the employee. This duty of good faith obliges employers to ensure that employees are treated with dignity at work, and to deal with their complaints fairly and seriously.

EMPLOYMENT ACT AS READ WITH REGULATION OF WAGES (AGRICULTURAL) ORDER

Section 5: Non-discrimination

Prohibits discrimination by employers directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status

An employer shall pay his employees **equal remuneration** for work of **equal value**.

NB: This section also provides that an employer shall pay his employees equal remuneration for work of equal value. In some countries, this principle is provided in the Constitution. This is not express in our Constitution but Article 27 (3) is clear that in providing that women and men have the right to equal treatment, including the right to equal opportunities in political, **economic**, cultural and social spheres. Sub-article 4 also prohibits discrimination on the basis of "gender".

Section 6: Prohibition of Sexual Harassment

This section prohibits sexual harassment and provides various scenarios for sexual harassment. According to the Act, an employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker-

(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express-

(i) promise of preferential treatment in employment;

(ii) threat of detrimental treatment in employment or

(iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;

(c) uses visual material of a sexual nature; or

(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

An employer who employs **twenty or more** employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.

Section 10: Mandatory details in every contract of service

Every written contract of service must state:

- a) the name, age, permanent address and sex of the employee;
- b) the name of the employer;
- c) the job description of the employment;
- d) the date of commencement of the employment;
- e) the form and duration of the contract;
- f) the place of work;
- g) the hours of work;
- h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
- i) the intervals at which remuneration is paid; and
- j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period

PART V:

Section 26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, **then such favourable terms and conditions of service shall apply.**

Section 27. Hours of work

(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

NOTE:

- Paragraph 5 of the Regulation of Wages (Agricultural) Order provides that the normal hours of work in respect of stockmen, herdsmen and watchmen shall be **sixty hours** of work spread over six days of the week.
- It further states that the normal hours of work in respect of all workers except those mentioned above shall be **forty-six hours** of work spread over six days of the week.
- The Order further provides for payment of overtime at **one and a half times** the basic hourly rate in respect of any time worked in excess of the normal hours of work; and twice the basic hourly rate in respect of any time worked on a rest day.
- Where an employee, works on a holiday he or she shall be paid at twice the basic hourly rate (Paragraph 7).
- Acting allowance (Paragraph 14): Where an employee is required to act in a grade higher than that in which he is normally employed, he shall work at his normal rate of pay for the first ten days and thereafter at the basic minimum wage for that higher grade, and shall also be entitled to any other benefits or privileges attached to that higher grade.

Section 28: Annual leave

(1) An employee shall be entitled—

- a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
- b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

(2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under subsection (1)(a) into different parts to be taken at different intervals.

(3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave-earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.

(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.

(5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.

NB:

Annual leave is additional to all public holidays, weekly rest days and any sick leave taken by an employee.

Refund of fare (Paragraph 13): Where an employee proceeds on annual leave he shall be entitled to a refund by the employer of the bus fare or third-class rail fare to and from his home in respect of himself and his wife; except that an employee shall not qualify for a refund under this paragraph unless he produces receipts to indicate that the fares in respect of which a refund is sought have been paid.

Section 29. Maternity leave

- (1) A female employee shall be entitled to three months maternity leave with full pay.
- (2) On expiry of a female employee's maternity leave as provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.
- (3) Where—
 - (a) the maternity leave has been extended with the consent of the employer; or
 - (b) immediately on expiry of maternity leave before resuming her duties a female employee proceeds on sick leave or with the consent of the employer on annual leave; compassionate leave; or any other leave,

the three months maternity leave under subsection (1) shall be deemed to expire on the last day of such extended leave.
- (4) A female employee shall only be entitled to the rights mentioned in subsections (1), (2) and (3) if she gives not less than seven days' notice in advance or a shorter period as may be reasonable in the circumstances of her intention to proceed on maternity leave on a specific date and to return to work thereafter.
- (5) The notice referred to in subsection (4) shall be in writing.
- (6) A female employee who seeks to exercise any of the rights mentioned in this section shall, if required by the employer, produce a certificate as to her medical condition from a qualified medical practitioner or midwife.
- (7) No female employee shall forfeit her annual leave entitlement under section 28 on account of having taken her maternity leave.
- (8) A male employee shall be entitled to **two weeks paternity leave** with full pay.

Section 30: Sick leave

- (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than **seven days with full pay and thereafter to sick leave of seven days with half pay**, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

(3) For the purposes of subsections (1) and (2) “full pay” includes wages at the basic rate excluding deductions from the wages allowable under section 19.

(4) For purposes of subsection (1), the twelve continuous months of service shall be deemed to commence on the date of the employment of the employee and on such subsequent anniversary dates of employment.

(5) An employer shall have the right to place all his employees on an annual cycle of an anniversary date falling on a day to be determined by the employer.

NOTE:

Provisions of the Regulation of Wages (General) Order on sick leave are relevant here. Paragraph 10 of the Order provides that “After one month’s continuous service with an employer an employee shall be entitled to sick leave with full pay up to a maximum period of **thirty days**, and thereafter to sick leave with **half pay up to a maximum period of thirty days**, in each period of twelve months’ continuous service.”

A type of leave not covered by the Act but covered by the Regulations of Wages (Agricultural) Order at Paragraph 9 is **compassionate leave**. It is granted at the discretion of the employer but should not be unreasonably denied. It may also be treated as paid annual leave.

Section 31: Housing

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

- a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
- b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

(3) The Minister may, on the recommendation of the Board by notice in the *Gazette*, exclude the application of this section to a category of employees and such category of employees shall be dealt with as shall be specified in the notice.

Section 32: Water

An employer shall provide a sufficient supply of wholesome water for the use of his employees at the place of employment and, as the case may be, within a reasonable distance of any housing accommodation provided for the employees by the employer.

Section 33: Food

- (1) An employer shall, where the provision of food has been expressly agreed to in or at the time of entering into a contract of service, ensure that an employee is properly fed and supplied with sufficient and proper cooking utensils and means of cooking, at the employer's expense.
- (2) The provisions of this section shall not be deemed to impose upon an employer any liability in respect of an employee during the time the employee is absent from his place of employment without the permission of the employer or without other lawful excuse.

Section 34: Medical attention

- (1) Subject to subsection (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.
- (2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.
- (3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.
- (4) This section shall not apply where—
- (a) the illness or injury to the employee was contracted during a period when the employee was absent from his employment without lawful cause or excuse;
 - (b) the illness or injury is proved to have been self-inflicted;
 - (c) medical treatment is provided free of charge by the Government or under any insurance scheme established under any written law which covers the employee.

NOTE:

Employment (Medical Treatment) Rules, 1977 are also relevant. Among other issues, the Rules require provision of a first aid kit, provision of a nurse where a hundred or more employees are in employment and provision of medicines.

PART VI – TERMINATION AND DISMISSAL

Section 35: Termination notice

- (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
- a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;
 - b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

(4) Nothing in this section affects the right—

- a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
- b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to **service pay** for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund.

NOTE:

Paragraph 19 of the Regulation of Wages (Agricultural) Order requires that in the case of an employee who has completed more than five years' continuous service with the employer, **forty-five days' notice** shall be given by either party in writing or otherwise by the payment by either party, in lieu of notice, of not less than thirty days' wage. For those who have worked for a lesser period, a **thirty days' notice** is required.

The Act does not elaborate on disciplinary procedures. The applicable law therefore is Paragraph 18 of the Order. It requires the employee be warned in writing. The first and second warnings shall be entered in the employee's employment record and the shop steward of his union shall be informed accordingly. The second warning shall be copied to the branch secretary of the union. If an employee who has already received two warnings commits a third breach of contract he shall be liable to summary dismissal. Where an employee completes **two hundred and ninety-two working days** from the date of the second warning without further unsatisfactory work or conduct or breach of contract any warning entered in his employment record shall be cancelled.

Section 36: Payment in lieu of notice

Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

Section 37: Conversion of causal employment to term contract

- (1) Notwithstanding any provisions of this Act, where a casual employee—
- a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - a) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
- (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
- (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

Section 38: Waiver of notice by employer

Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise.

Section 39: Contract expiring on a journey may be extended

If the period expressed in a contract of service expires, or if an employee seeks to terminate a contract where no agreement is expressed respecting its duration while the employee is engaged on a journey, the employer may, for the purpose of the completion of the journey, extend the period of service for a sufficient period, but in any case not exceeding one month, to enable the employee to complete the journey.

Section 40: Termination on account of redundancy

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
- a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee

is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

- b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

Section 41: Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Section 42: Termination of probationary contracts

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

Section 43: Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 44: Summary dismissal

(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

- a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
- c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
- e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

- f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Section 45: Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - b) the conduct and capability of the employee up to the date of termination;
 - c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee.

NOTE:

The High Court on 18th May 2012 in the case of **Samuel G. Momanyi vs The Hon. Attorney General and SDV Transami Kenya Ltd**¹ declared that Section 45(3) of the Employment Act 2007 is inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1). However, the Attorney General is yet to trigger the amendment procedure to

¹ Petition 341 of 2011

comply with this declaration. Thus workers who are unaware of this judgement may mistakenly stay away from the courts whereas the present legal position is that the barring section of the law is now unconstitutional.

Section 46: Reasons for termination or discipline

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

- a) a female employee's pregnancy, or any reason connected with her pregnancy;
- b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;
- c) an employee's membership or proposed membership of a trade union;
- d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
- e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
- f) an employee's refusal or proposed refusal to join or withdraw from a trade union;
- g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;
- h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or
- i) an employee's participation in a lawful strike.

Section 47: Complaint of summary dismissal and unfair termination

(1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

(2) A labour officer who is presented with a claim under this section shall, after affording every opportunity to both the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section 49.

(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.

(4) The right of an employee to make a complaint under this section shall be in addition to any right an employee may enjoy under a collective agreement.

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

(6) No employee whose services have been terminated or who has been summarily dismissed during a probationary contract shall make a complaint under this section.

Section 48: Representation

In any complaint made under section 47, no advocate shall represent a party in the proceedings before a labour officer, but any party may be assisted or represented by an official of a trade union or an official of an employers' organisation notwithstanding the fact that the official is an advocate.

Section 49: Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

- a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
- b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
- c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

- a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or
- b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

(4) A labour officer shall, in deciding whether to recommend the remedies in subsections (1) and (3), take into account any or all of the following—

- a) the wishes of the employee;
- b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c) the practicability of recommending reinstatement or re-engagement;
- d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e) the employee's length of service with the employer;

- f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h) the value of any severance payable by law;
- i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j) any expenses reasonably incurred by the employee as a consequence of the termination;
- k) any conduct of the employee which to any extent caused or contributed to the termination;
- l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m) any compensation, including *ex gratia* payment, in respect of termination of employment paid by the employer and received by the employee.

Section 50: Courts to be guided

In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

Section 51: Certificate of service

(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

(2) A certificate of service issued under subsection (1) shall contain—

- (a) the name of the employer and his postal address;
- (b) the name of the employee;
- (c) the date when employment of the employee commenced;
- (d) the nature and usual place of employment of the employee;
- (e) the date when the employment of the employee ceased; and
- (f) such other particulars as may be prescribed.

(3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.

(4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

THE LABOUR RELATIONS ACT, 2007

LABOUR RELATIONS ACT

It is an Act of Parliament to consolidate the law relating to trade unions and trade disputes. It also provides for the registration, regulation, management and democratization of trade unions and employers' organizations. It safeguards the right of association, promotion of effective collective bargaining, orderly and expeditious dispute settlement while ensuring social justice and economic development. (See the preamble of the Act).

The Act is divided into the following parts:

- Part 1- Preliminary part which provides for definition of terms.
- Part 2- Freedom of association.
- Part 3- Establishment of the registration of trade unions and employers' organizations.
- Part 4- Officials and members of Trade Unions and Employers' organizations.
- Part 5- Property, funds and accounts of trade unions, employers' organizations and federations.
- Part 6- Trade union agency fees and employer's organization fees.
- Part 7- Recognition of trade unions and collective agreements.
- Part 8- Dispute Resolution.
- Part 9- Adjudication of disputes.
- Part 10- Strikes and lock outs.
- Part 11- Miscellaneous provisions.

The Act finds a strong base on the *Constitution 2010* which provides for labour relations in *Article 41*. The *Constitution* provides that every person has the right to fair labour practices. Thus every worker has a right to; fair remuneration, reasonable working conditions, the right to join and participate in the activities of a trade union which includes participating in a strike.

The employer on the other hand has the right to form and join an employers' organization and to participate in the activities and programmes of an employers' organization.

Trade unions and employers' organizations have the right to determine and manage their respective activities. The trade unions and employers' organizations can form and join federations. Additionally they can engage in collective bargaining on behalf of its members.

Part 2: Freedom of association

In line with *Article 36 of the Constitution [2010]* every person (including an employee) has the freedom of association and this includes joining, forming and participating in the activities of an association. Joining an association is voluntary and no one is to be compelled to join an association of any kind. Employees are therefore allowed to form, join and participate in the lawful activities of a trade union and a federation. They also have a right to leave the trade union. This right includes the right to participate in and contest in an election to hold office in the union.

Every employee seeking employment is further protected against discrimination and victimization on the basis of his or her past or present association with a union or federation. Neither should they be compelled to join an association as a condition to be employed. (See s. 4, 5, 6 and 7 of the Act)

- Employers rights of association

Employers have a right to form, join and participate in the lawful activities of an employers' organization and federation. Representatives of the members have a right to participate in and contest in elections or to be appointed to office of the organization. An employer who is a juristic person (not a natural person i.e. a company) participates through its representative. An employer will also not be victimized or discriminated for participating in the past or present lawful activities of an employers' organization neither shall they be compelled to join any organization so as to be conferred with an advantage.

Section 8: Rights and duties of trade unions, employers' organizations and federations

The employers' organizations, trade unions and federations herein referred collectively as 'associations' have the right to determine their constitution and plan activities such as elections. The associations also have a right to affiliate with international workers' organizations and participate in activities and in this regard can contribute or receive funding from these international organizations.

In case of a dispute with regard to the above, any party can refer the matter to the Cabinet Secretary for labour herein referred to as the 'CS' who is to appoint a conciliator to resolve the dispute. A dispute will be referred to the Employment and Labour Relations Court 'ELRC' (formerly known as the Industrial Court) in case it is unresolved through conciliation. The burden of proof in case of a dispute is on a balance of probabilities (to mean each party will prove its case and the court to determine who is more convincing).

Part 3: Establishment of the registration of trade unions and employers' organizations

For the associations to be established they have to obtain a certificate from the Registrar of Trade Unions herein referred to as the 'Registrar' which will enable the recruitment of members. The application for the certificate is to be signed by 2 persons (promoters of the establishment of the union), specify the name and contain any relevant information. The certificate is issued in 30 days but it may be denied if the application is defective or the name is similar or sufficiently similar to that of an existing union. After the certificate is issued the parties have 6 months to apply for registration of the union or employers' organization. The certificate can be withdrawn in case of fraud, misrepresentation, mistake or an illegal act by the applicants.

Section 14: Requirements for registering of a trade union

- ✓ Must have a name not similar to that of an existing union or one that can cause confusion.
- ✓ Must have a constitution.
- ✓ Has an office and postal address in Kenya.
- ✓ No other union is registered that sufficiently represents the interests being sought to be represented and in case of an association of unions no other registered federation represents a whole or substantial proportion of the unions eligible for membership. (The Registrar is to give notice to existing unions which to him or her appear to represent similar interests and this is through a national newspaper and the unions concerned can raise objections if any).
- ✓ Only persons specified in the constitution qualify for membership.
- ✓ Decision to register the union is made by not less than 50 members.

- ✓ Independence of the union.
- ✓ The union is meant to pursue activities of the union only.

The Registrar may register a union of persons working in more than one sector if he or she is convinced that it represents the sectoral interests of the employees.

Section 15: Requirements for registering an employers' organization

- ✓ Must have a name not similar to that of an existing organization or that causes confusion.
- ✓ Must have a constitution.
- ✓ Must have an office and postal address.
- ✓ No other organization represents sufficiently the interests sought to be represented or in the case of an association of organizations represents sufficiently a substantial portion of the unions eligible for membership. (The Registrar to notify any existing organizations that he or she thinks represents the same interests through a notice in a newspaper and the notified organizations can raise objections if any).
- ✓ Constitution to specify eligible members.
- ✓ The decision for registration is made by four or more than four members.
- ✓ Is independent.
- ✓ The organization to pursue its specified activities only.

Section 16: Registration of a federation of trade unions

- ✓ Must have a name not similar to an existing federation or that causes confusion.
- ✓ Must have a constitution that complies with the law.
- ✓ Must have an office and postal address.
- ✓ Have registered unions as members.
- ✓ The decision for registration is made by the representatives of at least three unions with the mandate of their executive boards.
- ✓ Is independent.

Section 17: Registration of a federation of employers' associations

- ✓ Must have a name not similar to an existing federation or that causes confusion.
- ✓ Must have a constitution.
- ✓ Must have an office and postal address.
- ✓ No other federation represents sufficiently a substantial portion of the organizations eligible for membership. (The Registrar to notify any existing federations that he or she thinks

represents the same interests through a notice in a newspaper and the notified federations can raise objections if any).

- ✓ The decision for registration is made by representatives of at least three members.
- ✓ Is independent.

The application for registration of a trade union, employers' organization or federation is made by filling a form in the schedule of the Act. The application is accompanied by the prescribed fee, a certified copy of the constitution, minutes and the attendance register of the meeting when it was decided that the 'association' be established. The application is signed by 7 members. The Registrar can require further information and may require rectification and amendments including the name.

If satisfied that the union meets the requirements set and after consultation with the board, the Registrar shall register the union by entering the name in the register and thereafter issue a certificate of registration. In case the Registrar refuses to register, he or she shall give reasons for refusal in writing in the prescribed form set out in the schedule of the Act. Once registered the union, organization or federation is regarded as a body corporate (It has a legal personality and can sue or be sued). A union, organization or federation shall commence operation only after registration.

The associations have to apply before opening branches. This is made 30 days after formation of the branch and must specify the address and officials of the branch. A notice has to be given if a branch is dissolved.

Section 26: Amalgamation

The parties willing to amalgamate must give notice by filling out 'form G' as set out in the schedule to the Act. Amalgamation of associations may occur through a vote by secret ballot where more than 50% of those entitled to vote have voted and those in favour of the amalgamation are more than 20% of those who voted against. The Registrar has to be satisfied that the amalgamated union represents the respective sectoral interests, it is only after being satisfied that he or she will issue a certificate. The Registrar is then to remove the name of the respective unions from the register and insert the amalgamated union. Upon amalgamation then the amalgamated body takes up the rights and liabilities of the respective unions.

Section 27: Change of name or constitution of trade union, employers' organization or federation

The associations can change or replace the constitutions or the name. The parties have to apply to the Registrar for approval to change within 14 days of resolution for change. This is by filling a prescribed form in the schedule of the Act, having the resolution containing details of change and a certificate signed by the secretary indicating the resolution was passed in accordance with the constitution and rules.

The Registrar is to put up a notice of at least 21 days in the Kenya gazette and in 3 daily newspapers inviting objections if any and in case any is brought up the Registrar shall investigate and he may refer the complaint to the Employment and Labour Relations Court, refuse the amendments or make any order he or she deems fit.

If satisfied the Registrar shall issue a certificate of change of name or constitution. A change of name does not affect the rights, duties and obligations of the party changing. In case the Registrar refuses the change he shall give written notice and reasons for refusal.

Section 28: Cancellation or suspension of registration

The Registrar can suspend or cancel the registration of an association if it is dissolved or has ceased to exist. The registration can also be cancelled or suspended in case of fraud, representation, registration by mistake, unlawful or an illegal act. It may also be because the association has not conducted elections in accordance with the Act or is not independent. The cancellation or suspension will only take place after a two-month notice and the affected party has been heard and appealed the decision if unsatisfied. The suspension or cancellation is by written reasons from the Registrar. A party can appeal to the Employment and Labour Relations Court within 30 days of the decision of the Registrar.

Section 29: Notice of dissolution

An association can give a notice to the Registrar for dissolution which is submitted within 14 days of resolution to dissolve. The notice shall be signed by an authorized representative and 7 members (for a trade union), 3 members for an employers' organization or federation. A certificate is issued for dissolution and it is registered.

Part 4: Officials of trade unions and employers' organizations

The officials of a trade union or an employers' organization are persons who are engaged or employed in the sector of which the union or organization has been registered. An official shall only be an official of one association though an official of a trade union may also be an official of a federation to which the trade union is affiliated. As for an employers' organization its general secretary, CEO or association secretary maybe a person not engaged or employed in the sector. A person may be an official of more than one employers' organization. Notably if the union or employers' organization wants to fill an office by a person not engaged in the sector they can apply to the Registrar. A person who has been convicted for an offence of fraud or dishonesty cannot be elected or appointed as an official.

Section 31 provides that an employee who is minor of 16 years and above can be a member of a trade union and can participate in all the activities of the union unless the constitution provides otherwise. They however cannot be members of the executive or trustees of the union.

Section 33: Voting.

For a member of a trade union to vote they must be persons employed in the sector while for an employers' organization the person must have a physical address or an office. A member of either must not have subscription arrears for more than 13 weeks.

Section 34: Elections of officials shall be conducted in accordance with the registered constitutions of the associations. Elections are to be held by secret ballot at least once in every 5 years. Elections shall not be conducted in a discriminatory manner. A notice of 14 days shall be given to the Registrar. The Registrar can therefore issue directions to ensure the elections are conducted in accordance with the respective constitutions of the association and the law. (s. 34)

Section 35: Notification of officials

A notice exhibiting the names of officials and their titles are to be displayed at the registered office of the union, employers' organization and federation. The names of officials are also to be displayed at the branches.

Part 5: Property, funds and accounts of trade unions, employers' organizations and federations

Section 36: Trustees

The constitutions of the associations are to provide for the appointment or election of at least three trustees, who shall be in office at all times. An official of an association may be a trustee. A person holding the office of a trustee should not have been convicted of fraud or dishonesty.

Section 37, 38: Property vests in the trustees to be used for the benefit of the association. The association would need the authorization of a Cabinet Secretary for labour for the transfer of the association property to some other person and for other purpose than that of the association.

- **Use of funds**

Funds of an association may be used for; payment of salaries to officials, administrative expenses, prosecuting or defending a suit for it or its member with regard to employment issues, conduct of trade disputes, payment of compensation of members for loss arising out of trade disputes, allowances to members, payment of subscription fees to a federation and on any activity directed by a gazette notice from the Cabinet Secretary.

In case a member is fined (i.e by a court), the funds of the association may not be used to pay for a penalty imposed on a member unless the court order is directed to the association.

The ELRC can give an injunction (order to stop) unauthorized or unlawful expenditure by an association on application by the Registrar or five members of the association. In case the court decides to cancel the registration of the association in such a circumstance, money of the association is vested on a public trustee for distribution in accordance with its rules.

The treasurer is to render accounts at least once a year or at such times specified in the rules of the association. It can also be required that he or she renders account by the members in a resolution or if required by the Registrar. An account shall show all the incoming funds and expenses and is to be audited and be accompanied by a statutory declaration.

The association shall submit annual returns to the Registrar for the year ending 31st December of the preceded year and shall specify donations received and the assets and liabilities of the union. The annual return is to be accompanied by the auditor's report. Changes i.e. of officials are to be forwarded to the Registrar. Failure to submit the return is an offence. The same should be availed to a member on request free of charge.

Section 39-47: Inspection

An official, member or registrar can inspect accounts or records. Obstructing the Registrar from inspecting accounts or records of an association amounts to an offence. The ELRC can order a person who holds an association property in violation of its rules to deliver it back and such a member can be suspended.

Part 6: Trade union dues, agency fees and employers' organization fees

Trade union dues are regular subscriptions paid by member to a trade union as a condition for membership. A trade union with more than 5 employees belonging to it is to request the Cabinet Secretary to issue an order directing the employer to deduct union dues from wages and pay to a specified account of the trade union. Once the order is issued the employer shall within 30 days of receiving a notice from the union deduct the amounts from the employee's wages. The employer is not to deduct in a case where the employee has resigned from the union and has notified the employer. The notices take effect in the following month.

Section 48-49: A trade union that has concluded a collective bargaining agreement can request the Cabinet Secretary to issue an order to deduct agency fees for a unionisable employee who is not part of the trade union. This request shall specify the amount and persons whose amounts are to be deducted. It will also specify the account the dues are to be paid to. This provision also applies to a member who has resigned from the union.

Section 50: Guideline on the deductions

The deductions are to be paid within 10 days after deduction to the association's account. The CS can issue a notice to suspend or cancel an order to pay if it was obtained through fraud or misrepresentation. It is also not allowed if the money is not being used for the allowed purpose or when it is not paid to the designated account. The employee cannot claim the deducted amounts from the employer unless the employer overpaid the amounts. An association shall acknowledge receipt of money paid to it within 14 days. Any employer or person who contravenes this provision is guilty of an offence.

The CS is to make regulations for the deduction of other levies other than trade union dues for other activities approved by the Cabinet Secretary. A member of an association is not prevented from making a direct payment of any dues authorized by the association's constitution. For employers' organizations they are to provide in the constitution how its members are to pay levies.

Part 7: Recognition of trade unions and collective agreement

Section 54: An employer and employers' organization is to recognize a union for the purpose of collective bargaining if the trade union represents the simple majority of unionisable employees employed by the employer or group of employers. The employer is to then conclude a written recognition agreement setting the terms upon which the employer or employers' organization recognizes a trade union. An employer may apply to the CS to terminate a recognition agreement. In case there is a dispute with regard to a recognition agreement it may be referred to conciliation failure of which it may escalate to the ELRC.

Section 55: Election of trade union representatives

A recognition agreement is to provide for members of the trade union to elect union representatives according to their constitution. The elected member is to represent members in the grievance and disciplinary hearings at the work place and perform any other functions in the recognition agreement.

- **Access by trade union to employers premises**

Section 56: A recognition agreement to allow the trade union officials or representative reasonable access to members for the lawful activities of the union for; recruitment of members, holding meetings outside working hours and conducting ballots in accordance with the constitution. An employer may however issue reasonable conditions as to the rights of access in the interest of safety or undue disruption of operations. Officials and representatives may be required to identify themselves.

Section 57, 58, 59: Collective agreement

An employer, group of employers or employers' organization that has recognized a trade union shall conclude a collective agreement with the trade union, setting out the terms and conditions of service for all unionisable employees covered in the recognition agreement. For the negotiations the employer shall give all necessary information other than that which is legally privileged, restricted by law, may cause harm to employer or employee, is private information of the employee unless authorized. In the event that there is a dispute on the information required the same may be referred to the CS for conciliation. If conciliation fails any party can refer the matter to the ELRC. Information is only to be disclosed to a party to the negotiations.

Parties may refer matters in the collective agreement to conciliation or arbitration. In case of arbitration the arbitrator's award is final and binding. It can only be appealed on points of law. It is to otherwise be enforced by the ELRC. An application of review of the arbitrator's award shall be made to the ELRC within 30 days of the award.

A collective agreement binds parties for the period of the agreement. This binds past and present members. It is incorporated into the contract of the employment of the employees. It is in writing and signed by all the parties (CEO of the employee/ employers' organization or national secretary and the secretary general of the trade union). It is registered at the ELRC.

Section 60: Registration of a collective agreement

It is registered within 14 days of coming into force. It is the employer to submit it for registration failure of which the trade union can submit it. The ELRC can ask parties to supply further information or make oral presentations on it. The court will register the agreement as it is presented or with modifications. The court will not register an agreement that contravenes the law or guidelines concerning wages and salaries issued by the CS. In the event the court refuses to register the agreement, it has to give written reasons.

For the public sector where there is no collective agreement the CS is to come up with regulations for terms and conditions of employment which are to apply as a collective agreement.

Section 62-72: Part 8: Dispute resolution

A trade dispute may be reported to the CS by a trade union or an employers' organization or its representative. It is to be written and the party shall serve (and the CS is to be satisfied this has happened) all those who are involved. A dispute concerning the termination of employees shall be reported within 90 days of dismissal or any longer period allowed by the CS. For redundancy the report may be made as soon the notice has been served to the employee.

A party served in the dispute is to file a reply within 14 days of being served. An interested party may also file a statement within 14 days of receiving a copy of the referral. The CS is to appoint conciliators within 21 days unless the parties have not exhausted the dispute resolution in the collective agreement or if it is forbidden by law or the collective agreement. The CS may require further information before appointing conciliators. The CS may also refuse to appoint a conciliator, in such a case he/she will give reasons.

A conciliator is to be a public servant or a person drawn from a panel of conciliators or from the conciliation and mediation commission. If the CS is to appoint a committee he shall appoint the chairperson and the secretary and an even number from a list submitted by the parties. The conciliator can summon witnesses, require production of a document or question any party in the conciliation. The CS is to further pay witness fee to a witness who appears before a conciliator. If parties agree at the conciliation it shall be written, signed and lodged with the CS. A dispute is

deemed not to be solved by a conciliator when he issues a certificate to this effect or if it takes more than 30 days after appointment of conciliator and the dispute is unresolved. The CS can appoint a conciliator for the sake of public interest even if the matter has not been referred to him. The CS can further appoint a committee of inquiry to investigate. The powers of the CS can be delegated to the commissioner for labour or chief industrial relations officer.

Part 9: Adjudication of disputes

Section 73-75: Employment and Labour Relations Court (ELRC)

If a trade dispute is not solved by conciliation, an authorized representative of a party to the dispute may refer it to the ELRC. In case where the aggrieved party can call for a strike or lockout then it is the aggrieved party that can make the referral. An urgent case may be referred to the ELRC that touches on recognition of a trade union, a redundancy (where there is no notice from employer or the matter has already been referred to conciliation and the dispute remains unresolved). The Arbitration Act does not apply to the ELRC to mean at this juncture the court will listen and determine the trade dispute

Part 10: Strikes and lock outs

Section 76: Protected strike and lock out

- This happens when there is a trade dispute that concerns terms and conditions of service.
- The trade dispute is unresolved after conciliation (under the Act or in the collective agreement).
- Seven days' notice has been given to the other parties and to the CS by an authorized representative of the aggrieved party.

Section 77: Powers of the ELRC in strikes and lockouts

A party served with the notice can apply to court to prohibit the strike or lockout as a matter of urgency if the strike or lockout is prohibited under the Act or the party issuing the notice has failed to participate in conciliation in good faith with a view of resolving the dispute. The court can direct the parties to engage in conciliation in good faith. A party that failed to engage in conciliation meetings cannot rely on a strike or lockout.

Section 78: Prohibited strikes and lock outs

- If any law, court decision or collective agreement forbids a strike or lockout on the issue.
- The subject matter of the strike or lockout is regulated by a collective agreement or recognition agreement binding on the parties.
- Parties have agreed to refer the matter to court or for arbitration.
- If it is a dispute concerning the recognition of a trade union and it has been referred to the ELRC.
- The trade dispute was not referred to conciliation under the Act or under the collective agreement.

- The employer and employee are engaged in essential services.
- The strike or lockout is not in furtherance with a trade dispute.
- The strike or lockout constitutes a sympathetic strike or lockout.

A sympathetic strike is where the employee participates in a strike in support of a trade dispute in respect of which the employee's employer is not party to the dispute or is not represented by an organization that is party to the dispute. A sympathetic lock out on the other hand is where an employer locks out an employee in support of a trade dispute in respect of which the employee's employer is not party to the dispute or is not represented by an organization that is party to the dispute.

For a protected strike one is not liable for disciplinary action or a civil claim. An employee who takes part in a strike not in compliance with the Act is deemed to have breached the employment contract and is liable for disciplinary action and is not entitled to pay or any other benefit in the *Employment Act* for the period he or she participated in the strike. Any person who refuses to take part in a strike which is not in compliance with the Act shall not be victimized i.e. expelled by the union or disadvantaged. Any issue concerning a strike or lockout can be referred to the ELRC.

Section 81: A strike or lockout cannot be for essential services. These are services that the interruption of which would endanger the life or health of the population. They include:

- ✓ Water supply services.
- ✓ Hospital services. (*Interestingly however, health workers have been going on strike!)
- ✓ Air Traffic Control Services and Civil Aviation Telecommunication Services.
- ✓ Fire Services of the government or Public Institutions.
- ✓ Post Authorities and Local Government Authorities.
- ✓ Ferry services.

Part I I: Miscellaneous provisions

Section 82-84: The ELRC has jurisdiction on the prosecution of any offences under the Act. If a party is found guilty they shall upon conviction pay a fine not exceeding Ksh 40,000. A person found guilty shall upon conviction pay a fine not exceeding Ksh 10,000.

It is important to note that the Act repealed the Trade Union's Act and the Trade Disputes Act.

THE LABOUR INSTITUTIONS ACT, 2007

THE LABOUR INSTITUTIONS ACT

The Act provides a framework for establishment of government organs charged with administering labour laws and providing for their functions, duties and powers and other matters connected thereto.

Scope of Application

Under section 4, the Act applies to all workforces except the *Armed forces and Reserve, Kenya Police, Kenya Prisons Service, Administration Police force and National Youth Service* which because of the nature of their work and unique terms and conditions of employment are governed by special arrangements which are equivalent or better than the provisions of the Act. They have their own institutional frameworks specifically provided for under their establishing Acts.

The Act is divided into eight parts, five of which embody an institution each.

1. **Part I** - Preliminary.
2. **Part II** - National Labour Board.
3. **Part III** - Industrial Court (now repealed. The court is now independently established under the Constitution and the Industrial and Labour Relations Act.
3. **Part IV** - Committee of Inquiry.
4. **Part V** - Labour Administration and Inspection Offices.
5. **Part VI** - Wages Council.
6. **Part VII** - Employment Agencies.
7. **Part VIII** - Miscellaneous provisions.

This Act can be termed as an auxiliary Act within the labour laws framework. Distinct from the other Acts which provide for substantive rights, duties and obligations to the employers, employees and the government, the Labour Institutions is procedural. It provides the institutional framework for the implementation of these rights, duties and obligations.

NATIONAL LABOUR BOARD

It is established under **section 5** of the Act and is at the helm of the administrative structure, just below the Cabinet Secretary (CS) in the Ministry of Labour, Social Security and Services.

Composition of the Board – Section 6

Its membership comprises 14/15 (depending on whether one or two independent members are appointed) representatives of stakeholders within the employment sector, who must be Kenyans appointed by the CS.

- ✓ Chairperson who has expertise in labour relation matters.
- ✓ Secretary-General or Chief Executive of the most representative federation of trade unions.
- ✓ The Chief Executive of the most representative federation of employers' organization.

- ✓ Two persons appointed from nominees of the most representative federation of employers' organization dealing with labour matters.
- ✓ Two persons appointed from nominees of the most representative federation of trade unions.
- ✓ Not more than two other independent members.
- ✓ The Director of Employment.
- ✓ The Director of Micro and Small Enterprise Development
- ✓ The Director of Occupational Health and Safety Services
- ✓ The Director of Industrial Training
- ✓ Registrar of Industrial Court
- ✓ Registrar of Trade Unions

Functions- Section 7

The role of the board is essentially advisory in nature. It advises the CS on among other things: -

- ✓ All matters concerning employment and labour
- ✓ Legislations affecting employment and labour
- ✓ Labour relation and trade unionism issues
- ✓ Matters arising from the ILO or ILO Conventions
- ✓ Codes of good practice
- ✓ Status of Kenya in international and regional affairs
- ✓ Systems of inspection and administration of labour laws.
- ✓ Aspects of public employment services, vocational guidance, vocational training and employment of persons with disabilities.
- ✓ Policy development for paid study leave for workers, trade unions, social and civic education and trade union education.
- ✓ The general state of employment, training and manpower development in the country.
- ✓ Productivity measurement and improvement.
- ✓ Appointment of the wages council.
- ✓ Appointment of members of the Industrial Court.
- ✓ Setting of compensation benefits in accordance with the Work Injuries Benefits Act.
- ✓ The registration, suspension and deregistration of trade unions and employer organizations.

Additionally, in consultation with the CS, the board may advise: -

- ✓ The government in the issuance of immigration entry and work permits to non-citizens.
- ✓ The Chief Justice on assignment of judges to the industrial Court and the rules of the Industrial Court.

NB: Modus operandi

Because of the high level advise they are tasked to give, the board membership is evidently selected on the basis of their expertise in employment and labour related matters or the large stake they hold within the sector. It carries out its functions through investigations and researches related to labour, economics and social policy. In addition to the experts, the board is permitted to co-opt other persons in its deliberations though they do not have any vote in the meeting.

The board determines its own procedure for carrying out its functions. Thus, for effective and efficient operation, in consultation with the CS, **under section 8** establishes thematic committees which are: *Work Permit Committee, National Manpower Development Committee, Trade Dispute Committee, Productivity Committee* and any other committee necessary for performance of its duties. Co-option of experts within the committees is permitted subject to the CS approval.

Under **Section 10**, the Commissioner of Labour is the secretary to the board who may appoint other officers to assist the board. Key among his functions to the board is to give quarterly updates on employment trends, the general state of economy as reported by the Government, labour market information and reported strikes and lockouts, inflationary trends and indices, labour inspection services and the number of disputes (complaints by employees against employers and vice versa) lodged and their progress in resolution.

COMMITTEE OF INQUIRY

It is appointed by the CS. It consists of at least 3 people including the chairperson and a secretary and has no quorum for conducting its activities.

It conducts inquiries into matters appurtenant to trade disputes, trade disputes generally or trade disputes of any class and reports to the CS. (Sec. 28 & 29)

LABOUR INSPECTION AND ADMINISTRATION

To carry out the foregoing functions, the Cabinet Secretary is empowered to appoint the following officers: -

1. Commissioner for Labour
2. Director of Employment
3. Any other officer
 - labour officer.
 - Employment officers.
 - Medical officers.

NB: the preceding are termed as authorized officers (Section 30)

4. Registrar of trade unions
5. Deputy Registrar of Trade Unions
6. Assistant registrars of Trade Unions and such other officers as may be required by the Act. (Section 31)

Delegation of duties: the commissioner for labour, director of employment and registrar of trade unions may in writing, delegate duties to their subordinates, labour officers, employment officers and deputy and assistant registrars of trade unions respectively. The authorizing officer however retains the power to: -

- attach conditions to, amend or revoke the delegation.
- set aside the decision of an officer acting on delegation.

For these sub ordinate officers to validly operate, they must have certificates of authority from the authorizing officers which they are required to produce upon request by any person affected by performance of their duties. Further, when *entering any premises* for purposes of inspection or any other statutorily provided duties, it is mandatory that they introduce themselves unless such revelation of identity shall prejudice the performance of their duties or is likely to defeat the object thereof (Sections 32,33 & 34).

Powers of the Labour Officer

To ensure compliance with the labour laws, the labour officer may:

1. Order production, inspect or examine wage sheet and other records of employment kept by the employer.
2. Interview person giving out work or outworkers on information of the person to whom the work is given or vice versa respectively, with respect to remuneration.
3. Inspect and copy any material part of any list of outworkers kept by an employer or other persons giving out work to outworkers.
4. Examine, either alone or in the presence of other persons a matter on remuneration where he has reasonable cause to believe the person to have committed an offence.
5. Enter, inspect and examine any land, building or structure that provides residence to an employee to determine its fitness and compliance with the Act.
6. Examine documents establishing the employment relationship between an employer and an employee. These documents may be sourced from either the employer or employee.
7. Inspection of sanitary conditions and water supply in a business premises.
8. Examine and make copies of documents of employment and seize those that he has reasonable ground to believe contain evidence of an offence under the Act or any other law. In instances where employment records are seized, the labour officer should give the employer or his representative a receipt in respect of the documents seized.

9. Examine food provided by the employer to the employees and where need arises, take samples in duplicate for analysis. This examination has to be carried out in the presence of the employer.
10. Order that clean and sanitary conditions are upheld in buildings and premises where employees are housed.
11. Institute proceedings against employers who are in contravention with labour laws.
12. Institute civil proceedings on behalf of an employee in any cause of action against the employer, arising in the course of employment.
13. Take into custody and return to his parents or guardians any child he reasonably suspects to have been employed in contravention with employment laws.

Section 36: Powers of the employment officer

He is tasked with collecting labour market data. To achieve this, he is conferred with powers to exercise powers of the labour officer being 1, 3, 6 and 8 above stated.

Section 37: Power of the medical officer

In addition to power 5 to 9 of the labour officer above stated: -

1. Examine and assess the health conditions of an employee and make recommendations for his rapid recovery. He may recommend that the employee goes back to work or proceed to hospital at the earliest opportunity at the expense of the employer.
2. Condemn any food provided by the employer which in his opinion is not fit for human consumption. Such food will be destroyed in the presence of the medical officer.
3. Order at the expense of the employer, such variety of food for an employee as he may deem necessary. However, the cost of the food should not exceed the normal costs of the daily rations ordinarily supplied by employers to the employees.
4. Condemn any building in which an employee is residing or working where in his opinion it is inhabitable or unfit because of its construction, location or condition for the purpose for which it was built. Its use will hence stand suspended until the medical officer subsequently certifies its fitness.
5. Order that the employer provides an employee under a contract of service extra clothing and blankets at the expense of the employee. Such items shall remain the property of the employer until the employee fully pays for them.
6. Inspect all drugs and medicine provided for the use of employees

Section 38: Obstructing an authorized officer

Obstruction under the act entails wilfully hindering the exercise of his powers under the act and failing to comply with orders or requirements given in pursuance of his powers. It constitutes an offence punishable by a jail term not exceeding six months, a fine not exceeding Kshs. 100 000 (one hundred thousand shillings) or both.

Section 39: Offences by companies

Companies or juridical persons are also subject to the Act. Where an offence is committed by such persons, the specific officers in charge are held personally liable. The burden of proving that the company did not commit the offence alleged or the specific officer charged not the actual employer shall lie on the person alleging i.e. the company or the officer charged.

Section 41: Confidentiality

As a general rule, authorized officers are required to carry out their administrative duties with confidentiality. Disclosure of any information acquired in the course of performance of such duties amounts to an offence punishable by a jail term not exceeding six months, a fine not exceeding Kshs. 100 000 or both.

There are however exceptions to the general rule on confidentiality which are disclosure of information for: -

1. purposes of criminal proceedings.
2. purposes of proper administration of the Act
3. in accordance with any written law.
4. by a court order.

WAGES COUNCIL

There are established two wages councils

1. General Wages Council
2. Agriculture Wages Council- which is specific to the agricultural sector and any other sector where no other wages order is applicable

Additionally, there are established sectoral wages council on a need basis where: -

- a) The remuneration and other conditions of employment of any categories of employees in any sector is not adequately regulated by collective agreements.
- b) It is expedient to set a minimum wage and other conditions of employment in respect of those employees.

These sectoral wages councils may operate in the whole sector, part of the sector or for specific categories of employees in a sector, regionally or nationally.

Membership of the wages councils include: a chairperson & not more than three independent members (both of whom must be experts in determination of minimum terms and conditions of employment), at most, three members nominated by the board representing trade unions and at most, three members nominated by the board representing employers. The tenure of office of these officers is 3 years.

Section 44: Functions of wages council

- (a) investigate the remuneration and conditions of employment in any sector
- (b) invite and consider written and oral representations, in the prescribed manner, from interested parties
- (c) make recommendations to the Minister on minimum wage remuneration and conditions of employment.

Powers of the Wages Council

- (a) question any person who may be able to provide information relevant to the investigation.
- (b) require any person to provide any information, book, document or object relevant to the investigation.
- (c) conduct public hearings.

Failure to comply with any orders or requirements by the council pursuant to its foregoing powers amounts to an offence.

Considerations of the Council in determining the minimum wage

- a) the needs of employees and their families, taking into account the general level of wages in the country, the cost of living, social security benefits and the relative living standards of other social groups;
- b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment and the need to encourage investment;
- c) the ability of employers to carry on their business successfully;
- d) the operation of small, medium and micro enterprises;
- e) the cost of living
- f) the alleviation of poverty;
- g) the minimum subsistence level;
- h) the likely impact of any proposed conditions of employment on current employment or the creation of employment; and any other relevant factor.

Procedure for publication of the wages order

Under **section 45**, before publishing the wages order, the CS shall publish a draft wages order. He / she shall publish a notification in the gazette of his/her intention to make a wages order; specifying where copies of a draft of the wages order can be obtained; and inviting comments within at least 30 days from the date of publication of the notice. In addition to the gazette notification, another notification shall be published at least twice, with an interval of at least seven but not more than fourteen days between each publication, in a newspaper with a wide circulation.

Objections to any part of a draft order shall be set out specifying the grounds of objection and the deletions, additions or modifications proposed. Upon receiving the objections and comments the CS may request the Board to advise on them accordingly (however, if there are no objections the wages order may be published and submitted to parliament directly). After considering any further report of the wages council and any further advice from the Board, publish a wages order in the Gazette and submit it to the National Assembly within 21 days of publication. He may further publish notices in the local dailies advising people on where the orders can be obtained (Section 46).

Section 47: Contents of Wages Order

- a) minimum rates of remuneration;
- b) specific matters in which an employer may make deductions from employee's wages and maximum amount of deductions;
- c) the maximum specific amount deductible from an employee's wages in respect of rations supplied by the employer;
- d) provision that an employer may only make a deduction in respect of rations supplied if authorized in writing by a labour officer;
- e) regulations for task based work and piece work;
- f) regulations for outwork, casual work and contract work;
- g) set minimum standards of sanitation for employees who reside on the premises of their employer; and
- h) regulations for any other matter concerning remuneration or conditions of employment.

Section 48: Wages Order to constitute minimum terms of conditions of employment

The wages Order provides for the minimum rates of remuneration (**statutory minimum remuneration**) or conditions of employment of any employee to whom the Wages Order applies and may not be varied by agreement. In fact, these provisions supersede any other legal provision that conflicts with the order.

Consequences of non-compliance with the order.

1. Any contractual provision which purports to provide for the payment of less remuneration than the statutorily required or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, shall be substituted by the terms of the order.
2. An employer who underpays an employee or does not meet the conditions of employment prescribed in the order, commits an offence. If found guilty, the court may order the employer to, in addition to any other penalty, pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.
3. In addition to the recovery of sums for underpayment, the employee may institute civil proceedings against the employer over a different cause of action.

NB: Such suits may be instituted by the labour officer on behalf of employees (Section 49)

Section 50: Meaning of remuneration

The amount paid or to be paid in cash to the employee by his employer clear of any deductions, except any deduction lawfully made: -

- (a) for the purpose of a contribution to any provident fund or superannuation scheme;
- (b) in respect of actions supplied by an employer permitted under a Wages Order;
- (c) under any provision of any other written law for the time being in force which provides for or permits deductions to be made from an employee's wages by the employer; or
- (d) at the request in writing of the employee, for any purpose in which the employer has no direct or indirect beneficial interest.

Section 51: Employee waiting for work on employer's premises

In calculating the work hours of an employee waiting for work in an employer's premises time begins to run as from the time the employee was present in the premises if it is proved to the satisfaction of the court that the employee was required to be present by the employer. However, if the employee is a resident in the premises of the employer, work hours shall not be counted for the time that he is present on the premises by reason only of residence. Equally, meal times when no work is being done shall not be included in the computation of work hours.

Section 53: Records and notices

The employer of employees to whom a Wages Order applies shall;

- (1) keep such records as are necessary to show whether or not the employer is complying with the Wages Order;
- (2) retain the records for at least three years after the date of the last entry therein.

An employer shall—

- a) exhibit in the prescribed language and manner such notices as may be prescribed for the purpose of informing employees of any proposed wages order or wages order affecting them; and
 - a) give notice in the prescribed manner, to the employees of any other matters as may be prescribed.
- (3) An employer who contravenes this section commits an offence.

Establishment of an Inter-Ministerial Committee

It consists of officers from the Ministries responsible for immigration; labour (chairperson); security; Attorney-General; and foreign affairs.

Functions of the Inter-Ministerial Committee

The Inter-Ministerial committee shall be responsible for—

- (a) advising the Cabinet Secretary responsible for labour on matters related to work permits in relation with security issues; and
- (b) vetting the application for registration made by employment bureaus and agencies. It is a requirement that every employment bureau or agency gets approval from the government before sending Kenyan Citizens for employment outside Kenya and for employment of foreigners within Kenya.

EMPLOYMENT AGENCIES

Section 55: Registration of employment agencies

In order to legally operate, all employment agencies have to be registered. The Director of Employment is the custodian of the register containing all registered employment agencies.

Section 56: Application for registration

Applications for the registration of employment agencies are made to the Director in the prescribed form. They are then vetted by the Inter-Ministerial Committee. A certificate of registration is issued by the Director of Employment after consultation with the board and upon satisfaction that: -

- a) the vetting process has been satisfied.
- (a) there is capacity to own and manage an employment agency.
- (b) there is suitability of the designated business premises and any other relevant consideration.

If the application is rejected, the Director will give reasons

Specification of the certificate of registration

- (a) name of the person to whom the certificate is issued; location of the business premises
- (b) the premises at which the business is to be conducted; validity period of the certificate, the territorial scope of the business, target class(es) of persons of the business and any conditions subject to which the business may be conducted.

Ways of cancellation of registration or variance of the terms or conditions of an employment agency

- (a) by the Director on his motion for a good cause after inquiry. An aggrieved party following this action has the right of appeal in the Industrial Court.
- (b) on the application of the holder of the certificate.

Duties of persons operating employment agencies

- (a) retain any record which is statutorily required for at least three years, subsequent to the occurrence of the event recorded and produce them for inspection upon demand by an employment officer made at any reasonable time.
- (b) furnish to the Director such statistical information at such times and in such manner as may be prescribed.

Unlawful act in operation of an employment agency

- (c) Charging or receiving any fee or other payment or reward at a rate higher than what is prescribed for any particular area and class of business.
- (b) Charging or receiving any fee or other payment or reward, unless provision has been made for the charging of such fee, payment or reward in regulations made under the Act

NB: Business consultants are excluded from the provisions.

Powers of employment officers

1. Entering business premises for purposes of inspection and searches where there are reasonable grounds for believing that such entry or search is necessary for the prevention, investigation or detection of an offence in terms of this Part.

(2) They hold the power to

- require production of books or documents of employment,
- examine and make extracts from and copies the books or documents
- demand explanations for the entries in those books or documents
- seize the books or document which may constitute evidence of an offence committed.

Sections 58-59: Offences

1. making a false statement in representations or giving evidence to or before an employment officer investigating a case under this section which that person knows to be false in any material particular.
2. refusing to answer any question put forward by an employment officer.
3. non-compliance with the employment officer under this section; or
4. hindering an employment officer in the exercise of his functions under this section.
5. non-compliance with any part of the Act.
6. non-compliance with the terms or conditions of any certificate of registration

Section 60: Regulations

The Minister may make regulations necessary for the purpose of giving effect to, or for the better administration of employment agencies.

These include the application form for certificate of registration; fee payable for a certificate of registration or copies and in respect of the business of an employment agency; the surrender of certificates of registration where the conditions thereof are to be varied or where such certificates are to be cancelled, the records to be kept in respect of an employment agency; the qualification of the proprietor or persons running the employment agency; and the nature and form of security to be given by the proprietor of the employment agency for any recruitment of employees under this Part.

MISCELLANEOUS PROVISIONS

General penalty

A person who contravenes any provision of this Act for which no penalty is specifically provided shall be liable to a fine not exceeding Kenya shillings (50 000) fifty thousand shillings or, to imprisonment for a term not exceeding three months, or to both.

Section 64: Existing laws

The provisions of the Act supersede any other written law.

OCCUPATIONAL SAFETY AND HEALTH ACT, 2007

OCCUPATIONAL SAFETY AND HEALTH

Occupational health and safety is a fundamental human right.² Kenya's duty to foster a safe and healthy workplace stems from its constitutional duty as espoused under Kenya's international obligations.³ Kenya's law on occupational safety and health is consolidated under the Occupational Safety and Health Act.⁴ The Occupational Safety and Health Act No. 15 of 2007 repealed the Factories Act Cap 514. The Factories Act was meant to "make provisions for health, safety and welfare of persons employed in factories and other places of work, and for matters incidental thereto and connected therewith." In the year 2007, the Occupational Safety and Health Act was enacted.

PART I

According to the Act, its objective is to provide for the safety, health and welfare of workers and all persons lawfully present at workplaces, the establishment of the National Council for Occupational Safety and Health and other concomitant purposes.

Section 3(2) states that the purpose of the Act is to secure the safety, health and welfare of persons at work as well as others persons present at the workplace against risks to safety and health arising out of, or in connection with, the activities of persons at work.

In essence, the core aims of the Act as envisaged in all its provisions are;

- (a) to protect persons at work against risks to health , safety and welfare;
- (b) to assist in securing safe and healthy work environments;
- (c) to eliminate, at the source, risks to the health, safety and welfare of persons at work; and
- (d) to provide for the involvement of employees and employers and associations representing employees and employers in the formulation and implementation of health and safety standards.

This part also offers the definition of terms used in the Act. These include,

An "occupier" to mean person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer.⁵

A workplace is defined to include any land, premises, location, vessel or thing, at, in, upon, or near which, a worker is, in the course of employment.⁶

² Stefano Sensi in his paper, "The Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights," presented at a High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, held at Nairobi, November 30- December 1, 2009 opines that the right of everyone to the enjoyment of just and favorable conditions of work enshrined under Article 23 of the Universal Declaration of Human Rights (UDHR) includes the right to safe and health working conditions.

³ Article 2(6) of the Constitution of Kenya states that, "Any Convention or Treaty ratified by Kenya shall form part of the law of Kenya under this Constitution." With regard to this, Kenya is therefore bound by the provisions of the International Convention on Economic and Social Rights which obligate the state parties to recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, among other things, safe and healthy working conditions.

⁴ Act No. 15 of 2007, Government Printer, Nairobi.

⁵ Section 2 Occupational Safety and Health Act No. 15 of 2007. According to Kariuki Muigua (LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; MCI Arb; CPS (K); MKIM; Dip. In Law (KSL); Consultant: Lead expert EIA/ EA NEMA), this definition is coterminous with the common law position as espoused by John Murphy's book, Street on Torts. Street on Torts provides that, "The test of occupation, then, is whether a person has some degree of control associated with, and arising from, his presence in and use of, or his activity in, the premises..." (pg 195)

⁶ Ibid

An “employee” to mean a person who works under a contract of employment

“Premises” to mean any place including,

- (a) Any vehicle, vessel aircraft or hovercraft;
- (b) any installation on land including the foreshore and land intermittently covered by water, any offshore installation or any other installation whether floating, or resting on seabed or the subsoil of the seabed or resting on other land covered with water or the subsoil of that sea bed.
- (c) Any tent or movable structure.

“Sanitary conveniences” to mean urinals, water-closets, earth-closets, privies, ash pits and any similar convenience;

The Act does not define occupational health. However, ILO through a joint committee with WHO, has defined workers’ health to be synonymous with occupational health in the following words, “Occupational health should aim at the promotion and maintenance of the highest degree of physical, mental and social wellbeing in all occupations; the prevention amongst workers of departures from health caused by their working conditions; the protection of workers in their employment from risks resulting from factors adverse to health; the placing and maintenance of the worker in an occupational environment adapted to its physiological and psychological equipment and, to summarize: the adaptation of work to man and of each man to his job”.⁷

Section 3 defines the scope of application of the Act to be any workplace whether permanent or temporary.

According to this section, the Act purposes to;

- (a) Secure the safety, health and welfare of persons at work; and
- (b) Protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work.

The Occupational Safety and Health Act 2007 set objectives to promote and improve occupational safety and health standards.

PART 2

It sets out the general duties in the Act, and provides that such duties are supported by other requirements in the Act, codes of practice and regulations.

DUTY OF CARE

The Act is pegged on the fundamental principle of ‘duty of care’.⁸ The duty of care is a general legal duty on all individuals and organizations to avoid carelessly causing injury to persons. It requires everything ‘reasonably practicable’ to be done to protect the health and safety of others at the workplace.⁹

⁷ http://www.ilo.org/safework/info/publications/lang--en/docName--WCMS_110478/index.htm, accessed on 17/08/2015

⁸ Kariuki Muigua

⁹ Ibid

According to Street on Torts, duty of care is, “a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”¹⁰

The duties of the occupier¹¹, the employees,¹² designers, manufacturers, importers¹³ are all set out in such a manner as to suggest that their respective duties are grounded on the “duty of care”.

DUTY TO CONSULT, COOPERATE AND REPRESENT

There is universal agreement that employee participation is a necessary condition of the effective regulation of workplace safety. This means that everyone who works at a workplace

– Not just the “employees” of the “employer” – must be able to participate in and be consulted about health and safety matters at that workplace.

The general requirement for employers to consult and co-operate with safety and health representatives and other employees is part of the employer’s general duty under the Act.¹⁴ Employees are required to co-operate with employers in safety and health matters so that employers are able to meet their responsibilities.¹⁵

The Act encourages employers and employees to resolve safety and health issues in a spirit of cooperation, using procedures developed through consultation.¹⁶ The Act places emphasis on workplace consultation between employers and employees, and safety and health representatives, if the workstation has any.

Section 13 (b) provides for the election of employee safety and health representatives and the formation of workplace safety and health committees. Safety and health committees are made up of employer representatives and safety and health representatives, or employee representatives if the workplace has no safety and health representatives.

Section 6(1) obliges an occupier to;

1. Ensure the safety, health and welfare at work of all persons working in his workplace. This is through, among others;

- (a) The provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
- (b) Arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- (c) The provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed

¹⁰ John Murphy, Street on Torts, 4th ed. (Oxford University Press, Oxford, 2007), p.201

¹¹ Section 6

¹² Section 13

¹³ Section 20

¹⁴ Section 13

¹⁵ Section 13(b)

¹⁶ Section 13

- (d) The maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;
- (e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;
- (f) Informing all persons employed of any risks from new technologies; and imminent danger; and
- (g) Ensuring that every person employed participates in the application and review of safety and health measures.

2. Carry out appropriate risk assessments in relation to the safety and health of persons employed and, on the basis of these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all chemicals, machinery, equipment, tools and process under the control of the occupier are safe and without risk to health and comply with the requirements of safety and health provisions in this Act.

3. Take immediate steps to stop any operation or activity where there is an imminent and serious danger to safety and health and to evacuate all persons employed as appropriate.

4. To prepare a health and safety policy for his workplace and notify his employees about its existence and contents therein.

Section 8 prohibits an employer from dismissing an employee, injuring the employee or discriminating against or disadvantaging an employee in respect of the employee's employment, or altering the employee's position to the detriment of the employee on the basis of health and safety complaints or duties undertaken by the employee. It is an offence to do any of this. The fine is Ksh. 100,000.

5. In accordance with Section 9(1), establish a safety and health committee at the workplace in accordance with regulations prescribed by the Minister if there are twenty or more persons employed at the workplace.

Section 10(1) prohibits an employer from making any deduction from an employee's remuneration or levy, or permit to be levied on any of his employees any charge in respect of anything done or provided in pursuance of this Act or any regulation made there under.

6. Cause a thorough safety and health audit of his workplace to be carried out at least once in every period of twelve months by a safety and health advisor, who shall issue a report of such an audit containing the prescribed particulars to the occupier on payment of a prescribed fee and shall send a copy of the report to the Director. The report of the audit must be made available for inspection by the occupational safety and health officer. It is an offence to contravene this section. The maximum penalty is Kshs. 500,000 with the option of a 6 month jail term or both.

Under **Section 7** of the Act, an occupier must prepare a safety and health policy statement. A health and safety policy is a method of action that influences and guides actions that promote effective safe working procedures, occupational hygiene and safety training. It is a requirement under the Act that the policy must be amended from time to time to incorporate changes in the work environment.

Section 12(1) imposes duties on self-employed employees. These duties include;

- (i) Take all necessary precautions to ensure his own safety and health and that of any other person in his workplace or within the environs of his workplace;
- (ii) To use appropriate safe systems of work, preventive and control measures and where not feasible, use suitable personal protective appliances and clothing required under this Act at all times.

- (iii) To comply with any safety and health rules, regulations instructions and procedures issued under this Act;

Section 13(1) obliges the employees to comply with the following responsibilities at the workplace;

- (a) Ensure their own safety and health and that of other persons who may be affected by their acts or omissions at the workplace;
- (b) Co-operate with their employers or any other persons in the discharge of any duty or requirement imposed on the employer or that other person by this Act or any regulation made hereunder;
- (c) Wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risks to their safety and health at all times;
- (d) Comply with the safety and health procedures, requirements and instructions given by a person having authority over him for his own or any other person's safety;
- (e) Report to the supervisor, any situation which presents an hazard and which they can't correct
- (f) Report to their supervisor any accident or injury that arises in the course of or in connection with their work

It is an offence to contravene any of these duties. The maximum penalty for such an offence is Ksh.50,000 or a jail term of not more than 3 months.

Section 16 prohibits creation of hazards at the workplace through engagement in any improper activity or behaviour at the workplace, which might create or constitute a hazard to that person or any other person.

The Act defines improper activity or behaviour to include boisterous play, scuffling, fighting, practical jokes, unnecessary running or jumping or similar conduct.

Section 19 obliges an occupier of any premises likely to emit, poisonous, harmful, injurious or offensive substances, into the atmosphere to use the best practicable means to prevent such emissions into the atmosphere or render them harmless and inoffensive the substances.

Where there is an accident or occupational poisoning at the workplace, Section 21 obliges an employer or self-employed person to notify the area occupational safety and health officer.

PART 3

For the purposes of executing and actualizing the provisions of the Act, the Act establishes the following institutions;

The Directorate of Occupational Health and Safety Services

Section 23 of the Act establishes it. Under Section 24, the Director is empowered to conduct research either on his own or with the assistance of other persons or bodies on occupational health and safety. The Director is then supposed to use the information collected to formulate safety and health policies to be implemented at the workplace in furtherance of the provisions of the Act.

Under **Section 24(6)** of the Act the Director is tasked with duty of setting up the Occupational Safety and Health Institute. This institute is supposed to conduct research and train occupational health and safety officers and other persons on all aspects of safety and health.

The National Council for Occupational Safety and Health

This is established under **Section 27** of the Act. **Section 28** outlines the members of the Council. The Director is a member of this institution. Under **Section 27(1)**, the Council's function is to advise the Minister on the formulation and development of policy framework on occupational safety and health; on legislative proposals on occupational safety and health; on the strategic means of promoting the best practices in occupational safety and health; on the establishment, maintenance and development of a safety and health preventative culture; reviewing the provisions of the Act; the statistical analysis of work related deaths and injuries and such other matters affecting the quality of working life in Kenya. Under **Section 27(4)**, the Act further requires the Council to establish committees in different industries to assist it perform its duties with regards to industrial codes of practice and such other committees as it may deem fit.

Technical Advisory Committee

Pursuant to **Section 30**, the Director of Occupational Safety and Health may constitute a technical advisory committee for purposes of, among other things,

1. Approving institutions or firms to carry out laboratory tests and analysis of substances and articles for use at workplaces;
2. Approve training syllabi to be used by organizations, institutions, firms or consultants offering occupational safety and health courses;
3. Formulate and publish standards and specifications or other forms of guidance for the other users to maintain adequate standards of occupational safety and health at the workplace;
4. Promoting education and training in occupational safety and health;
5. Collecting and disseminating information on occupational safety and health;

Section 32 spells out the powers of an Occupational Safety and Health Officer. The powers include power to;

- ✓ enter, inspect and examine workplaces (by day or by night);
- ✓ take possession of any plant or thing for examination, testing or use as evidence;
- ✓ make examinations or inquiries;
- ✓ take samples, photographs, measurements, sketches and recordings;
- ✓ require the production of and take copies of documents; and
- ✓ direct that the workplace be left undisturbed.

Subject to **Section 32(2)**, occupiers and their agents have a duty to cooperate with Occupational Safety and Health Officer for the purposes of carrying out the afore mentioned functions.

Section 32(4) authorizes an Occupational Safety and Health Officer to take possession of any article or substance and detain it for as long as is necessary for the following reasons;

- (a) To examine it and do to it anything which he has power to do under this Act.
- (b) To ensure that it is not tampered with before it has been examined; and
- (c) To ensure that it is available for evidence in any proceedings for an offence under this Act; and

- (d) to summon in writing any person whom he has reasonable cause to believe to be able to give any information relevant to any inspection, examination or investigation, to attend at a time and place specified and to give such information or to produce any relevant document.

Section 32(7) & (8) make it an offence to obstruct an Occupational Safety and Health Officer in his duty. The maximum penalty for the offence is Ksh.100,000 or a 6 months' imprisonment.

Under **Section 33**, the Occupational Safety & Health Officer has powers to prosecute, conduct or defend before a magistrate's court any charge, information, complaint or other proceeding arising under the Act or discharge of his duties.

PART 5

This section provides for registration of workplaces.

Under **Section 44**, before any person occupies or uses any premises as a workplace, he shall apply for the registration of the premises by sending to the Director a written notice containing, among others,;

1. The name of the workplace.
2. Address and location of the workplace.
3. Name of the occupier or intending occupier of the workplace.
4. The name and address of the owner of the premises or building.
5. The address to which communications relating to the workplace may be sent.
6. Nature of the work carried on, or proposed to be carried on, in the workplace.
7. The name of the manager of the workplace for the purposes of this Act.
8. The list of chemical substances used or intended to be used in the workplace, the chemical and trade name including chemical safety data sheet for each chemical substance.
9. Whether mechanical power is used or intended to be used and, if so, its nature.

Subject to **Section 44(2)**, the Director of Occupational Safety and Health, upon being satisfied of suitability of the premises and the payment of the prescribed fees, is under an obligation to issue a certificate of registration for a workplace.

PART 6

This section contains general provisions on health.

Subject to **Section 47(1)** every workplace shall be kept in a clean state, and free from effluvia arising from any drain, sanitary convenience or nuisance. This includes, removing of accumulations of dirt and refuse, washing and sweeping the floors and painting and whitewashing walls and partitions.

Under **Section 48(1)**, it is the duty of the occupier to ensure that the workplace is not overcrowded.

Pursuant to **Section 49(1)**, it is the obligation of the occupier to ensure that effective and suitable provision is made for securing and maintaining, by the circulation of fresh air in each workroom, the adequate ventilation of the room.

Section 50(1) provides that an occupier shall ensure that effective provision is made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of his workplace in which persons are working or passing. This extends to keeping all glazed windows and skylights clean and unobstructed.

According to **Section 51**, all wet floors must be drained.

Pursuant to **Section 52**, it is the responsibility of the occupier to maintain sufficient and suitable sanitary conveniences for the persons employed in the workplace. They should be clean, well lit and separated for different sexes except in cases of family members.

PART 7

This section deals with machine safety.

Section 55 provides that machines should only be used for the work they are designed for and should only be operated by competent persons.

Section 56 & 57 provides that all prime movers and transmission machines should have secured fences around them irrespective of location.

Section 59(1) makes the employer responsible for the safe condition of tools and equipment used by his employees, including tools and equipment which may be furnished by the employees.

PART 8

Section 73 provides that vessels containing dangerous fluids and which are fixed on the ground and less than one metre in height must have secure fences around them to prevent persons from falling into them.

Section 74 provides that all goods, articles and substances stored in a workplace shall be stored or stacked in such manner as will ensure their stability and prevent any fall or collapse of the stack; not to interfere with the adequate distribution of natural or artificial light, the natural ventilation systems, the proper operation of machines or other equipment, the unobstructed use of passageways, gangways or traffic lanes, and the efficient functioning of sprinkler systems, the unobstructed access to other fire extinguishing equipments within the workplace and on firm foundations not liable to overload any floor.

Section 77 provides that all floors, steps, stairs, passages and gangways in a workplace shall be of sound construction and be properly maintained.

Section 81 provides for a fire extinguishing means and a fire escape route. The section provides that, in every workplace or workroom, means of extinguishing fire shall be provided and maintained, and conspicuously displayed and shall be free from any obstruction so as to be readily accessible, which shall be adequate and suitable having regard to the circumstances of each case. In addition, every workplace shall be provided with adequate means of escape, in case of fire, for the persons employed therein, having regard to the circumstances of each case.

PART 9

This section is concerned with welfare of the persons at the place of work.

Section 91 (1) provides that it is a duty of the occupier to provide and maintain an adequate supply of wholesome drinking water at suitable points conveniently accessible to all persons employed.

Section 93 provides that every occupier shall provide and maintain adequate and suitable accommodation for clothing not worn during working hours for the use of a person employed.

Section 95 provides for the provision of a first aid kit at the workplace. The kit must be readily accessible to all persons at the workplace.

Section 98 obliges the provision of supervision for apprentices and indentured learners. In particular, these learners are disallowed by the law to attend to any machinery, equipment, tools, plant or process unless adequate supervision and protection from hazardous work conditions and environment is maintained.

Section 100 prohibits the partaking of food and drinks where there are emissions of poisonous or injurious substances.

Section 101 and 102 obliges the occupier to provide protective equipment where offensive substances are in use.

PART 13

This section provides for offences and penalties.

Breach of duty under the OSHA legislation is a criminal offence, triable on indictment. But in important respects an OSHA offence differs from a breach of the general criminal law.

First, the offence is committed whether or not harm is caused. It is the failure to provide a safe working environment which constitutes the breach. Secondly, proof of a breach of duty does not depend upon proof of a relevant state of knowledge or intent.

Pursuant to **Section 111**, If any person is killed, or dies, suffers any bodily injury, in consequence of the occupier or owner of a workplace having contravened any provision of this Act, the occupier or owner of the workplace shall, without prejudice to any other penalty, be liable to a fine not exceeding one million shillings or, to imprisonment for a term not exceeding twelve months; and the whole or any part of the fine may be applied for the benefit of the injured person or his family or otherwise as the Minister may determine.

Section 116 grants the magistrates courts the powers to determine offences under this Act.

WORK INJURY BENEFITS ACT, 2007 (WIBA)

THE WORKERS INJURY BENEFIT ACT

This section begins with a few definitions of some of the words that relate to workplace injuries.

Definition Clauses

“accident” means an accident arising out of and in the course and scope of an employee’s employment and resulting in personal injury;

“compensation” means compensation as provided for under this Act and includes medical aid and any benefit of any nature to which an employee or his dependants may be entitled to under this Act;

“capitalized value” means the total anticipated allowance over a certain period;

“medical practitioner” means a person appointed by the Director of Occupational Health and Safety services for purposes of section 48 entitled to practice in Kenya under the Medical Practitioners and Dentists Act;

According to section 4(1), “employer” means any person who employs an employee and includes-

- (a) the legal personal representative of a deceased employer;
- (b) any person controlling the business of an employer; and
- (c) the Government.

Section 4(2) provides that if the services of an employee are temporarily lent or let on hire to another person by an employer, the employer is deemed to continue to be the employer of the employee while the employee is working for that other person.

Section 4(3) provides that in the case of an employee employed by a club or an association of persons, the trustees of the club or association shall be deemed to be the employer.

Section 4(4) provides that for the purposes of the giving or receiving of statements, notices or other documents under this Act, the term “employer” includes the manager, or other duly authorized employee or agent of the employer.

Section 5(1) defines an employee as a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured¹⁷ learner.

Sub-section (1) applies irrespective of whether the contract is expressed or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period and whether the payment is in cash or recognized legal tender.

Section 5 (3) lists persons not regarded as employees under the Act. These are,

- (a) A person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business;
- (b) Any person employed outside Kenya except as provided in section 11 of the Work Injury Benefit Act (WIBA);
- (c) A member of the employer’s family dwelling in the employer’s house or cartilage thereof and not for the purpose of employment; or
- (d) a member of the Armed Forces as defined in the Armed Forces Act.

¹⁷ A person who signs and is bound by a contract (indenture) to work for another for a specified period especially in return for payments of travel expenses and maintenance.

Under **Section 6(1)**, the Act defines “dependant” to mean

- (a) The widow or widower of an employee;
- (b) a child of the employee who has not attained the age of eighteen years including a posthumous child¹⁸, a stepchild and an adopted child, adopted prior to the accident, but excluding a child who is married or who is self-supporting;
- (c) a parent, step-parent or an adoptive parent who adopted such employee if he adopted prior to the accident or death;
- (d) a child of the employee not contemplated by paragraph (b);
- (e) a brother, sister, half-brother, half-sister or parent, grandparent, or grandchild of an employee; and
- (f) any other person who at the time of the accident was wholly dependent upon the employee for the necessities of life.

Section 6(2) provides that in the case of an employee who leaves two or more widows, such widows shall be entitled to share such compensation as would be payable to a single widow of the deceased employee.

Right to compensation.

Subject to **Section 10 (1)** An employee who is involved in an accident resulting in the employee’s disablement or death is subject to the provisions of WIBA, and entitled to the benefits provided for under the Act.

- (2) An employer is liable to pay compensation in accordance with the provisions of the Act to an employee injured while at work.
- (3) An employee is not entitled to compensation if an accident, not resulting in serious disablement or death, is caused by the deliberate and willful misconduct of the employee.

According to **Sub section (4)** For the purposes of the WIBA, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting-

- (a) in contravention of any law or any instructions by or on behalf of his employer; or
- (b) without any instructions from his employer.

Pursuant to **Sub section(5)** For the purposes of the Act, the transportation of an employee to or from the employee’s place of employment for the purpose of the employee’s employment by means of a vehicle provided by the employer for the purpose of transporting his employees is deemed to be in the course of the employee’s employment.

(6) For the purposes of this section, an injury shall only be deemed to result in serious disablement if the employee suffers a degree of permanent disablement of forty percent or more.

¹⁸ A child born after the death of its father.

Compensation for accidents happening outside the country.

According to **Section 11**, if an employer carries on business chiefly in Kenya and an employee ordinarily employed in Kenya is injured in an accident while temporarily deployed outside Kenya, the employee is, subject to **sub section 3** entitled to compensation as if the accident had happened in Kenya. The compensation contemplated here shall be determined on the basis of the earnings the employee would have received had he/she remained in Kenya.

Sub section 3 outlines limitations to the compensation described above:

This section on compensation does not apply to an employee who has been deployed outside Kenya for a continuous period of 12 months or longer

This section on compensation does not apply to an employee who has been deployed outside Kenya for a shorter period, if the employment outside Kenya is expected to last for more than 12 months.

Accidents during Training for or Performance of Emergency Services.

According to **section 12**, If an employee is injured in an occupational accident or contracts an occupational disease while the employee, with the consent of the employer, is engaged in any organized first aid, ambulance or rescue work, fire-fighting or other emergency service, the accident or disease is for the purposes of the Act, deemed to have arisen out of and in the course of the employee's employment.

Section 14 If in a claim for compensation under the Act it appears that the contract of service apprenticeship of the employee concerned is invalid, the Director may approve compensation for the claim as if the contract was valid at the time of the accident.

Section 16 states that no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of the Act in respect of such disablement or death.

Compensation not to be alienated.

Section 19 (1) provides that compensation shall not be

- (a) Assigned or pledged;
- (b) capable of attachment or any form of execution under a judgment or order of a court of law; or
- (c) set off against any debt of the person entitled to the compensation.

In addition, **sub section(2)** provides that any provision of an agreement in terms of which an employee assigns, purports to assign, relinquishes or purports to relinquish any right to benefits in accordance with this Act, shall be void.

Section 20 states that compensation paid under the Act for the death of an employee shall not form part of the employee's estate.

Notice of accident by employee to employer.

Section 22 states that, written or verbal notice of any accident provided for in **section 22** which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

Notice of injury or accident by employer to Director.

Section 22 further provides that,

- (1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.
- (2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.
- (3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.
- (4) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.

According to **section 23 (1)**, after having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with the Act.

In accordance with **Section 26 (1)**, a claim for compensation shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.

Lapse of right to benefits.

Section 27 (1) provides that, a right to benefits in accordance with the Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.

Sub section (2) Notwithstanding the provisions of **sub section (1)**, the failure to report an accident to an employer as required in **sub section (1)** is not a hindrance to compensation if it is proved that the employer had knowledge of the accident from any other source.

Amount of compensation in case of death.

According to section 34 (1) if an employee dies as a result of an injury caused by an accident, compensation shall be paid to the dependants of the employee in accordance with the provisions of the Third Schedule (see table below), subject to the maximum and minimum amount determined by the Minister after consultation with the Council.

THIRD SCHEDULE OF THE WORK INJURY BENEFITS ACT

(Sections 30,34,35,36)

DEPENDANT'S COMPENSATION

1. One child - 12.5% of workman's allowance
2. Two children - 17.5% of workman's allowance
3. Three children - 22.5% of workman's allowance
4. Four children - 27.5% of workman's allowance
5. Five children - 32.5% of workman's allowance
6. More than five children - At a rate to be determined by the Director.

Manner of calculating earnings.

In accordance with **Section 3 (1)** in order to determine compensation, the earnings of an employee are deemed to be the monthly rate at which the employee was being remunerated by the employer at the time of the accident, including-

- (a) the value of any rations, living quarters or both supplied by the employer to the employee to the date of the accident or report of disease;
- (b) allowances paid regularly;

Compensation with Regard to Occupational Diseases

Section 38 provides that, where an employee contracts a disease specified in the second schedule or any other disease out of and in the course of employment, they are entitled to compensation.

According to **Section 40**, calculation of compensation for an occupational disease shall take into account the employee's earnings either from the time of the commencement of the disease or from an earlier date as may be determined by a medical practitioner. The more favourable of the two options shall be used for the calculation. Accordingly, if an employee has since left work, calculation shall be on the basis of what he/she would be earning at the time had he/she been working.

First Aid

Section 45 obliges an employer to provide and maintain such appliances and services for the rendering of first aid to his employees in case of any accident in respect of the trade or business in which the employer is engaged.

Transport to hospital

According to **Section 46**, where an employee has been injured and it is necessary for them to be transported to hospital, it is upon the employer to ensure that they are transported to hospital.

Medical Expenses

According to **Section 47**, where an employee is involved in an accident arising out of and in the course of the employer's employment, the employer is under a duty to bear the cost of the expenses for the following matters;

- a) Dental, medical, surgical or hospital treatment,
- b) Skilled nursing services
- c) Supply of medicine and surgical dressing
- d) Travelling and subsistence for treatment where it is imperative that they must travel for treatment
- e) The supply, maintenance, repair and replacement of artificial limbs, crutches, and other appliances and apparatus used by persons who are physically disabled.

THE INDUSTRIAL COURT ACT, 2011

THE INDUSTRIAL COURT ACT

This section addresses an overview of the employment and labour relations court and how to file a suit at the court.

PART A

The Employment and Labour Relations Court

It is a court established by *Article 162 (2) of the Constitution [2010]*. The *Constitution* gives parliament the authority to establish courts (through an Act of Parliament) with the same status as the high court to deal with matters that touch on employment and labour relations. It is now referred to as the employment and labour relations court as a result of *Statute Law (Miscellaneous Amendments) Act, 2014* published in the special Gazette Supplement No. 160 (Acts No. 18) of November 24, 2014. This court was previously known as the Industrial Court.

In line with this authority parliament passed the *Industrial Court Act of 2011* that sets up the court. This law came into force on 30th of August 2011. This law is divided into 6 parts namely:

- Part 1: Preliminary part (providing for the interpretation and its principal objective).
- Part 2: Establishment and how the court is constituted.
- Part 3: Jurisdiction of the court.
- Part 4: Proceedings of the court.
- Part 5: The Employment and Labour Relations Rules Committee.
- Part 6: The miscellaneous provisions.

Part 1: Preliminary part

Section 3: It provides that the principal objective of the court is to facilitate the just, expeditious and proportionate resolutions of disputes that touch on employment and labour relations. This in essence means that the court is to ensure that cases that touch on employment and labour relations are heard and determined without delays and to ensure that justice is served. The court is to ensure this principal objective is observed at all times. It is the duty of all persons who come to this court including the complainants and their Advocates and the other party (the ones complained against) and their Advocates to help the court in achieving this objective. The duties of parties is to ensure that cases are heard and determined without delays (this includes avoiding tactics and unnecessary adjournments that would further delay a case) and to present their complaints and defences in a manner allowed by law so that the court can reach a just determination.

Part 2: Establishment of the court.

The court is established as a result of *Article 162(2) (a) of the Constitution* with a purpose of dealing with cases of employment and labour relations and in this regard is to ensure good employment and labour relations in the country. The court has the status of the high court. The importance of this can't be overemphasized as initially the court was a subordinate court meaning its decisions could and were in deed varied many times by the high court. This greatly undermined the court and was not effective.

With the status of this court being same as that of the high court, this means that in the hierarchy of courts only the Court of Appeal and the Supreme Court are above the Employment and Labour Relations Court. Secondly the court has unlimited jurisdiction just the same way the high court has unlimited jurisdiction. This means that the court has jurisdiction in the entire state of Kenya.

The court is headed by a Principal Judge and currently has 12 judges. The Principal Judge is answerable to the Chief Justice. He is elected by other judges of the court and he holds office for a period of not more than 5 years and can be re-elected for one further term of 5 years.

For one to be appointed as a Judge of the court, he or she must have at least 10 years' experience as a superior court judge (a judge of the high court, court of appeal or the Supreme Court) or a professionally qualified magistrate. Alternatively one must have at least 10 years' experience in the law and practice of employment and labour relations in Kenya. It is thus clear that for one to be a judge of the court then they must be lawyers in the first place. The judges of the court retire at age 70, they can also resign or be removed after recommendations from a tribunal appointed by the President for either physical or mental inability to perform, bankruptcy, incompetence, breach of conduct for judges or gross misconduct.

Section 9: Officers of the court

The court has registrars and officers appointed by the Judicial Service Commission (JSC) who assist in the proper functioning of the court. These officers are under the supervision of the registrar. The registrar is a lawyer who is either an Advocate or has served as a magistrate for 10 years and has experience in administrative work.

- **Functions of the Registrar**

- ✓ Maintenance of the register of cases.
- ✓ Keeping documents and facilitating service of the same.
- ✓ Enforce the decisions of the court.
- ✓ Certifying, orders and directions of the court.
- ✓ Keeping records of minutes and proceedings of court.

Part 3: Jurisdiction of the court

Under *Section 12*, the court has what we call subject matter jurisdiction. That means that any matter touching on employment and labour relations can be presented to it, this includes;

- a) disputes relating to or arising out of employment between an employer and an employee;
- b) disputes between an employer and a trade union;
- c) disputes between an employers' organisation and a trade unions' organisation;
- d) disputes between trade unions;
- e) disputes between employer organisations;
- f) disputes between an employers' organisation and a trade union;
- g) disputes between a trade union and a member thereof;

- h) disputes between an employer's organisation or a federation and a member thereof;
- i) disputes concerning the registration and election of trade union officials; and
- j) disputes relating to the registration and enforcement of collective agreements.

Complaints can be lodged by an employee, employer, trade union, cabinet secretary, employer's organisation, a federation, Registrar of Trade Union and any other office established by law that can sue or be sued.

The court is presided over by one judge. A party or person can be represented by an Advocate or can represent himself or herself. A party can also be represented by an official of his or her trade union or employers' organisation. If a party is a body corporate it can be represented by an employee or Director authorized to do so. For such a case as a company, it may appoint someone in the articles of association to represent it in cases that relate to employment and labour relations matters.

- **Orders by the court**

The court can make any of the following orders:

- i. interim preservation orders including injunctions in cases of urgency (This means that the court can give an order so that something remains intact as the matter is determined in court. It maybe to maintain the status quo e.g. if an employee sues for wrongful dismissal the court may order that he or she continues to work the way he or she has been working until the case is heard and determined.)
- ii. a prohibitory order; (This is an order to stop something, it prevents one from taking a specific action)
- iii. an order for specific performance; (This is an order to compel someone to take a particular action).
- iv. a declaratory order; (an order to declare that something has happened, e.g. it can declare that the rights of the employee have been infringed)
- v. an award of compensation in any circumstances contemplated under the Act or any written law;
- vi. an award of damages in any circumstances contemplated under the Act or any written law;
- vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
- viii. any other appropriate relief as the Court may deem fit to grant.

The court can also give any other order as regard to who bears the costs after a case is concluded.

- **The application of Alternative Dispute Resolution (ADR) mechanisms**

In line with **Article 159(2) of the Constitution**, the court is guided by the ADR mechanisms and the parties or the court may adopt conciliation, mediation or traditional dispute mechanisms. The court can refuse to review or determine an appeal if it is satisfied that no attempts have been made to address the dispute using ADR. If evidence and minutes of conciliation and the reason for the decision are presented then this maybe evidence that ADR was attempted and the court will only come in if the issue is still unresolved.

Section 15: The court can refer the case back to conciliation or mediation at any stage if it becomes apparent that the dispute ought to have been referred to mediation or conciliation.

The court is also guided by guidelines such as the national wage guidelines on minimum wages and standard of employment and other terms and conditions as may be issued from time to time by the cabinet secretary in-charge of finance.

- **Power of review and appeal**

The court has the power to review its orders. Review ordinarily takes place in cases of an error. An appeal of the decision of the court is instituted at the court of appeal. One can only appeal on matters of law. This is the general rule for all appeals even in other civil cases. This essentially means that the court of appeal will only determine legal issues which are still in dispute. It will not decide on the facts of the case as this is the work of the first court which listens to the matter (it is the first court that has the opportunity to listen to witnesses and hear them being cross examined. The court of appeal does not hear witnesses).

The court can listen to appeals from the decision of the Registrar of Trade Unions or from any other court or tribunal or commission.

Part 4: Proceedings before the court

Section 19: The proceedings before the court are public (meaning they are held in an open court) and can only be heard minus the public to protect vulnerable persons such as children, for the sake of morality, public order or national security.

The court has general powers that include summoning of witnesses and to call for expert witnesses. It can also administer oaths and require documentation from a person. Any person who is called upon to give evidence or produce documents or who gives false and misleading information is upon being found guilty liable to a fine not exceeding Ksh 200,000 or imprisonment for a term not exceeding 6 months or to both.

Any order made by the court directed to a firm or to a body corporate or trade union, organisation of workers or a federation is to be obeyed by all the officers in that organization.

Where an offence is committed by a firm, body corporate, trade union, employers organisation or federation as regards the obedience of an order of the court, then every partner, director, officer or official concerned shall be liable of the offence unless they prove that they never consented to the act and they acted with all due diligence to prevent the occurrence of the offence. (The upshot of this provision is to provide for corporate criminal liability where officers of an organisation are held liable for offences committed by the organisation. Secondly it is to ensure that orders and directions of the court are obeyed.)

Part 5: Employment and Labour Relations Rules Committee

Section 23: The law establishes the rules committee that is comprised of the principal judge and the following persons appointed by the Chief Justice; a judge, two advocates- a man and a woman- with knowledge and expertise in labour matters (these two are nominated by the Law Society of Kenya), one (person who is not a lawyer) but with experience and knowledge of labour issues, two persons- a man and a woman- nominated by employers' organisation, two from employees' organisation, one person representing the AG, two persons appointed by the Chief Justice.)

The main function of the committee is to make the rules that regulate the practice and procedure of the court. As such they came up with the rules (2010). Their role also includes regulating the sittings

and selection of judges for any purpose, prescribing the fees to be paid in suits and the form to file and defend claims before the court.

Part 6: Other provisions

Appointments of officers have to respect the gender equity (not more than two thirds rule) and to be in line with chapter 6 of the Constitution which provides for leadership and integrity.

The court is to ensure access to justice and as a result is to be in all counties. In view of the low number of judges the chief justice can appoint certain magistrates to preside over cases involving employment and labour matters. Such appointments have to be gazetted.

PART B

How to file a claim at the Employment and Labour Relations Court.

This is guided by the rules put in place by the rules committee. For one to bring a suit one files a statement of claim accompanied by a verifying affidavit. The statement of claim sets out:

- a. the name, the physical and the mailing address and full particulars of the claimant;
- b. the name, the physical and mailing address and the description of the respondent;
- c. the name, the physical and mailing address of any other party involved in the dispute;
- d. the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of trade dispute the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;
- e. any principle or policy, convention, law or industrial relations issue or management practice to be relied upon; and
- f. the relief sought.

More than one employee can file claims at the court. The court can allow one employee to file one statement of claim on behalf of many if the case is the same and then the other employees' names can be included in a schedule. A party files 6 separate pleadings (to mean one will make 5 more copies of the original statement of claim and verifying affidavit).

For an appeal to the court the party shall file a memorandum of appeal. An appeal is to be filed within 30 days unless specified otherwise by any other law.

After filing a claim or appeal one shall issue summons to appear. Thereafter an affidavit of service by a process server shall be filed. The summons requires the party to appear to court and respond to the claim and the affidavit of service is to ensure that the party complained about was served with the statement of claim and other documents that accompany it.

A party served can within 14 days file a response to the claim or appeal. A party may also file grounds of opposition.

A respondent's statement of response shall contain—

- (i) the respondent's name and address for purposes of service of process;
- (ii) a reply on issues raised in the statement of claim or appeal;
- (iii) any admission of statement of facts set out in the statement of claim or appeal as the respondent admits, and a denial of any statements made in the statement of facts or appeal that the respondent does not admit;
- (iv) any additional statements of facts which the respondent may wish to make in support of its reply;
- (v) grounds upon which the respondent may wish to rely;
- (vi) any principle or policy, convention, law or industrial relations or management practice to be relied upon;
- (vii) a counterclaim; or
- (viii) relief that might be sought by the respondent against the claimant or the appellant.

(See appendices)

APPENDIX I: MEMORANDUM OF CLAIM

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

E.L.R CAUSE NO. OF 2015

XXXXXXXXX.....CLAIMANT

-VERSUS-

YYYYYYYYY.....RESPONDENT

THE CLAIMANT’S MEMORANDUM OF CLAIM

ISSUE IN DISPUTE

Wrongful dismissal of the Claimant, **YYYYYYYYY**, being aggrieved by such wrongful dismissal files the claim herein.

MEMORANDUM OF CLAIM

(This claim has been filed pursuant to the provisions of sections 3, 43, 45 and 87 of the Employment Act No. 11 of 2007, sections 12 and 15 of the Labour Institutions Act No. 12 of 2007)

1. The Claimant is an adult female of sound mind and her address for service for purposes of this suit shall be care of Messrs **Kazi Nzuri Advocates, 8th Floor, Kwetu Towers, Daima Street, P.O Box xxxx-00100, Nairobi.**
2. The Respondent is an International Non-Governmental Organization involved in development projects in Nairobi within the Republic of Kenya.
3. At all material times relevant to this claim, the Claimant was an employee of the Respondent herein.
4. The Claimant was employed by the Respondent on or about 9th January 2008 in the capacity of Regional Human Resource Manager under a written contract of service at a gross monthly remuneration package of Kshs. 300,135/- payable monthly.
5. It was a term of the contract that the Employment Agreement would terminate upon completion of the project unless terminated in accordance with the Agreement and upon reasonable cause.

6. The Claimant's termination of Employment was based on alleged improper performance of her duties.
7. The Claimant's presence at the Respondent's Regional office in Nairobi streamlined HR procedures which were hardly adhered to, as a result of which her expertise was used to resolve HR issues in Respondent's offices in Uganda and Rwanda.
8. The Respondent had been duly satisfied with Claimant's overall performance for the first 8 months of her employment, without the Claimant's supervisee, the Respondent's Deputy Director raising any performance or behaviour issues with the Claimant.
9. The Respondent's Deputy Director noted with gratitude that the Claimant had continued to play a key role in ensuring that the Respondent attains and maintains its vision and mission in the Regional Human Resource Department.
10. The Claimant's problem with the Respondent started when the organization hired one Chastity Karemba¹⁹, its Director of Operations, without the involvement of the Claimant who was the Regional Human Resource Manager. Troubles began to befall the Claimant after questioning the Director of Operation's qualifications, maturity for the job and the legality of her working permit in Kenya.
11. The Claimant's role at the Respondent organization was further undermined when she was required to report to the Director of Operations and for 6 weeks prior to her suspension from work, the Claimant worked with the Director of Operations under contemptuous temperament. The Director of Operation's questionable qualifications and maturity could not constitute objective and legitimate characterization of the Claimant's performance or behaviour for the 11 months she worked with the Respondent.
12. The Claimant's reason of dismissal from the Respondent organization was malicious, discriminatory and fuelled by bad faith and personal differences between her and the Director of Operations who discriminated against the claimant because she is a Kenyan, black and inferior to question the Director of Operation's qualification and the legality of her work permit in Kenya.
13. The Claimant is not a member of a Trade Union
14. On or about 23rd December 2008, the Respondent, without any justifiable and fair cause, purportedly summarily dismissed and terminated the Claimant's services effective immediately on the pretext, guise and or ruse, that the Claimant was improperly performing her responsibilities, which said ground was not factual but fuelled by personal differences and was as a way of discriminating against locals.
15. At the time of the Claimants dismissal, she was earning a gross monthly salary of Kshs. 300,135/=
16. It is the Claimant's case that the Respondent has not acted in accordance with natural justice, fundamental human rights principles and equity in terminating the Claimant's employment.
17. The Claimant has been in the continuous employment of the Respondent for a period of approximately 11 months immediately before the date of termination and as such has every legal right to challenge and or/complain that her services as a professional have been unfairly terminated.
18. The Respondent further acted contrary to and in breach of the terms of the Employment Act

¹⁹ Names have been changed to conceal identity and for privacy reasons.

in that the grounds relied upon to terminate her services were of such a nature that would lead one to believe that the Respondent discriminates against locals and in the circumstances the reasons by the Respondent for termination are invalid and void at both Kenyan and International Law.

19. The Claimant's services were not terminated on account of gross misconduct.
20. By the Respondent's actions, it breached the relevant provisions of the Employment Act as it discriminated directly against the Claimant in respect of termination of employment because of personal differences between the Claimant and an alien worker.
21. The Claimant's records of unparalleled good and exemplary performance of work urges one to wonder on what basis the Respondent could have dismissed the Claimant.
22. The circumstances under which the aggrieved Claimant was dismissed are vague and fathomless as are the grounds advanced by the Respondent.
23. The Claimant further avers that the final dues and emoluments offered by the Respondent are far below the bare minimum set out under the Employment Act.
24. The Claimant's fundamental rights have to this end been obviously violated and he has the right to dispute the lawfulness and fairness of her termination.
25. The Claimant urges this Honourable court to justly and equitably uphold the law in the exercise of its powers and rights in the furtherance, securing and maintenance of employment terms and conditions.
26. This Honourable Court has the jurisdiction to entertain this matter by virtue of the provisions of section 12 of the Labour Institutions Act No. 12 of 2007.

REASONS WHEREFORE the Claimant prays to this Honourable Court for orders against the Respondent for:-

- a) A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and or unfairly.
- b) Award of damages for breach of contract
- c) Award of damages of 11 months' salary (Kshs. 300,135/= × 11) = Kshs. 3,301,485/=
- d) The Claimant be re-instated in her former employment without any loss of benefits and/ or seniority.
- e) Any other or further relief that this Honourable Court may deem fit and just to grant

Dated at Nairobi this day of 2009

Kazi Nzuri Associates Advocates

Advocates for the Claimant

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